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Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (formerly known as Dai-Ichi Shokai) & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-541–03 OF 2014
ZAWAWI SALLEH, IDRUS HARUN AND ABDUL RAHMAN SEBLI JJCA
21 APRIL 2017

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Contract — Specific performance — Availability of — Appellant sued for specific performance of purported agreement by first respondent to sell its shares in second respondent to appellant — High Court declined to grant specific performance but awarded damages in lieu thereof — Appellant appealed only against order refusing specific performance — After High Court's verdict and before hearing of appeal shares in second respondent were acquired by third party who was not named as party in appeal — Whether appeal had to be dismissed as first respondent ceased to be owner of the shares — Whether appellant conceded in earlier litigation that appeal was rendered nugatory by third party's acquisition of the shares — Whether judicial estoppel estopped appellant from arguing during appeal hearing that remedy of specific performance was still available to appellant

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The appellant and the first respondent ('R1') signed a memorandum of understanding ('the MOU') to negotiate the sale and purchase of R1's shares ('the shares') in the second respondent ('R2'). Some months after the MOU, they signed another memorandum ('the HK MOU') which stated that the terms of the HK MOU would be incorporated into a definitive agreement ('SPA') for the sale and purchase of the shares. Negotiations began to draft a SPA but R1 called off negotiations after the parties could not agree on several terms and conditions. The appellant, however, contended that the HK MOU was in fact and in law a valid, definitive, binding and enforceable agreement for the sale and purchase of the shares as all salient terms were agreed upon. The appellant contended that R1 breached the purported agreement by refusing to sign a draft SPA that its solicitors had forwarded to R1's lawyers. The appellant also claimed that all the respondents had conspired to injure and/or defraud the appellant. Amongst its various claims against the respondents, the appellant sought an order to compel R1 to specifically perform a purported SPA for the sale and purchase of the shares. Alternatively, the appellant sought damages in addition to or in lieu of an order for specific performance. The High Court refused the order for specific performance but ordered R1 to pay the appellant damages in lieu thereof, to be assessed. The court also dismissed the appellant's claims against R2 and R3 and allowed R3's counterclaim against the appellant. During the period between the High Court's verdict and the hearing of the

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instant appeal against part of the verdict, the entire shareholding of R2 was acquired by the Sultan of Johor. At the appeal hearing, the respondents raised the preliminary argument that the appeal should be dismissed solely on the ground the shares were no longer owned by R1 and, hence, no order for specific performance in respect of the shares could be ordered.

Held, dismissing the appeal:

(1) The court was satisfied from the information produced that there had been a change in the shareholding of R2 when its entire shareholding was acquired by the Sultan of Johor. Hence, specific performance of the agreement for the sale and purchase of the shares between the appellant and R1 was no longer possible. R1 could not be ordered to sell what it no longer owned. The entire appeal was only against that part of the High Court's decision that disallowed specific performance. There was no appeal against the decision in granting damages in lieu of specific performance to be assessed. In its affidavit in support of committal proceedings, the appellant had itself conceded that the transfer of the entire issued and paid-up shares of R2 to the third party new shareholders had defeated, overcome and rendered illusory and nugatory this very appeal. Hence, the only remedy that was available to be appellant was obviously the damages to be assessed which the High Court had already granted in lieu of specific performance (see paras 10–11).

(2) The appellant's failure to take steps to preserve the shares and recover the same from the present owner was a factor this court had to take into account in determining fairness and in exercising its discretion to refuse specific performance. In the present appeal, where the transferee of the shares was not a party to the appeal and as such the transfer could not be 'undone', an order for specific performance had to be refused (see para 15).

(3) Judicial estoppel operated to estop the appellant from arguing that the present appeal was not academic and from taking an inconsistent position during the appeal after having assumed a particular position in earlier litigation. In the earlier committal proceedings, the appellant had unequivocally assumed the position that the transfer of the entire issued and paid-up shares of R2 by the third party new shareholders had defeated, overcome and rendered illusory and nugatory this very appeal. The appellant could not change its stance to now adopt a completely different position that specific performance should be ordered in its favour in respect of a subject matter that had ceased to exist (see paras 16 & 18).

[Bahasa Malaysia summary

Perayu dan responden pertama ('R1') menandatangani memorandum persefahaman ('MOU tersebut') untuk berunding jual beli saham-saham R1 ('saham-saham tersebut') di dalam responden kedua ('R2'). Beberapa bulan selepas MOU tersebut, mereka menandatangani memorandum yang lain ('HK MOU tersebut') yang menyatakan bahawa terma-terma HK MOU tersebut akan digabungkan ke dalam perjanjian muktamad ('PM tersebut') bagi jual beli saham-saham tersebut. Perundingan mula mendraf PM tersebut tetapi R1 membatalkan perundingan selepas pihak-pihak tidak dapat bersetuju atas beberapa terma dan syarat. Perayu, walau bagaimanapun, berhujah bahawa HK MOU tersebut dari segi fakta dan undang-undang perjanjian sah, muktamad, mengikat dan berkuat kuasa untuk jual beli saham-saham kerana kesemua syarat penting telah dipersetujui. Perayu berhujah bahawa R1 melanggar perjanjian dimaksudkan dengan menolak daripada menandatangani draf PM tersebut yang peguamnya telah serahkan kepada peguam R1. Perayu juga menuntut bahawa kesemua responden telah berkomplot untuk mencederakan dan/atau menipu perayu. Di antara pelbagai tuntutannya terhadap responden-responden, perayu memohon perintah untuk memaksa R1 melaksanakan secara spesifik PM yang dimaksudkan bagi jual dan beli saham-saham tersebut. Perayu, secara alternatif memohon ganti rugi sebagai tambahan kepada atau sebagai ganti perintah untuk pelaksanaan spesifik. Mahkamah Tinggi menolak perintah untuk pelaksanaan spesifik tetapi memerintah R1 membayar perayu ganti rugi sebagai gantinya, untuk dinilai. Mahkamah juga menolak tuntutan-tuntutan perayu terhadap R2 dan R3 dan membenarkan tuntutan balas R3 terhadap perayu. Semasa tempoh di antara keputusan Mahkamah Tinggi dan pendengaran rayuan ini terhadap sebahagian keputusan, keseluruhan pemegangan saham R2 diambil alih oleh Sultan Johor. Semasa pendengaran rayuan, responden-responden membangkitkan hujahan awal bahawa rayuan patut ditolak semata-mata atas alasan saham-saham bukan lagi dimiliki oleh R1 dan, maka, tiada perintah untuk pelaksanaan spesifik berkenaan saham-saham boleh diperintah.

Diputuskan, menolak rayuan:

(1) Mahkamah berpuas hati daripada maklumat yang dikemukakan bahawa terdapat perubahan di dalam pemegangan saham R2 apabila keseluruhan pemegangan sahamnya diambil alih oleh Sultan Johor. Maka, pelaksanaan spesifik perjanjian untuk jual beli saham-saham di antara perayu dan R1 tidak lagi mungkin. R1 tidak dapat diperintahkan untuk menjual apa yang bukan lagi miliknya. Keseluruhan rayuan hanya terhadap bahagian keputusan Mahkamah Tinggi yang tidak membenarkan pelaksanaan spesifik. Tidak terdapat rayuan terhadap keputusan dalam memberikan ganti rugi sebagai ganti pelaksanaan spesifik untuk dinilai. Perayu, dalam afidavit sokongannya terhadap prosiding komital, telah sendirinya bersetuju bahawa pindahan kesemua

saham-saham terbitan dan berbayar R2 kepada pemegang-pemegang saham baru pihak ketiga telah mematahkan, mengatasi dan memberikan ilusori dan sia-sia rayuan ini. Maka, satu-satunya remedi yang ada untuk perayu adalah jelas ganti rugi untuk dinilai yang mana Mahkamah Tinggi telah berikan sebagai ganti pelaksanaan spesifik (lihat perenggan 10–11).

(2) Kegagalan perayu untuk mengambil langkah menjaga saham-saham dan mendapatkannya daripada tuan punya sekarang adalah faktor mahkamah ini perlu mengambil kira dalam menentukan keadilan dan dalam menjalankan budi bicaranya untuk menolak pelaksanaan spesifik. Di dalam rayuan ini, di mana penerima pindahan saham-saham bukan pihak kepada rayuan dan oleh itu pindahan tersebut tidak boleh menjadi 'undone', perintah untuk pelaksanaan spesifik perlu ditolak (lihat perenggan 15).

(3) Estopel kehakiman beroperasi untuk estop perayu daripada berhujah bahawa rayuan ini bukan akademik dan daripada mengambil kedudukan tidak konsisten semasa rayuan selepas menerima kedudukan tertentu dalam litigasi terdahulu. Dalam prosiding komital yang terdahulu, perayu telah secara jelas menganggap kedudukan bahawa pindahan keseluruhan saham-saham berbayar dan terbitan R2 oleh pemegang-pemegang saham baru pihak ketiga telah mematahkan, mengatasi dan memberikan ilusori dan sia-sia rayuan ini. Perayu tidak dapat mengubah pendiriannya untuk sekarang menerima kedudukan yang sama sekali berbeza bahawa pelaksanaan spesifik perlu diperintahkan memihaknya berkaitan perkara yang telah tidak ada lagi (lihat perenggan 16 & 18).]

Notes

For a case on availability of specific performance, see 3(4) *Mallal's Digest* (5th Ed, 2015) para 6924.

Cases referred to

Bandar Eco-Setia Sdn Bhd v Angelane Eng [2016] 1 MLJ 764, FC (refd)

Choong Kim Meng & Anor v Arena Kencana Sdn Bhd & Ors (Goh Hok Huat, intervener) [2016] MLJU 604, HC (refd)

EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal [2012] 1 SLR 32, CA (refd)

Lim Kim Choy v Wong Chow [1952] 1 MLJ 20 (refd)

OJSC Oil Co Yugraneft (in liquidation) v Abramovich and others [2008] EWHC 2613 (Comm), QBD (refd)

Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors [2017] MLJU 273, CA (refd)

Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd [2013] 2 MLJ 915, CA (refd)

Appeal from: Suit No 22NCC-1074–07 of 2012 (High Court, Kuala Lumpur)

Cecil WM Abraham (Rishwant Singh and Chua Vi Cher with him) (Zul Rafique & Partners) for the appellant.
Cyrus Das (Ong Chee Kwan and Tracy Tan with him) (Christopher & Lee Ong) for the first respondent.
Malik Imtiaz Sarwar (Yoong Nim Chor with him) (Lee Hishamuddin Allen & Gledhill) for the second respondent.
Darryl Goon (Maidzuara Mohammed, Mathew Thomas Philip and Tan Jee Tjun with him) (Thomas Philip) for the third respondent.

Idrus Harun JCA (delivering judgment of the court):

[1] This appeal is brought as a result of the High Court's decision given on 11 March 2014 after full trial:

(a) in disallowing the appellant's claim for specific performance as prayed for by the appellant against the first respondent and instead granting the appellant's alternative prayer for damages in lieu of specific performance to be assessed as well as liquidated damages of RM841,691.94 to be paid by the first respondent to the appellant;

(b) in disallowing the appellant's claims against the second and third respondents; and

(c) in allowing the third respondent's counterclaim against the appellant.

This appeal is against the above decision save such part of the High Court's decision in granting the appellant the alternative prayer for damages in lieu of specific performance to be assessed and liquidated damages of RM841,691.94. We dismissed the appeal and our reasons for doing so now follow.

[2] To appreciate the contentions that have been raised before this court, it would be desirable to state briefly the material facts. The background to this case is set out comprehensively in the appellant's re-amended statement of claim. We begin by stating that the appellant who is the plaintiff in the proceedings, is a company registered in Malaysia whereas the first respondent is a company incorporated in Japan. The second respondent, a company incorporated in Malaysia, operates a 36 hole golf course known as Poresia Country Club and manages the membership of the said golf club. Its entire issued shares are owned by the first respondent. The third respondent intervenes into and is subsequently added as a party to this suit. All the respondents are the defendants in the proceedings in the court below.

[3] By a memorandum of understanding dated 8 December 2011 ('the 2011

MOU') between the appellant and the first respondent, both parties agreed to negotiate on the potential sale and purchase of the entire issued shares of the second respondent ('the shares'). The 2011 MOU, inter alia, stated that:

(a) it is non-binding;

(b) it does not constitute an offer or commitment by the parties and is intended to serve as a basis for definitive agreement;

(c) parties contemplated that they would not be bound to sell and purchase the shares unless there was a definitive agreement, incorporating all the terms of their agreement; and

(d) a definitive agreement would be executed by 28 December 2011.

It is noteworthy that the name of the first respondent is stated in the 2011 MOU as Dai-Ichi Shokai Co Ltd which is its previous name.

[4] However, no definitive agreement was executed by 28 December 2011. Instead, on 16 March 2012, the first respondent and the appellant executed in Hong Kong a memorandum ('the HK MOU') which consisted of a one page document. The fact that can be gleaned from the HK MOU is that the parties thereto agreed that the terms of the HK MOU would be incorporated into a definitive purchase and sale agreement. During the execution of the HK MOU, both parties were not represented by their respective solicitors who were involved in the 2011 MOU. Pursuant to the HK MOU, the solicitors acting for the appellant and the first respondent proceeded to discuss the terms of the draft sale and purchase agreement towards the finalisation of a definitive agreement or a definitive purchase and sale agreement. We are told, however, that there were terms and conditions of the share sale transaction which parties could not reach agreement, and the first respondent on that account terminated negotiations with the appellant.

[5] So far as could be seen from the appellants' re-amended statement of claim, the appellant's contention is that the HK MOU was in fact and in law a valid, definitive, binding and enforceable agreement for the sale of the shares by the first respondent to the appellant. The appellant treats the HK MOU, being an independent, a stand-alone and definitive document from the 2011 MOU, as the basis for its claims that all salient terms to constitute an agreement had been agreed upon by the parties. It is the appellant's pleaded case that the first respondent had breached the purported agreement in refusing to proceed with the sale of the shares, in particular, in refusing to execute the draft sale and purchase agreement forwarded by the appellant's solicitors, Messrs SC Teh & Azura to the previous first respondent's solicitors Messrs David Ong on 21 March 2012. The plaintiff further claims that the first, second and third respondents had, in various permutations, conspired to injure and/or defraud

A the appellant, by the second respondent's holding an extraordinary general meeting, by the second respondent's granting to the third respondent an option to purchase certain land, by the second respondent's entering into a sale and purchase agreement with the third respondent ('the walker SPA') pursuant to such option and by the first and second respondents' engaging in 'mala fide conduct' which the first respondent however alleges is asserted without providing any particulars of this conduct. The appellant finally claims that the Walker SPA was a 'sham' and/or was entered into for a 'collateral purpose'.

C **[6]** Upon the basis of these claims, the appellant brings this action seeking by way of relief relevantly:

(a) as against the first respondent, an order for:

D (i) specific performance of the sale and purchase agreement originally to be executed on 23 March 2012 between the appellant and the first respondent for the sale and purchase of the entire issued shares of the second respondent for the consideration price of USD25.3m;

E (ii) further and/or in the alternative damages for the sum of RM101,224,194.94 for the first respondent's breach of contract in lieu of specific performance; and

(iii) further and/or in the alternative damages in addition to specific performance;

F (b) as against the second respondent, an order that:

(i) the second respondent shall do everything necessary to complete the transfer of its entire issued shares in accordance with the terms of the sale and purchase agreement originally to be executed on 23 March 2012 between the appellant and the first respondent; and

G (ii) damages for conspiracy to injure and/or defraud to be assessed;

(c) as against the third respondent, damages for conspiracy to injure and/or defraud to be assessed;

H (d) as against the second and third respondents, a declaration that the walker SPA is null and void; and

(e) as against the first and second respondents, in the event the walker SPA is not held as null and void, an alternative order requiring the directors of the first and second respondents as at 4 April 2012 to bear any loss or damage suffered by the third respondent and/or indemnify the appellant in relation to the compliance and/or non-performance of the walker SPA as at 14 March 2013.

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[7] On 11 March 2014, the High Court delivered its decision and ordered that the first respondent to pay to the appellant damages in lieu of specific performance to be assessed, the sum of RM841,691.94 as expenditure incurred by the appellant and costs of RM150,000 and the appellant's claim against the second and third respondent be dismissed and the third respondent's counterclaim be allowed with costs of RM50,000. A B

[8] Before we embark upon a detailed consideration of the appeal, it is necessary to draw attention to one aspect of the proceedings before this court, which we think, requires special mention. This is with regard to the event which took place after the High Court's decision was delivered. To be specific, during the pendency of this appeal, the shares, it transpired, had been transferred to a third party. We shall deliberate upon this significant event in turn as it has a bearing on the outcome of this appeal in view of the direction which the respondents have adopted in the course of their oral submissions during the hearing of this appeal. C D

[9] At this stage, we will allude briefly to the main points in the appellant's appeal which focus on, firstly, the issue of the appellant's claim for specific performance which it has submitted, the learned judge had erred in disallowing it and, secondly, the order for the payment of damages in lieu thereof which according to the appellant was erroneously decided. This appeal also turns upon the questions whether the walker SPA was a sham agreement and the learned judge had erred in law and on the fact when she dismissed the claim for conspiracy between the respondents by failing to consider the factual circumstances surrounding the execution of the same. E F

[10] It would be useful to remember that the position adopted for the respondents is described in this court by their counsel in the written submissions. In summary, it is contended that specific performance of the purported sale and purchase of the shares ought not to be granted. The respondents advanced several grounds for this submission one of which is that the shares, being the subject matter of the purported contract, are no longer available that is the first respondent no longer owns the shares. We make specific reference to this ground in view of our earlier emphasis on, and of its connection with, the sale of the shares in the second respondent to the third party. Save for this ground, we shall not delve into all the other grounds as we do not find it necessary to do so for the reasons that we shall give in due course. Before us, learned counsel for the first respondent took on this ground as a preliminary point and proceeded to argue thereon in opposing the appellant's appeal concluding that the appeal ought appropriately to be dismissed on the preliminary point alone. The most compelling reason justifying this course of action according to learned counsel, is that at present, the subject matter of the purported contract that is the shares, are no longer available for any decree of G H I

specific performance to be ordered for the appellant. This is because the first respondent no longer owns the shares as it has been sold and transferred to the third party on 27 July 2016 and 3 August 2016. Learned counsel then draws our attention to the second respondent's letter dated 28 September 2016 as proof of the transfer. Based on the information that we have garnered from the said letter and the relevant share certificates attached thereto manifesting the new ownership of the shares, we are satisfied that there has been a change in the shareholders of the second respondent when the entire shareholding of the second respondent has been acquired by His Majesty DYMM Sultan Ibrahim Johor.

[11] A pertinent question which arises in consequence of this development is whether a decree of specific performance is still a viable option. In this case, in our judgment, based on the above uncontroverted fact, there is no reason for this evidence to be ignored. Therefore, with regard to the aforesaid question, we accept that specific performance of the agreement for the sale and purchase of the shares between the appellant and the first respondent is no longer possible. Simply, the first respondent cannot be ordered by this court to sell what it no longer owns and what is more significant is that the appellant has conceded as much, by the position it had taken in the application in encl 46a for leave to commence committal proceedings against the respondents and its directors and secretaries which we had heard and dismissed on 24 February 2017, ten days before this appeal came up for hearing before us. In para 29 of the appellant's first affidavit in support of the committal application affirmed on 23 December 2016, the appellant asserts that the transfer of the entire issued and paid up shares of the second respondent to the third party new shareholders defeats, overcomes and renders illusory and nugatory this very appeal. In its letter dated 28 February 2017 the applicant once again reiterates this position when it sought an adjournment of this appeal stating to the effect that if an adjournment was not granted and the appeal was allowed, the appellant would not succeed in recovering the subject matter of the appeal that is, the shares. By taking this position, we would say that the glaring conclusion that could be drawn is that the only remedy available would obviously be damages to be assessed which the learned judge had already granted in lieu of specific performance. The respondents take up this preliminary point as understandably, the entire appeal is only against part of the High Court's decision in disallowing specific performance. There is without question, no appeal against the High Court's decision in granting damages in lieu of specific performance to be assessed. Moreover, the appeal on the specific performance undeniably proceeds on the assumption that the shares are in the hand of the second respondent.

[12] Following this turn of event, and on the facts of the present case, our stand is, owing to circumstance which has occurred subsequently, that is, the

shares are no longer with the first respondent due to the transfer of the shares to the third party, no meaningful order of specific performance could in our view, be made by this court and enforced against the first respondent as the subject matter of the purported contract is no longer in existence. The appellant, furthermore, takes no steps to preserve the shares, and has undoubtedly taken no steps to recover the shares from the present owner. The proposition that we have just deliberated is lucidly explained in *Bandar Eco-Setia Sdn Bhd v Angelane Eng* [2016] 1 MLJ 764 in language that merits recollection:

> [40] In *Knight v Simmonds* Lindley LJ summed up the relevant law at pp 297–298 as follows:
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> > When a court of equity is asked to enforce a covenant by a decree of specific performance or granting an injunction, in other words, when equitable as distinguished from legal relief is sought, equitable as distinguished from legal defences have to be considered. The conduct of the plaintiff may disentitle him from relief; his acquiescence in what he complains of, or his delay in seeking relief may of itself be sufficient to preclude him from obtaining it. *Sayers v Collyer* and *Roper v Williams* illustrate this. In both of those cases the court refused to enforce restrictive covenants at the instance of the particular plaintiffs. *But, further, before granting equitable relief, Courts of Equity look not only to the words of a covenant but to the object to attain which it was entered into, and if, owing to circumstance which have occurred since it was entered into, that object cannot be attained, equitable relief will be refused*. This doctrine was laid down and acted upon by Lord Alden and Sir Thomas Plumber in *Duke of Bedford v Trustees of the British Museum* and by Vice Chancellor Wood in *Peek v Matthews* and was recognised in *German v Chapman*. *It is upon this ground that restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced if the land has already been so laid out or used that its preservation as intended is no longer possible*. Such a state of things can seldom, if ever, have arisen except from a departure by the vendor and the purchasers from him from the scheme, or from the acquiescence or laches of those entitled to enforce the observance of the covenants in question; but, *whatever the explanation of the altered state of things may be, if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused*. (Emphasis added.)

[13] In *Choong Kim Meng & Anor v Arena Kencana Sdn Bhd & Ors (Goh Hok Huat, intervener)* [2016] MLJU 604 the High Court explained the law further in the following terms:

> [65] The plot of land sold to the intervener by the second defendant is a replacement plot. This replacement plot is not the plot of land that was sold to the plaintiffs under the SPA. *The plot of land sold to the plaintiffs, which is the subject matter of the SPA, does not exist any more. Thus, there is no basis in law for the plaintiffs' to ground their application for specific relief, for the court cannot order specific performance of a contract of which its subject matter is no longer in existence.* Nor do the plaintiffs have any caveatable interest in PT 13526, as it is not the same plot of land that the

plaintiffs had contracted to purchase under the SPA. (Emphasis added.)

[14] The appropriate remedy under the circumstances, would therefore be damages as ordered by the High Court. Thus in *Lim Kim Choy v Wong Chow* [1952] 1 MLJ 20, Thomson J had this to say:

> As regards the defendant's failure to renew for the year commencing 21 November 1950, *there can, of course, be no question of specific performance because to perform would be impossible*. There will, therefore, be judgment for the plaintiff for damages to be assessed on inquiry by the Registrar. The measure of damages will be the net profit of the time to the defendant during the year in question subject to the deduction of the tribute which would have been payable to him by the plaintiff under the sublease. The plaintiff will also have the taxed costs. (Emphasis added.)

[15] The appellant's failure to take steps to preserve the shares and recover the same from the present owner is a factor which this court ought to take into account in determining fairness and in exercising its discretion to refuse specific performance. In *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32, it was held that:

> [107] Fourth, during the hearing of the present appeals, counsel for ECI brought it to our attention that in the event of our ruling that the transaction was indeed for the sale of the property by Ridout to ECI, this court should order that the transfer of the property to Thomas Chan (which was effected on 17 December 2010 following the judgment of the court below) be undone. *It is trite that an appeal does not operate as a stay of execution* (see s 41 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and O 57 r 15(1)(a) of the Rules of Court). *Although ECI's failure/omission to apply for a stay of the transfer of the property to Thomas Chan does not ipso facto disentitle it from praying to this court for specific performance of the sale agreement, its failure/omission in this regard is a factor which the court can take into account in determining fairness and in exercising its discretion to grant or refuse specific performance*.

It should be noted that, the transferee in *ECI v Ridout*, Thomas Chan, was the fourth respondent in that case, unlike the transferee of the shares in the present appeal, who is not a party before this court. Even so, the court in *ECI v Ridout* refused specific performance, despite accepting that the transfer could be 'undone', and that the transfer did not ipso facto prevent the appellant from seeking specific performance on appeal. A fortiori, in the present appeal, where the transferee namely His Majesty DYMM Sultan Ibrahim Johor, is not a party to the appeal and as such the transfer cannot be 'undone', specific performance should be refused. In any event, it is significantly relevant to consider that the appellant was granted the alternative prayer for damages by the High Court for which the appellant did not appeal thus raising a pertinent question in consequence thereof that is how could such order coexist with the order of specific performance should this appeal be allowed.

[16] Learned counsel for the second respondent further reinforces the submission of the first respondent when he submits the remaining point before us. His contention is couched in forceful but deferential terms when he says that the appellant's assertion in para 29 of the affidavit in support of the committal application was made in this court during the hearing of the said application to the effect that this appeal had been rendered illusory and nugatory. The appellant, however, is now saying that it is not academic. That, learned counsel submits, is not permitted. Learned counsel's argument directed before us as we understand it, is that, in view of its earlier stand in the committal proceedings, judicial estoppel would operate to now estop the appellant from taking an inconsistent position during the appeal. It is clear to this court that the object of judicial estoppel is to prevent a party who assumes a particular position in litigation to take an inconsistent position in later litigation. Christopher Clarke J explained the law on judicial estoppel in *OJSC Oil Co Yugraneft (in liquidation) v Abramovich and others* [2008] EWHC 2613 (Comm) and we now quote the relevant excerpts:

> The Court of Appeals for the Sixth Circuit explained the position in *Edwards v Aetna Life and Casualty* 690 F 2s 595 (1982):
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> > The policies supporting judicial estoppel are different from those that support the more common doctrines of issue preclusion, equitable and collateral estoppel. Courts apply equitable estoppel to prevent a party from contradicting a position taken in a prior judicial proceeding ... Equitable estoppel enables a party to avoid litigating, in the second proceeding, claims which are plainly inconsistent with those litigated in the first proceeding. Because the doctrine is intended to ensure fair dealing between the parties, the courts will apply the doctrine only if the party asserting the estoppel was a party in the prior proceeding and if that party has detrimentally relied upon his opponent's prior position. See Id at 689–90. Collateral estoppel prevents relitigation of factual matters that were fully considered and decided in a prior proceeding. Thus, collateral estoppel operates to prevent repetitive litigation.
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> > *The doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding.... Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. ... This distinction reflects the difference in the policies served by the two rules. Equitable estoppel protects litigants from less than scrupulous opponents. Judicial estoppel, however, is intended to protect the integrity of the judicial process. ... Scarano v Central R Co,* 203 F 2d 510, 512–13 (3rd Cir 1953) ('such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the court should not tolerate'). *The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery*. ... Collateral estoppel is essentially a finality rule, which serves to conserve judicial resources by precluding the litigation of

> issues previously decided. *Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled* ...
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> 430. Sibir mounted a claim based on the contention that the receipt by the six offshore companies of the participation interests (knowingly assisted by Mr Abramovich) was unlawful. It failed in that attempt since the BVI Courts, held that the relevant law is the law of Russia, by which law Sibir has no claim. They did so as a result of Sibir's own contention that there was no claim in Russian law by Sibir (or Yugraneft). Now through Yugraneft, its privy, it seeks to bring a claim in knowing receipt against Mr Abramovich and Millhouse, on the footing that the receipt was unlawful in Russian law. Yugraneft also seeks to bring a claim in knowing assistance against Mr Abramovich when Sibir had previously claimed that the BVI court should refuse a stay on the ground that neither it not Yugraneft had any claim. *That seems to me an abuse of the process of the courts. Part of the rationale for the doctrine is the protection of the Court's process and avoidance of the harassment of defendants. Sibir's changes of tack and jurisdiction, alleging, at one moment, that the claims are governed by BVI law as the place of receipt, then BVI law as the law of the forum, then English law as the place of enrichment, and that Russian law (a) does not and (b) does afford a remedy, seems to me to offend on both counts*. This is not only an example of forum shopping but of issue switching which the courts should not be prepared to tolerate. (Emphasis added.)

[17] Also cited by learned counsel in the course of his oral submission on this point is this court's decision in the case of *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 in which it was held that the respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit showed that the appellants were innocent victims as much as the respondent was. The respondent was estopped from taking a position different from that pleaded in its defence in the earlier suit. Clearly, the essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal (*Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] MLJU 273).

[18] On the facts of the present case, we are satisfied that the appellant had unequivocally assumed a position that the transfer of the entire issued and paid up shares of the second respondent to the third party new shareholders defeats, overcomes and renders illusory and nugatory this very appeal. The appellant cannot now change its stance in this appeal adopting a completely different position that specific performance should be ordered in their favour in respect of the subject matter which has ceased to exist. Such position, we would say, is incongruous with their position manifested in its affidavit and argument in the

earlier proceedings and thus certainly flies in the face of the appellant's earlier position it stood for during the committal proceedings.

[19] For the reasons that we have given, it is our inevitable conclusion to hold unanimously that the appeal lacks merit. On that basis, there is certainly force in the first and second respondents' contentions (which the third respondent has adopted) on the preliminary point upon which this court is of the opinion that it is sufficient to finally dispose of this appeal. We find the appellant's contention that the position it had taken in the committal proceedings does not raise the issue of estoppel or switching as wholly untenable. One thing is clear, that is that, the irrefragable facts are that firstly, the acquisition of the entire shareholding of the second respondent by the third party from the first respondent has rendered specific performance no longer a viable solution and secondly the appellant had asserted a position in the committal proceedings and the opposite in this appeal which in the result has disentitled it from the relief of specific performance. In the end, we do not find it necessary to decide on the other grounds raised by the appellant and the respondents in this appeal. Accordingly, this appeal is, in our judgment, one which we should appropriately dismiss and which we now do. The appellant is ordered to pay costs of RM20,000 to each respondents.

Appeal dismissed.

Reported by Ashok Kumar