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CIMB Bank Bhd v Gan Teow Hooi & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-2470 OF 2010
ZAINUN ALI, RAMLY ALI, AND KANG HWEE GEE JJCA
27 MARCH 2012

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Contract — Loan agreement — Breach of — Defaulted in repayment of loan — Loan to finance purchase of vacant land and to pay for price of construction — Whether loan transaction valid and allowed under provisions of Banking and Financial Institutions Act 1989 — Whether sale and purchase agreement cum construction agreement contravened Housing Development (Control and Licensing) Act 1966 — Whether appellant to bear loss

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The respondents entered into a sale and purchase agreement with the vendor to purchase a vacant land. The respondents had also entered into a construction agreement with the contractor to build a 2½ storey house on the said vacant land. The construction price was to be paid in accordance with the third schedule of the construction agreement. Meanwhile, the respondents applied for and the appellant approved a housing loan for the sum of RM280,000 in the respondent's favour in the following manner: (a) RM100,000 for the purchase of vacant land for the vendor; and (b) RM180,000 for the building or construction price to the contractor. The appellant and the respondents then executed the loan agreement and a deed of assignment. Upon the stamping of the above documents, the appellant released the loan sum of RM100,000 to the vendor for the purchase of vacant land. 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. As the notice of completion of work was yet to be sent to the appellant pursuant to cl 3 of the third schedule of the construction agreement, the balance sum of RM10,000 was not released to the contractor. However, there was failure on the part of the respondents' to repay the loan in compliance with the express terms of the loan agreement. The appellant filed the writ of summons against the respondent to recover the total loan amount which was released to the respondents, plus the accrued interest. In the meantime, the respondents lodged a police report against the vendor and the contractor, alleging that both the contractor and vendor do not have a housing developer license. Subsequently, the Local Government and Housing Ministry issued a letter informing the respondents that they were in the process of carrying out investigation on the said project. It was the respondents' case that both the sale and purchase agreement and construction agreement were void ab initio since the vendor/contractor did not have a housing developer licence. Further, the respondents contended that the appellant was under a duty to verify the legality of the sale and purchase agreement and construction

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agreement. It was also the respondents' position that the loan agreement was void and was therefore not enforceable against them. The 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 2 acres of land which will in essence constitute more than four units of housing development, thereby triggering the application of the Housing Development (Control and Licensing) Act 1966'. Hence, this appeal by the appellant.

Held, allowing the appeal with costs:

(1) The said loan agreement was valid even if the sale and purchase agreement and construction agreement was illegal and void. The respondents had given an undertaking pursuant to cl 8.01(a)-(b) of the loan agreement, that the loan agreement and the security documents would not violate any law and thus the said agreements were valid. 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. 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 (see paras 25–28).

(2) 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 for punishment to the party who fails to obtain a license but 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. Thus, 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 (see paras 30 & 33).

(3) 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. The respondents did not take either of these causes 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 years of the sale and purchase agreement and construction agreement having been executed (see paras 34–35).

(4) Even if the deed of assignment was invalid (if the sale and purchase agreement and construction agreement was illegal), the loan agreement is however, distinct and separate from the deed of assignment. 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

A the debt due and owing by the respondents. The contractual liability of the respondents as borrowers under the loan agreement could not be discharged with impunity, merely because the contractor had no licence as a housing developer (see paras 37–39).

B **[Bahasa Malaysia summary**

Responden-responden memeterai satu perjanjian jual dan beli dengan penjual untuk membeli sebidang tanah kosong. Responden-responden juga memeterai perjanjian pembinaan dengan kontraktor untuk membina sebuah rumah 2½ tingkat di atas tanah kosong tersebut. Harga pembinaan perlu dibayar C menurut jadual ketiga perjanjian pembinaan. Di samping itu, responden-responden memohon untuk dan perayu membenarkan satu pinjaman perumahan berjumlah RM280,000 kepada responden dalam cara yang berikut: (a) RM100,000 untuk belian tanah kosong kepada penjual; dan (b) RM180,000 untuk membina atau harga pembinaan kepada kontraktor. D Perayu dan responden-responden kemudiannya menyempurnakan perjanjian pinjaman dan surat ikatan penyerahhakan. Selepas dokumen-dokumen yang dinyatakan di atas disetem, perayu mengeluarkan pinjaman berjumlah RM100,000 kepada penjual untuk membeli tanah kosong tersebut. Baki berjumlah RM170,000 dikeluarkan kepada kontraktor, Perumahan Atlaw, E menurut klausa 2 jadual ketiga perjanjian pembinaan. Memandangkan notis selesai kerja belum lagi dihantar kepada perayu menurut klausa 3 jadual ketiga perjanjian pembinaan, baki berjumlah RM10,000 tidak dikeluarkan kepada kontraktor. Walau bagaimanapun, terdapat kegagalan bagi pihak responden-responden untuk membayar semula perjanjian mengikut F terma-terma tersurat perjanjian pinjaman. Perayu memfailkan writ saman terhadap responden-responden untuk mendapatkan semula jumlah keseluruhan pinjaman yang dikeluarkan kepada responden-responden, termasuk faedah terakru. Pada masa yang sama, responden-responden membuat laporan polis terhadap penjual dan kontraktor, mendakwa bahawa G kontraktor dan penjual tidak mempunyai lesen pemaju perumahan. Selepas itu, Kementerian Kerajaan dan Perumahan Tempatan mengeluarkan sepucuk surat memaklumkan responden-responden bahawa mereka di dalam proses menjalankan penyiasatan ke atas projek tersebut. Ini merupakan kes responden bahawa kedua-dua perjanjian jual dan beli dan perjanjian pembinaan tidak sah H *ab initio* memandangkan penjual/kontraktor tidak mempunyai lesen pemaju perumahan. Selanjutnya, responden-responden menghujah bahawa perayu mempunyai kewajipan untuk mengesahkan kesahihan perjanjian jual dan beli dan perjanjian pembinaan. Responden-responden juga mengambil pendirian bahawa perjanjian pinjaman adalah tidak sah dan oleh itu tidak boleh I dikuatkuasakan terhadap mereka. Hakim perbicaraan mendapati bahawa kemudahan pinjaman tidak seharusnya diberikan memandangkan ia 'berkaitan dengan skim perumahan yang dicadangkan berhubung pembangunan 2 ekar tanah yang pada dasarnya menjadi lebih daripada empat unit pembangunan perumahan, dengan itu menimbulkan permohonan

kepada Akta Pembangunan Perumahan (Kawalan dan Pelesenan) 1966'. Oleh itu, rayuan ini dibuat oleh perayu. A

Diputuskan, membenarkan rayuan dengan kos:

(1) Perjanjian pinjaman adalah sah meskipun perjanjian jual dan beli dan perjanjian pembinaan adalah menyalahi undang-undang dan batal. Responden-responden telah membuat akujanji menurut klausa 8.01(a)-(b) perjanjian pinjaman, bahawa perjanjian pinjaman dan dokumen-dokumen sekuriti tidak menyalahi mana-mana undang-undang dan oleh itu perjanjian tersebut adalah sah. Jumlah pinjaman telah dikeluarkan mengikut permintaan responden-responden. Pada semua masa material, tiada arahan daripada peminjam-peminjam responden untuk menghentikan pengeluaran progresif pinjaman tersebut. Dengan bergantung kepada respresentasi oleh responden-responden, perayu tidak berkewajipan untuk mengesahkan kesahihan perjanjian jual dan beli dan perjanjian pembinaan (lihat perenggan 25–28). B C D

(2) Meskipun terdapat pelanggaran Akta Pembangunan Perumahan (Kawalan dan Pelesenan) 1966, peruntukan relevan di dalamnya iaitu s 18(a), hanya memperuntukkan hukuman kepada pihak yang gagal mendapatkan lesen tetapi tidak menjejaskan kesahan sebarang kontrak jualan yang dimeterai di antara pihak-pihak walaupun didapati tiada lesen. Oleh itu, walaupun terdapat ketidakpatuhan dengan Akta Pembangunan Perumahan (Kawalan dan Pelesenan) 1966 untuk kegagalan mendapatkan lesen yang diperlukan sebagai pemaju perumahan, ini tidak menjadikan perjanjian jual dan beli sebagai tidak sah dan batal (lihat perenggan 30 & 33). E F

(3) Sekiranya responden-responden mendakwa bahawa penjual/kontraktor melanggar perjanjian-perjanjian, responden-responden mempunyai pilihan untuk memohon pelaksanaan spesifik atau untuk menamatkan perjanjian dan menuntut ganti rugi. Responden-responden tidak mengambil mana-mana kausa tindakan, dan oleh itu dianggap mengesahkan kesahihan perjanjian-perjanjian. Dalam mana-mana kes juga, adalah tidak adil dan tidak ekuiti untuk membenarkan responden-responden mengemukakan isu ketidaksahan selepas tujuh tahun perjanjian jual dan beli dan perjanjian pembinaan disempurnakan (lihat perenggan 34–35). G H

(4) Malah jika surat ikatan penyerahhakan tidak sah (sekiranya perjanjian jual dan beli dan perjanjian pembinaan menyalahi undang-undang), perjanjian pinjaman bagaimanapun berbeza dan berasingan daripada surat ikatan penyerahhakan. Selanjutnya, perayu mempunyai hak untuk memulakan tindakan sivil (tindakan *in personam*) terhadap responden di bawah perjanjian pinjaman untuk mendapatkan semula hutang kena I

A dibayar dan terhutang oleh responden-responden. Liabiliti dari segi kontraktual responden-responden sebagai peminjam-peminjam di bawah perjanjian pinjaman tidak boleh dilepaskan dengan sewenang-wenangnya, hanya kerana kontraktor tidak mempunyai lesen sebagai pemaju perumahan (lihat perenggan 37–39).]

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Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (folld)

Beca (Malaysia) Sdn Bhd v Tang Choong Kuang and Anor [1986] 1 MLJ 390; C [1985] CLJ (Rep) 64, SC (refd)

Kin Nam Development Sdn Bhd v Khau Daw Yau [1984] 1 MLJ 256; [1984] CLJ (Rep) 181, FC (refd)

Legislation referred to

D Banking and Financial Institutions Act 1989
Contracts Act 1950 s 24
Housing Development (Control and Licensing) Act, 1966 ss 5(1), 18(a)
Rules of the High Court 1980 O 14A

E **Appeal from:** Civil Suit No D–22 NCC–193 of 2009 (High Court, Kuala Lumpur).

Hizri bin Hasshan (Ashmadi bin Othman and Mohd Helmy bin Razelan with him) (Che Mokhtar and Ling) for the appellant.

Teh Beng Boon (Soo Pei Ping with him) (BB Teh) for the respondent. F

Zainun Ali JCA:

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

[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 H repayment of the loan and breached the terms of the loan agreement.

THE AGREEMENT FACTS

[3] Briefly the background to this appeal can be described thus. The I 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.

[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 2½ 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 third schedule of the construction agreement.

[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; RM 180,000 for the building or construction price to the contractor.

[6] The 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.

[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.

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.

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

[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.

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

[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 the respondents on the agreement that it be repaid in accordance with the terms and conditions of the loan agreement.

[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.

[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.

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

(a) 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

(b) 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.

THE 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

A 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 cl 8.01 (a)–(b) of the loan agreement that the loan agreement and security documents will not
B violate any law and thus the said agreements are valid.

[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.
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[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.

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[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
E 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.

[30] We disagree with the position taken by learned trial judge. We find that
F 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.

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[31] On this point, the Federal Court in *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256; [1984] CLJ (Rep) 181 held that:

> In any case there is nothing illegal about the consideration or object of the contracts
H 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
I eh purchasers.

[32] In another case of *Beca (Malaysia) Sdn Bhd v Tang Choong Kuang and Anor* [1986] 1 MLJ 390 at p 394;; [1985] CLJ (Rep) 64at p 70 the Supreme Court, inter alia, held:

> … 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 implicity forbidden depends upon the construction of the statute, and for this purpose no one tests 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 he 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 recognise that each case must be decided by reference to the relevant statute.

[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.

[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.

[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 years the sale and purchase agreement and construction agreement having been executed.

[36] The principle of estopped 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.

[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 bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75.

[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.

[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.

[40] We therefore unanimously allow the appeal with costs. Cost of RM7,000. Deposit is refunded to the appellant.

[41] By agreement by both parties, the case is remitted to the High Court for assessment of damages.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed