

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR  
IN FEDERAL TERRITORY, MALAYSIA  
(CIVIL DIVISION)  
CIVIL SUIT NO : S7-22-382-2006**

**BETWEEN**

- 1. CHANG CHOR HEONG  
(NRIC NO. 480522-08-5706)**
- 2. LIM WEI  
(NRICNO. 781123-14-5512) ... PLAINTIFFS**

**AND**

**PUNCAK KENCANA SDN BHD  
(COMPANY NO. 309545-A) ... DEFENDANT**

**AND**

- 1. LIM KIM KEE  
(NRIC NO. 720308-05-5127)**
- 2. TAN MEI PINK  
(NRIC NO. 720326-01-5890) ... THIRD PARTY**

## **GROUND OF JUDGMENT**

### **Introduction**

This is the Plaintiff's application by way of Summons in Chambers (Enclosure 4) for an order of Specific Performance under Order 81 Rules of the High Court 1980 with regard to the Sale and Purchase Agreement and the Deed of Mutual Covenants between the Plaintiff and the Defendant both dated 15.4.2004 respectively and House Rules.

### **Background**

The facts not in dispute herein are as follows. The Defendant is the registered and beneficial owner of the land held under HS(D) 135922 Lot 42407 Pekan Cempaka District of Petaling State of Selangor ('the said land').

At material times, the Defendant is the developer of the condominium known as Dataran Prima Condominium ('the said Condominium'). The Defendant sold to the Plaintiffs the apartment described as Parcel No. P-

PH-07 Storey No.21 at Building Block P ('the said Apartment') *vide* the Sale and Purchase Agreement dated 15.4.2004.

The above said Sale and Purchase Agreement entered by the Defendant is in the standard form prescribed by Schedule H of the Housing Development (Control and Licensing) Act 1966 and the Regulation 11(1).

The Defendant agreed and covenanted to construct the said Apartment together with the common property in a good and workmanlike manner in accordance with the description set out in the 4<sup>th</sup> Schedule to the Sale and Purchase Agreement, and in accordance with the plans approved by the relevant authority.

The Defendant agreed and covenanted to repair and make good at its own costs and expense within thirty (30) days of receipt of a written notice any defects, shrinkages and other faults to the said Apartment, the building or the common property which shall become apparent within a period of eighteen (18) months (the defects liability period) after the date the Plaintiff took vacant possession of the said Apartment which are due

to defective workmanship or materials or the Apartment or the Building or the common property not having been constructed in accordance with the approved building plans or the specifications.

The Defendant agreed and covenanted, upon payment of service charges by the Plaintiff, to maintain and manage the common property. The Plaintiff paid the service charges to the Defendant as and when the same becomes due and payable.

The Defendant delivered vacant possession of the said Apartment to the Plaintiff on 14.7.2005. Any defects to the said Apartment, the building or the common property that shall become apparent after 31.1.2007 shall be outside the defects liability period.

The Defendant received a notice in a letter dated 13.3.2006 within the defects liability period from the Plaintiffs that there is water leakage and seepage through the common property reinforced concrete roof slab into the said Apartment and requiring the Defendant to, *inter alia*, repair and install adequate water proofing to the reinforced concrete roof slab to ensure that there is no water leakage or seepage to the said Apartment.

The Defendant agreed, *inter alia*, to check the waterproof membrane of the common property reinforced concrete roof slab and if the same is damaged to repair the waterproof membrane on the common property reinforced concrete roof slab. The reinforced concrete roof slab is common property and part of the external structure of the building.

The Defendant admitted in their letter dated 22.9.2006 to Messrs KK Lim & Associates that the illegal extension on the roof top had caused water leakages to the immediate unit below and their engineering specialist verified that that the leakages were directly due to floor punctures caused by drilling which in turn has resulted in water being retained by the pebbles and sipping into the slab through the bolts.

The Defendant failed to and refused to repair and make good the defects as the reinforced concrete slab is common property and part of the external structure of the building.

The illegal extension and structure on the common property reinforced concrete roof slab have not been removed. The floor punctures caused

by drilling which in turn has resulted in water being retained by the pebbles and sipping into the slab through the bolts are also not removed and the floor punctures repaired.

The Defendant never inspected the Plaintiff's Apartment and there is no basis for the Defendant's belief that there is no more water leakage through into the Plaintiff's roof. The 2<sup>nd</sup> Plaintiff inspected the Plaintiff's Apartment on 8.9.2007 and confirmed that water continue to leak into the Plaintiffs Apartment. The illegal extension and structure on the common property reinforced concrete roof slab have not been removed and can be seen from outside the said Condominium.

For these reasons the Plaintiff, therefore, sought the following orders:-

- 1) that the Defendant shall within 14 days of the order of the court permanently close the unauthorized opening in the wall of the bedroom on the 22<sup>nd</sup> floor of the Adjoining Apartment Unit P-PH-05, and stop all unauthorized access to the reinforced concrete roof top slab above the Plaintiff's Apartment Unit P-PH-07;

- 2) that the Defendant shall within 14 days of the order of the court remove the unauthorized wooden structures and the metal grill erected on the reinforced concrete roof top slab of the Building P and restore the roof level to its original state
- 3) that the Defendant shall within 14 days of the order of the court repair and make good the water proofing to the reinforced concrete roof top slab of the Building P and to ensure that there is no water seepage or leakage from the roof into the Plaintiff's Apartment Unit P-PH-07 below.
- 4) that the Defendant shall within 14 days of the order of the court to lock the fire-escape door to prevent any and all unauthorized personnel from having access to the roof level of the Building P and
- 5) that the Defendant shall within 14 days of the order of the court, repair, rectify and make good the defects and damage caused to the Plaintiff's Apartment Unit P-PH-07 by the water seepage or the leakage from the roof level.

It is also to be noted that in this case, the Defendant filed a third party proceeding against the residents of the Adjoining Apartment *vide* Enclosure 6.

### **Court's Opinion**

Based on the submissions and facts presented to me, I am of the view that the third party proceedings brought by the Defendant herein are not a triable issue. It is settled law that the Defendant's liability towards the Plaintiffs need to be proven first by this court.

This is because Clause 30(1) of the Sale and Purchase Agreement dated 15.4.2004 (the Plaintiff's Affidavit, Enclosure 4A) clearly showed that the Defendant covenanted and agreed with the Plaintiffs that any defects, shrinkage or other faults in the said Apartment or in the Building or in the common property shall be repaired and made good by the Defendant at its own costs and expense within thirty (30) days of the Defendant receiving a written notice from the Plaintiffs.



In the circumstances and despite of several notices of complaints given by the Plaintiffs to the Defendant, the Defendant failed to perform its obligations under the Sale and Purchase Agreement, the Deed of Mutual Covenants and the House Rules.

On the other hand, it is clear that O. 16 of the Rules of the High Court 1980 provides the guidelines in cases of third party proceedings, but I am drawn to the principles enunciated in the decision made by the Supreme Court in the case of *Mat Abu bin Man v. Medical Superintendent, General Hospital Taiping, Perak & Others* [1989] 1 MLJ 226 and as well as the decision of the Federal Court in the case of *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151.

I hereby reiterate the above mentioned decisions wherein the Supreme Court held to the effect that:-

*“We also do not think that a proceeding under O. 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.*

*Third party proceedings for contribution should be regarded as independent and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date defendant is held liable. “*

Meanwhile the Federal Court in its decision held that:-

*“...third party proceedings are independent proceedings between a defendant as plaintiff and a third party as defendant (Mat Abu bin Man v. Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 CLJ 137; [1989] 1 MLJ 226 SC. Secondly, the determination of the question in the third party proceedings has to await the determination of the issues in the plaintiff’s action against the defendant (See: Ng Kim Hwa v. Ng See Chow & Ors. [1993] 2 MLJ 155). See also Summons for Third Party Proceedings (Form 26) which stipulates:*

*And that the question of the liability of the said third party to indemnify the defendant be tried at the trial of this action, but subsequent thereto. [Emphasis added].*

*It should also be noted that any statement by a defendant that he is entitled to be indemnified by a third party is no answer to the plaintiff’s claim in an O. 14 application, unless the third party has discharged the plaintiff’s claim (Thome v. Steel [1878] WN 215 CA). See The Supreme Court Practice 1997 Vol. 1 para 14/3-4/2 p. 156.*

Applying the above principles and after considering all relevant considerations, I hereby allow the Plaintiff's application in paragraph c wherein the Defendant within thirty (30) days from the service of this Order to repair and make good the water proofing to the reinforced concrete roof top slab of the Building P and to ensure that there is no water seepage or leakage from the roof top into the Plaintiff's said apartment unit below. I also allow paragraph e that the Defendant within thirty (30) days from the service of this Order to repair and rectify the defects and the damage caused to the Plaintiff's said apartment unit by the water- seepage or leakage from the roof level. Accordingly, the costs of this application will be borne by the Defendant and to be taxed before the Registrar on a date which will be fixed later.

Dated 15.4.2008

**AZMAN BIN ABDULLAH**  
JUDICIAL COMMISSIONER  
CIVIL DIVISION 7  
HIGH COURT KUALA LUMPUR

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