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**CIMB BANK BHD**

v.

**GAN TEOW HOOI & ORS**

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COURT OF APPEAL, PUTRAJAYA

ZAINUN ALI JCA

RAMLY ALI JCA

KANG HWEE GEE JCA

[CIVIL APPEAL NO: W-02(IM)(NCC)-2470-2010]

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27 MARCH 2012

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**CONTRACT:** *Loan - Default of repayment of loan - Sale and purchase of land to build house - Construction agreement - Execution of loan agreement - Investigation by Local Government and Housing Ministry on project - Vendor/contractor did not possess licence as housing developer - Whether sale and purchase agreement and construction agreement void ab initio*

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The respondents had entered into a sale and purchase agreement with Paragon Nova Sdn Bhd ('the vendor') to purchase a vacant land at the price of RM125,000. Concurrently, the respondents also entered into a construction agreement with Atlaw Housing Sdn Bhd ('the contractor') to build a two and a half storey house on the vacant land at the price of RM200,000 which was to be paid in accordance with the third schedule of the construction agreement. The respondents applied for a housing loan in the sum of RM280,000 and this was approved by the appellant. The agreement stipulated that RM100,000 was to be released to the vendor for the purchase of vacant land while RM180,000 was for the building or construction price to the contractor. A loan agreement between the appellant and the respondents was executed and the loan sum of RM 100,000 was released to the vendor for the purchase of vacant land while the balance sum of RM180,000 was released to the contractor, pursuant to cl. 2 of the Third Schedule of the construction agreement. Since there was no notice of completion of work sent to the appellant, the sum of RM180,000 was not released to the contractor. The respondents defaulted in the repayment of the loan as stipulated in an express term of the loan agreement and several notices of demand were issued to the respondents. Almost

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a year later, the respondents lodged a police report against the vendor and contractor, on the basis that they did not have license as housing developer. On 9 April 2008, the Local Government and Housing Ministry issued a letter informing them they are in the process of investigating the said project. The appellant subsequently sent a notice of demand claiming for the total loan amount which was released to the respondents inclusive of the accrued interest. However no payment was made by them. The appellant then filed the writ of summons against the respondents. In the High Court, the main issue raised by the appellant was whether the sale and purchase agreement and construction agreement were *void ab initio* since the vendor/contractor did not have licence as housing developer. The appellant's claim was dismissed with costs. Hence, the present appeal against the said decision by the trial judge.

**Held (allowing appeal with costs)**

**Per Zainun Ali JCA delivering the judgment of the court:**

- (1) The learned trial judge had misdirected himself in arriving at the decision he did. The said loan agreement was valid even if the sale and purchase agreement and construction agreement was illegal and void. Even if there was non-compliance with the Housing Development (Control and Licensing) Act 1966 for failing to obtain the required license as housing developer, it would not render the sale and purchase agreement and or the construction agreement as null and void. (paras 24-25 & 33)
- (2) The loan sum had been released at the respondents' request and at all material times, there was no instruction from the respondent borrowers to stop the progressive release of the loan. Relying on such representation by the respondents, the appellant was under no duty to further verify the legality of the sale and purchase agreement and construction agreement. The principle of estopped applies. The respondents did not take either of these courses of action, and as such, must be deemed to have affirmed the legality of the agreements. In any case too, it would be unjust and inequitable to allow the respondents to raise the issue of illegality after seven of years the sale and purchase agreement and construction agreement having been executed. (paras 27-28 & 35-36)

**A Bahasa Malaysia Translation Of Headnotes**

Responden-responden telah memeterai perjanjian jual beli dengan Paragon Nova Sdn Bhd ('vendor') untuk membeli tanah kosong pada harga RM125,000. Pada masa yang sama, responden-responden juga telah memeterai perjanjian pembinaan dengan Atlaw Housing Sdn Bhd ('kontraktor') untuk membina sebuah rumah dua setengah tingkat di atas tanah kosong tersebut pada harga RM200,000 yang perlu dibayar selaras dengan jadual ketiga perjanjian pembinaan. Responden-responden memohon untuk pinjaman perumahan sebanyak RM280,000 dan ini telah diluluskan oleh perayu. Perjanjian yang ditetapkan adalah bahawa RM100,000 akan dikeluarkan kepada penjual untuk pembelian tanah kosong manakala RM180,000 pula adalah untuk harga bangunan atau pembinaan kepada kontraktor. Satu perjanjian pinjaman antara perayu dan responden-responden telah dimeterai dan jumlah pinjaman sebanyak RM100,000 telah dikeluarkan kepada penjual untuk pembelian tanah kosong manakala jumlah baki sebanyak RM180,000 telah dikeluarkan kepada kontraktor, menurut kl. 2 Jadual Ketiga Perjanjian Pembinaan. Kerana notis penyiapan kerja tidak dihantar kepada perayu, sejumlah RM180,000 tidak dikeluarkan kepada kontraktor. Responden-responden ingkar dalam pembayaran balik pinjaman seperti yang ditetapkan dalam terma nyata perjanjian pinjaman dan beberapa notis permintaan telah dikeluarkan kepada responden-responden. Hampir setahun kemudian, responden-responden telah membuat laporan polis terhadap vendor dan kontraktor, atas alasan bahawa mereka tidak mempunyai lesen sebagai pemaju perumahan. Pada 9 April 2008, Kementerian Kerajaan dan Perumahan Tempatan telah mengeluarkan surat memaklumkan bahawa mereka dalam proses menjalankan siasatan ke atas projek tersebut. Perayu kemudiannya menghantar notis tuntutan menuntut jumlah pinjaman yang telah dikeluarkan kepada responden-responden termasuk faedah terakru. Walau bagaimanapun, tiada bayaran telah dibuat oleh mereka. Perayu kemudiannya memfailkan writ saman terhadap responden-responden. Di Mahkamah Tinggi, isu utama yang dibangkitkan oleh perayu ialah sama ada perjanjian jual beli dan perjanjian pembinaan adalah *void ab initio* kerana vendor/kontraktor tidak mempunyai lesen sebagai pemaju perumahan. Tuntutan perayu telah ditolak dengan kos. Oleh itu, rayuan ini terhadap keputusan oleh hakim bicara.

**Diputuskan (membenarkan rayuan dengan kos)**

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**Oleh Zainun Ali HMR menyampaikan penghakiman mahkamah:**

(1) Hakim bicara telah salah arah dirinya dalam memutuskan keputusan tersebut. Perjanjian pinjaman adalah sah walaupun perjanjian jual beli dan perjanjian pembinaan menyalahi undang-undang dan tidak sah. Walaupun terdapat ketidakpatuhan Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 kerana gagal mendapatkan lesen yang perlu sebagai pemaju perumahan, ia tidak akan menyebabkan penjualan dan perjanjian pembelian dan atau perjanjian pembinaan batal dan tidak sah.

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(2) Jumlah pinjaman telah dikeluarkan atas permintaan responden-responden dan pada setiap masa material, tiada arahan dari peminjam responden-responden untuk menghentikan pelepasan progresif pinjaman. Bergantung kepada perwakilan sedemikian oleh responden-responden, perayu tidak berkewajipan untuk mengesahkan kesahihan perjanjian jual dan beli dan perjanjian pembinaan. Prinsip estoppel terpakai. Responden-responden tidak mengambil mana-mana tindakan, dan dengan itu hendaklah disifatkan telah mengesahkan kesahihan perjanjian. Dalam apa jua kes, ia tidak adil dan tidak saksama untuk membolehkan responden-responden membangkitkan isu menyalahi undang-undang selepas tujuh tahun perjanjian jual beli dan perjanjian pembinaan telah dilaksanakan.

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**Case(s) referred to:**

*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC (**refd**)

*Beca (M) Sdn Bhd v. Tang Choong Kuang & Anor* [1986] 1 CLJ 20; [1986] CLJ (Rep) 64 SC (**refd**)

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*Kin Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181 FC (**refd**)

**Legislation referred to:**

Contracts Act 1950, s. 24

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Housing Development (Control and Licensing) Act 1966, ss. 5(1), 18(a)

*For the appellant - Hizri Hasshan (Ashmadi Othman & Mohd Helmy Razelan with him); M/s Che Mokhtar & Ling*

*For the respondent - Teh Beng Boon (Soo Pei Ping with him); M/s BB Teh*

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[Appeal from High Court, Kuala Lumpur; Suit No: D-22-NCC-193-2009]

Reported by Najib Tamby

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## JUDGMENT

### Zainun Ali JCA:

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[1] This appeal arose from the dismissal by the learned High Court judge of the appellant's Order 14A application.

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[2] In the court below, the appellant's cause of action against the respondents was for breach of contract in which the respondent had defaulted in the repayment of the loan and breached the terms of the loan agreement.

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### Agreement Facts

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[3] Briefly the background to this appeal can be described thus. The respondents entered into a sale and purchase agreement with a company called Paragon Nova Sdn Bhd ("the vendor") to purchase a vacant land at the price of RM125,000 on 14 January 2002.

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[4] On the same day (14 January 2002), the respondents had also entered into a construction agreement with the contractor, Atlaw Housing Sdn Bhd to build a 2 1/2 storey house on the said vacant land. The price of constructing the house was RM200,000. The construction price is to be paid in accordance with the 3rd schedule of the construction agreement.

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[5] Meanwhile, the respondents applied for and the appellant approved a housing loan for the sum of RM280,000 in the respondent's favour in this manner:

RM100,000 for the purchase of vacant land for the vendor;

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RM180,000 for the building or construction price to the contractor.

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[6] Respondent was given a letter of offer and following that a loan agreement was prepared. The appellant and the respondents then executed the loan agreement on 13 December 2002. The terms and conditions were made known to the respondents. A deed of assignment was executed by the respondents in favour of the appellant.

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[7] The appellant released the loan sum of RM100,000 to the vendor for the purchase of vacant land, once the loan agreement and deed of assignment were executed and stamped. The balance sum of RM170,000 was released to the contractor, Atlaw Housing, pursuant to cl. 2 of the third schedule of the construction agreement. This is from the date the appellant received the notice of commencement of the work.

[8] There was as yet no notice of completion of work sent to the appellant pursuant to cl. 3 of the third schedule of the construction agreement. Thus the sum of RM10,000 was not released to the contractor.

[9] However there was failure on the respondents' part to repay the loan in compliance with the express terms of the loan agreement. Several notices of demand were sent to the respondents to pay the interest, but no payment was forthcoming for the respondents.

[10] For almost a year nothing happened, until 6 January 2006, when the respondents lodged a police report against the vendor and contractor, alleging that both the contractor and vendor do not have license as housing developer. Then on 9 April 2008, the Local Government and Housing Ministry issued a letter informing them they are in the process of carrying investigation on the said project.

[11] The appellant's solicitor subsequently sent a notice of demand on 2 September 2009 to claim for the total loan amount which was released to the respondents, plus the accrued interest. However no payment was made by them.

[12] The appellant then filed the writ of summons against the respondents.

#### **The Respondents' Case**

[13] It is the respondents' case that both the sale and purchase agreement and construction agreement were void *ab initio* since the vendor/contractor do not have licence as housing developer.

[14] It is also the respondents' case that the appellant was under a duty to verify the legality of the sale and purchase agreement and construction agreement. It is also the respondents' position that the loan agreement is void and was therefore not enforceable against them.

**A The Appellant's Case**

[15] It was the appellant's case that firstly it was never a contracting party to those agreements. The duty to verify the legality of the two agreements was therefore not imposed on the appellant either by statute or under the loan agreement.

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[16] In any case, it was the appellant's contention that the loan agreement entered into between the appellant and respondents is lawful and enforceable since it is not a prohibited transaction under s. 24 of the Contracts Act 1950.

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[17] The purpose of the loan agreement was to assist the respondents to part finance the purchase of the vacant land as well as to pay for the price of construction. In consideration of the appellant releasing the loan sum at the respondents' request, the respondents' as borrowers, agreed to repay the loan to the appellant together with interest at the agreed rate.

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[18] The said loan transaction is therefore perfectly valid and allowed under the provisions of the Banking and Financial Institutions Act 1989 ("BAFIA").

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[19] The appellant as a banking institution, is licensed to carry out such banking business from the Minister of Finance. In so far as the appellant was concerned, the relationship between the appellant and the respondents was strictly commercial in nature, on a *quid pro quo* basis, in which monies were released on loan to respondents on the agreement that it be repaid in accordance with the terms and conditions of the loan agreement.

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[20] The terms of the loan are removed from the terms and subject matter of the purchase of the vacant land or construction of the building, which in any event, the appellant had no privity.

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[21] It is also the appellant's case that in any event, there was no cogent evidence adduced before the court which confirmed that said housing project contravened the Housing Development (Control and Licensing) Act 1966. The only piece of evidence if at all, was a letter dated 9 April 2008 issued by the Ministry of Housing, which indicated that the contractor (Atlaw Housing Sdn Bhd) was suspected to have been engaged in housing development without a valid license under s. 5(1) of the Housing Development (Control and Licensing) Act 1966, and that the said Ministry was in the midst of investigating the matter.

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[22] The learned trial judge instructed the appellants to file an Order 14A application and so the appellant filed it as instructed and framed two questions under the said Order 14A application in their summons in chambers dated 5 July 2010. The two questions framed were:

- (i) whether the sale and purchase agreement cum construction agreement (“SPA”) both dated 14 November 2002, contravened the Housing Development (Control and Licensing) Act 1966 and if so, whether they are in consequence, illegal, null and void; and
- (ii) If the answer to the first question above is in the affirmative, whether the loan agreement dated 13 December 2002 is consequently illegal, null and void and the appellant is to bear the loss.

[23] The learned trial judge found that the loan facility should not have been granted as “it relates to a proposed housing scheme which relates to a development of about two acres of land which will in essence constitute more than four units of housing development, thereby triggering the application of the Act stated above”. (The Act in question is the Housing Development (Control and Licensing) Act 1966). The learned judge dismissed the appellant’s claim with costs.

### Findings

[24] After having heard the parties, we found that the learned trial judge had misdirected himself in arriving at the decision he did.

[25] Firstly it is our view that the said loan agreement is valid even if the sale and purchase agreement and construction agreement dated 14 November 2002 is illegal and void. Our reasons are as follows.

[26] The respondents had given an undertaking pursuant to cls. 8.01 (a) and 8.01 (b) of the loan agreement that the loan agreement and security documents will not violate any law and thus the said agreements are valid.



A [27] The loan sum had been released at the respondents' request. At all material times, there was no instruction from the respondent borrowers to stop the progressive release of the loan.

B [28] Relying on such representation by the respondents, the appellant was under no duty to further verify the legality of the sale and purchase agreement and construction agreement.

C [29] The learned trial judge agreed with the respondent that the sale and purchase agreement expressly stipulated that the development is a proposed housing scheme and as such, the application of the Act would be triggered. The respondents' contention which was agreed to by the learned trial judge was that the sale and purchase agreement and the construction agreement read together constitute collateral agreements that have the effect of circumventing the application of the Act.

D [30] We disagree with the position taken by the learned trial judge. We find that even if there was a breach of the said Housing Development (Control and Licensing) Act 1966, the relevant provision therein, ie, s. 18(a), merely provides punishment to the party who fails to obtain the license but that it does not affect the validity of any contract of sale which has been entered into between the parties despite there being no licence obtained.

E [31] On this point, the Federal Court in *Kin Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181 held that:

G In any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses, and neither do they come within any of the paragraphs of s. 24 quoted above, although the appellant may well be guilty of an offence under r. 17 for contravening r. 11(1) of the Housing Developers (Control and Licensing) rule 1970. In other words, these rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers.

H [32] In another case of *Beca (M) Sdn Bhd v. Tang Choong Kuang & Anor* [1986] 1 CLJ 20; [1986] CLJ (Rep) 64 at p. 70 the Supreme Court *inter alia*, held:

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... Not every breach of a statutory prohibition would render an agreement illegal or void though such breach may attract criminal penalty. The fundamental question is whether the Enactment means to prohibit the agreement. It is important that the courts should be slow to imply the statutory prohibition of agreements, and should do so only when the implication is clear. Whether an agreement is implicitly forbidden depends upon the construction of the statute, and for this purpose no one test is decisive. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice. It would be a different matter when the law is unwittingly broken. An agreement for the sale of, say, frozen food, is not to be considered illegal or void merely because the premises in which the frozen food is sold does not comply with the law. We recognize that each case must be decided by reference to the relevant statute.

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[33] Thus based on the above authorities, we find that even if there was non-compliance with the Housing Development (Control and Licensing) Act 1966 for failing to obtain the required license as housing developer, it will not render the sale and purchase agreement and or the construction agreement as null and void.

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[34] In any event, if the respondents alleged that the vendor/contractor had breached the agreements, the respondents had the option to seek specific performance or to terminate the agreement and claim damages.

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[35] The respondents did not take either of these courses of action, and as such must be deemed to have affirmed the legality of the agreements. In any case too, it would be unjust and inequitable to allow the respondents to raise the issue of illegality after seven of years the sale and purchase agreement and construction agreement having been executed.

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[36] The principle of estoppel applies. At the end of day, what is pivotal is that, even if the sale and purchase agreement and construction agreement both dated 14 November 2002 were illegal, it will not automatically render the loan agreement unlawful and unenforceable.

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[37] Even if the deed of assignment is invalid (if the sale and purchase agreement and construction agreement is illegal), the loan agreement is however, distinct and separate from the deed of assignment. This principle of severability is applicable as was approved in authorities such as *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75.

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- A [38] Over and above this, the appellant has the right to initiate civil action (action *in personam*) against the respondent under the loan agreement to recover the debt due and owing by the respondents.
- B [39] The contractual liability of the respondents as borrowers under the loan agreement cannot be discharged with impunity, merely because the contractor had no licence as a housing developer.
- C [40] We therefore unanimously allow the appeal with costs.  
[41] Cost of RM7,000.  
[42] Deposit is refunded to the appellant.
- D [43] By agreement by both parties, the case is remitted to the High Court for assessment of damages.

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