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15 JANUARY 2019



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Waiver in the Context of a 'Draft' Agreement

K3-Synergy Holdings (M) Sdn Bhd v Hicom Indungan Sdn Bhd
[2018] 1 LNS 1434

| by CK Lung |

A landowner entered into an agreement for the sale of its land to a purchaser on the terms of an agreement that was subject to a condition precedent that the purchaser was to obtain, within seven months of the agreement, the written approval of the relevant authorities for the development of the land, failing which the agreement would be automatically terminated.

The purchaser failed to obtain the requisite approval.

The purchaser wanted to continue with the purchase of the land and negotiations between the parties ensued. In the course of these negotiations, the landowner sent to the purchaser a draft supplemental agreement, but the negotiations ended without that agreement being signed.

The purchaser then brought an action against the landowner seeking specific performance of the agreement, or damages. The purchaser argued that it was entitled to specific performance and that such a remedy had the effect of extending time for the purchaser to obtain the approval because the landowner had, by putting forward the draft supplemental agreement:

- (a) condoned the delay and waived the requirement for the purchaser to obtain the approval within the stipulated time; and
- (b) "withdrawn the automatic termination" of the agreement.

In dismissing the purchaser's claim, the learned judge, YA Dato' Mohamad Zabidin bin Mohd Diah, held that:

- (a) The failure to fulfil the condition precedent rendered the agreement, which was a contingent contract, unenforceable,

void and no longer legally binding.

- (b) There was no evidence that the landowner had, by a voluntary, conscious and affirmative act, unequivocally represented to the purchaser that it would waive the requirement for the approval.
- (c) The equitable remedy of specific performance was unavailable to the purchaser as the law provides that the timeline stipulated in the agreement must be strictly adhered to and that it could not be extended by reference to equitable principles.

The landowner was represented by partner, SM Shanmugam, and senior associate, CK Lung, of Lee Hishammuddin Allen & Gledhill.

The grounds of judgment of the High Court may be viewed [here](#).

If you have any queries, please contact the author (ckl@lh-ag.com) or his team partner SM Shanmugam (ssm@lh-ag.com).

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Published by the Dispute Resolution Practice Group

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