MALAYSIA
IN THE HIGH COURT IN KUALA LUMPUR
(COMMERCIAL DIVISION)
[SUIT NO. D-22NCC-193-2009]

BETWEEN

CIMB BANK BERHAD
(Company No: 127776-V) ... PLAINTIFF

AND

1. **GAN TEOW HOOI**
   (NRIC NO: 690526-10-5175) (A1270775)
2. **GAN MEE LING**
   (NRIC NO: 710926-06-5024) (A2058039)
3. **GAN TEOW TIONG**
   (NRIC NO: 761008-06-5279) (A3378270) ... DEFENDANT

BEFORE THE HONOURABLE JUDGE
Y.A. HAJI HAMID SULTAN BIN ABU BACKER

IN CHAMBERS

JUDGMENT

This is my judgment in respect of the defendants' application (with consent of plaintiff) pursuant to Order 14A of RHC 1980 for the determination of the following issues, namely;

"(i) Whether the Sale and Purchase Agreement dated 14/11/2002 and Construction Agreement dated 14/11/2002 are unlawful and contravene the Housing Development (Control & Licensing) Act 1966.

(ii) Whether the Loan Agreement dated 13/12/2002 is rendered illegal and cannot be enforced by the plaintiff against the First, Second and Third Defendants if the court finds that the Sale and Purchase Agreement dated 14/11/2002 and Construction Agreement dated 14/11/2002 to be unlawful.

(b) That upon determination of any of the above said questions of law and/or issues in favour of the Plaintiff, this Honourable Court shall record judgment against the First, Second and Third Defendants and order the First, Second and Third Defendants to pay the Plaintiff the amount of claim, interest and costs as shall be assessed and determined by the Deputy Registrar.

(c) That the amount of claim, interest and costs shall be assessed and determined by the Deputy Registrar by way of affidavit evidence pursuant to the contractual terms between the Plaintiff and the First, Second and Third Defendants; and

(d) Such other consequential orders and/or relief as this Honourable Court deems fit and just."

Brief Facts

1. The defendants have entered into two agreements, namely: (i) Sale and Purchase Agreement for the purchase of land from Paragon Nova Sdn Bhd; (ii) Construction Agreement with the contractor Atlaw Housing Sdn Bhd to build a 2 $^{1}/_{2}$ storey house. For this purpose the plaintiff as bankers has given two separate facilities namely; (i) a loan of RM 100,000.00 for purchase of land which has been fully disbursed; (ii) a loan sum of RM 180,000.00 of which RM 170,000.00 has been fully disbursed. There were many other transactions of similar nature with other purchaser and borrower and the scheme was relating to a housing

development for which no license has been issued by the Housing Ministry. In essence the housing project presently is deemed to be an abandoned project for which the defendant obtains no benefit. The plaintiff concedes that no license has been issued. And the defendants say that the Sale and Purchase Agreement and Construction Agreement both dated 14.11.2002 are unlawful and contravene the Housing Development (Control & Licensing) Act 1966. The plaintiff argues as follows:

(i) The sale of land and the loan thereof is valid as the purchase of vacant land does not amount to carrying on or undertaking a housing development project.

(ii) The Construction Agreement does not contravene the Housing Development (Control & Licensing) Act 1966 since the contractor is not carrying housing development project and not selling building lots. And relies heavily on the Federal Court decision of *Lim Sze On & Ors v. Syarikat Gunung Sejahtera Sdn Bhd* [2009] 4 CLJ 468 where Zulkefli Makinudin FCJ made the following observations:

> *"[28] To determine whether the defendant is in fact a housing developer within the meaning of the Act, we have to look into the terms of the agreement entered into by the defendant and the plaintiffs. Under the second agreement, the plaintiffs are the landowners. That being the position, we cannot see how the second agreement, even if read together with the first agreement, can in law be replaced by the "statutory agreement' under Schedule G of the*

Regulations. It is clear from the terms of the said two agreements the development concept of the project was different from that undertaken by a licensed housing developer under the Act.

[32] The facts in the instant appeal however, are clearly different, viz., there were no sale and purchase agreements for the sale of the building lots. Even if the first agreement and the second agreement are read together the defendant can neither be treated as the vendor nor the registered owner of the building lots. SLSB also cannot be treated as the vendor or the registered owner of the said land prior to the assignment of the development works to the defendant. The Acts and the Regulations are clearly not applicable under the circumstances of this instant appeal."

2. I have read the application, documents and submission of the parties in detail. I take the view the plaintiff's action against the defendants must be dismissed. My reasons *inter alia* are as follows:

(i) The plaintiff had relied on two agreements for granting of the facilities. They are the Sale and Purchase Agreement for the land and the Construction Agreement both dated 14.11.2002. Any solicitor conversant in conveyancing transaction will have advised the plaintiff as bankers that the facility cannot be granted as it relates to a proposed housing scheme which relates to development of about 2 acres which will in essence constitute more than 4 units of housing development, thereby triggering the application of the Act stated above.

(ii) The facts of this case are different from the facts of the Federal Court case relied on by the plaintiff and in consequence can be distinguished.

(iii) On the facts of the instant case there is much merit in the submission of the learned counsel for the defendant that the device of using separate Sale and Purchase Agreement and Construction Agreement which are inextricably interwoven are illegal, null and void. Support for the proposition is found in a number of cases, to name a few are as follows:

(a) In *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] CLJ (Rep) 77, the Federal Court held:

> *"A device to avoid possible consequence to statutory provision is not wrong if and only if it can be done legitimately. The attempt of the appellants to contract out of the Act is clearly not a device which can be described as legitimate. It is an open defiance of the Housing Developers legislation. Having regard to the policy and objective of Housing Developers Act 1966 and the 1970 Rules made thereunder the protection afforded by this legislation to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or renounced in advance by an individual purchaser."*

(b) In *Keng Soon Finance Bhd v. M.K. Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Interveners)* [1996] 4 CLJ 52, the Kuala Lumpur High Court (after the Privy Council) held:

> *"I adopt the reasoning of Tan Sri Hashim Yeop A. Sani SCJ as regards the consumer protection legislation and any attempt directly or indirectly to evade the protection must necessarily be struck down.*
>
> *The aim of the legislation and accompanied subsidiary legislation is clear: to protect purchasers .... Therefore, any attempt to evade the legislation will not be countenanced by the Courts.*
>
> *The HDA 1966 prohibits the defendant from carrying on housing development and provides criminal sanction for the breach of that prohibition. The defendant not being in possession of the housing development license under s. 5 HDA 1966 is prohibited from carrying on business of housing development, the consequence of which I declare is that the charge is void ab initio and unenforceable."*

(iv) On the facts of the case the Sale and Purchase Agreement and the Construction Agreement dated 14.11.2002 contravenes the Housing Development (Control & Licensing) Act 1966, and in consequence the plaintiff's reliance of these agreements to grant the facilities and initiate an action for its breach cannot be enforced in law.

3. For reasons stated above the plaintiff's action is dismissed with costs. The plaintiff to pay the defendants costs in the sum of RM 10,000.00.

I hereby order so.

(Y.A. DR. HAJI HAMID SULTAN BIN ABU BACKER)
Judge
High Court
(Commercial Division)
KUALA LUMPUR

Date: 28 JULY 2010

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

For the defendant - Teh Beng Boon; M/s BB Teh