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NORDIN ALI & ORS v. FOCUS DEVELOPMENT SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL RAHMAN SEBLI JCA
[CIVIL SUIT NO: 22NCVC-141-05-2013]
22 AUGUST 2016

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BANKING: *Banker and customer – Duty of banker – Bank financed housing project – Sales proceeds for housing project assigned by developer to bank – Purchasers paid full purchase price to developer – Developer defaulted on loan – Foreclosure proceedings by bank – Whether bank retained right to auction properties – Bank failed to account for any redemption sum – Whether bank's decision to proceed with auction tainted with fraud*

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LIMITATION: *Fraud – Discovery of fraud – Bank financed housing project – Sales proceeds for housing project assigned by developer to bank – Purchasers paid full purchase price to developer – Developer defaulted on loan – Foreclosure proceedings by bank – Bank failed to account for any redemption sum– Whether bank's decision to proceed with auction tainted with fraud – Whether period of limitation begins upon discovery of fraud – Whether purchasers within limitation period*

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The plaintiffs, all Singaporean nationals, had purchased properties from the first and second defendants, the developer and proprietor respectively, and six separate sale and purchase agreements were signed between the parties. The first to fourth, seventh and eleventh to sixteenth plaintiffs had paid the full purchase price of the properties whereas the fifth, sixth, eighth to tenth plaintiffs had not paid 100% of the purchase price but their case was that under the Third Schedule of the respective sale and purchase agreements, they were not obliged to pay the 15%-20% last stages without their properties being delivered free from encumbrances. The fifth defendant ('AmBank') as financier of the housing project had granted a loan of RM28.8 million to the first defendant, where the second defendant and two other related companies, namely Hiliran Makmur Sdn Bhd ('Hiliran Makmur') and Kumpulan Hiliran Jaya Sdn Bhd ('Hiliran Jaya') charged three master titles to AmBank as securities for the loan. The letters of offer by AmBank unequivocally provided that all sales proceeds for the housing project were assigned to AmBank by the first defendant. However, the first and second defendants defaulted on the loan and the housing project was subsequently abandoned by the first and second defendants who were under receivership. The plaintiffs had paid a total amount of approximately RM1.8 million to the first and second defendants for the purchase price of the properties as evidenced by the 'confirmation on sale and purchase transactions' received by the receiver and manager, who were appointed by AmBank. The CF for all the units were only issued on or about 14 January 2004, pursuant to which the

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plaintiffs took possession of their respective properties and occupied them as legal owners. However, the first and second defendants had failed to deliver vacant possession of the properties free from encumbrances immediately prior to the handing over of vacant possession to the plaintiffs and to deliver valid and registrable memorandums of transfer together with the relevant issue documents of title, free from encumbrances. In spite of the knowledge of the plaintiffs' interest in the properties, AmBank commenced foreclosure proceedings against the second defendant, after obtaining judgment in default against the first, third and fourth defendants *vide* Suit 582. Suit 582 was the High Court case taken by AmBank against the first defendant for the same subject matter, *ie* the loan granted by AmBank to the first defendant where default judgment had been obtained for the sum of RM21 million. The High Court allowed the order for sale on 13 October 2006. The present suit was filed by the plaintiffs when AmBank could not account for any redemption sum due for any of the properties. The plaintiffs' case was that there was no more debt owing in relation to the properties since the entire loan owing to AmBank by the first and second defendants had been settled in full and that AmBank's decision to proceed with auction of the properties was tainted with fraud. The issues for determination were: (i) whether there was any debt owing to AmBank in relation to the purchase of the properties by the plaintiffs from the first and second defendants; and (ii) if no such debt was owing to AmBank, whether AmBank retained the right to auction the properties.

Held (allowing claim with costs):

(1) All the facts and circumstances that the plaintiffs relied on in the present suit were facts and circumstances that took place from 2008 onwards, *ie*, after the order for sale of the properties was obtained by AmBank on 13 October 2006. They could not, therefore, have been brought up in the foreclosure action as they were unknown to the plaintiffs at the time. The question of *res judicata,* therefore, did not arise at all. It was clear that the cause of action was different from the foreclosure action and any other action between the parties. (para 29)

(2) The order for sale dated 13 October 2006 was based on the same letter of offer and loan account which was the subject matter of Suit 582, which had been amicably settled. This meant that the two loans given by AmBank had been settled entirely and there was no more debt owing to the bank in respect of the properties. Therefore, there was no case for any further foreclosure by AmBank. Since the purchase monies had been paid in full to the first defendant by the plaintiffs, the burden shifted to the defendants to account for the monies. (paras 31 & 34)

(3) The first defendant, under receivership, made no real effort to investigate where the monies paid by the plaintiffs towards the purchase price had gone to and how were they utilised. The first defendant was clearly acting at the behest of AmBank in recovering the monies without regard for the plaintiffs' rights to the properties for which they had paid for in full. On the other hand, AmBank also could not account as to how much was due to it, nor could it produce figures for the redemption sums in respect of the properties. It was not able to provide any explanation as to how there was still a sum of RM35 million due to it in connection with the plaintiffs' purchase of the properties. Under the circumstances, AmBank was clearly estopped from proceeding with any auction or to sell the properties, which was an attempt at unjust enrichment and to prejudice the plaintiffs. (paras 36, 37, 44 & 46)

(4) An adverse inference must be drawn against all the defendants for failure to provide any account or any form of documentary proof to show that the plaintiffs still owed them money in connection with the purchase of the properties. It must be inferred that if the documents were produced, the evidence would be adverse against them. (para 38)

(5) It is trite law that when there is issue of fraud involved and there is injustice, the corporate veil should be lifted. The third and fourth defendants were clearly the directing minds and will of the first and second defendants. The first and second defendants had, under the direction and control of the third and fourth defendants, defrauded the plaintiffs where the first defendant had taken the plaintiffs' monies and failed to account for them, and further failed to prove that the monies were used to redeem the properties from AmBank. Therefore, the corporate veil ought to be lifted. (paras 51 & 52)

(6) A defendant who fails to plead defence of limitation and allows the case to proceed to be fought on the merits is not to be permitted to fall back upon a plea of limitation as a second line of defence at the conclusion of the trial. Hence, the issue of limitation raised by the defendants were devoid of merit. In any event, the facts relating to the sale of Strait Bay and the global settlement took place in 2008 and the present suit was filed in 2013, well within 6 years from 2008. Further, the breach of agreement was continuing as the first and second defendants' failure to provide the properties free from encumbrances was continuing. Since the plaintiffs did not accept the breach and had insisted on performance, time would run afresh from the continuing breach. (paras 54 & 55)

(7) Further, in cases of fraud, the period of limitation does not begin to run until the fraud is discovered. Suspicion of fraud began when AmBank wanted to re-commence foreclosure proceedings but did not wish to provide redemption sums requested by the plaintiffs. The critical facts

were only disclosed in the defence and affidavit in reply filed and affirmed by the third defendant dated 12 July 2013 and 30 July 2013 respectively, confirming that there was no more debt due to AmBank. AmBank could not be innocent either when none of the other defendants could account for the monies paid over to them by the plaintiffs. Even if there was no element of fraud involved, clearly the first and second defendants who were aware of the plaintiffs' interest in the matter would be negligent in failing to provide the plaintiffs with good titles free from encumbrances. (paras 58-59)

Case(s) referred to:
Carl-Zeiss Stiftung v. Rayner & Keeler Ltd (No 2) [1966] 2 All ER 536 ***(refd)***
Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2011] 2 CLJ 321 CA ***(refd)***
Munah v. Fatimah [1967] 1 LNS 108 HC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Tengku Ismail Tengku Sulaiman & Ors v. Sia Cheng Soon & Anor [2006] 3 CLJ 556 CA ***(refd)***
Tengku Mariah Sultan Sulaiman v. Halimah Abdullah [1979] 1 LNS 114 FC ***(refd)***
Waniwang Sdn Bhd v. Violet Holdings Sdn Bhd & Ors [1993] 1 LNS 83 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 29

For the plaintiffs - Justin Voon, Amy Law & Kho Zhen Qi; M/s Justin Voon Chooi & Wing
For the 1st and 2nd defendants - Robert Low, Helen Lim & Jimmy Chong; M/s Ranjit Ooi & Robert Low
For the 3rd defendant - Edwin Savariraj; M/s Pushpa Naidu & Co
For the 4th defendant - KP Ng & Jamie Tan; M/s Yoong & Partners
For the 5th defendant - Malcolm Fernandez; M/s C Sukumaran & Co

Reported by S Barathi

JUDGMENT

Abdul Rahman Sebli JCA:

[1] There were two issues at the trial that were determinative of the plaintiffs' claim and they are the following:

(a) Whether there is any debt still owing to the fifth defendant, AmBank (M) Berhad ("AmBank") in relation to the purchase of double storey terrace houses ("the properties") by the plaintiffs from the first defendant (Focus Development Sdn Bhd) as developer and the second defendant (Hiliran Permai Sdn Bhd) as proprietor.

(b) If no such debt is still owing to AmBank, whether AmBank retains the right to auction the properties.

[2] The first issue is purely factual whilst the second is one of law flowing directly from the answer to the first. Should the first issue be decided in favour of the plaintiffs, it must follow that the plaintiffs would be entitled to succeed in their claim. A whole gamut of issues was raised by the parties in their written submissions but in my view, the justice of the case will have to be determined based on these two core issues.

[3] The plaintiffs' case is that there is no more debt owing in relation to the properties. According to the plaintiffs, the entire loan owing to AmBank by the first and second defendants had been settled in full and that AmBank's decision to proceed with the auction of the properties was tainted with fraud. The present suit was filed by the plaintiffs when AmBank could not account for any redemption sum due for any of the properties. To the plaintiffs, this is rather unusual as commercial banks would ordinarily supply redemption statements when requested, more so when the matter has gone to court for adjudication.

[4] The plaintiffs who had paid the full purchase price of the properties are the first, second, third, fourth, seventh, eleventh - sixteenth plaintiffs. The fifth, sixth, eighth - tenth plaintiffs had not paid 100% of the purchase price but their case is that under the third schedule of the respective sale and purchase agreements, they are not yet obliged to pay the 15% - 20% last stages without their properties being delivered free from encumbrances first. Thus even if they are not beneficial owners of the properties for the reason that they have not paid in full, there is still no right on the part of AmBank to auction their houses without any debt due.

[5] The plaintiffs have brought in all possible parties who could answer to the first issue, namely:

(i) The first and second defendants who were the developer and proprietor respectively who received the purchase monies from the plaintiffs and who signed the sale and purchase agreements. By right the first defendant ought to pay over the purchase monies to AmBank so that the charges over the properties could be discharged by the bank.

(ii) The third and fourth defendants who were the remaining directors of Focus Development and Hiliran Permai who as directors ought to be aware of what happened to the monies paid over by the plaintiffs to Focus Development and whether they were paid over to AmBank so that the charges over the properties could be discharged.

(iii) The fifth defendant who is the bank who could account for how much of the monies paid by the plaintiffs had been received in their accounts from Focus Development to settle the loan.

[6] AmBank does not seem to seriously deny that the debt had been settled or substantially settled. Its defence essentially was that when it reached a settlement agreement with the individual guarantors on 12 December 2008, it was only to discharge the liability of the third and fourth defendants as guarantors and not the liability of the plaintiffs, nor did it extinguish the first and second defendants' debt to AmBank. It follows, according to AmBank, that their existing rights against the securities were not affected and that accordingly they could proceed with the auction. Quite an ingenious argument I must say.

[7] At the conclusion of the trial, I found for the plaintiffs and accordingly entered judgment in their favour in the following terms:

6.1 A declaration that the plaintiffs are the beneficial owners of the properties.

6.2 A declaration that there is no more sum due to AmBank pursuant to the charges registered on the properties;

6.3 That the Order for Sale of the properties obtained by AmBank dated 13.10.2006 be set aside;

6.3 That AmBank be injuncted from proceeding in any manner to sell or deal or dispose of the properties whether by auction or otherwise;

6.4 That AmBank is to discharge the charges in respect of the properties and to execute all documents required to effect the discharge and transfer; and

6.5 Damages to be assessed.

[8] The facts of the case have been meticulously set out by learned counsel for the plaintiffs in his written submissions. On the evidence before the court both oral and documentary, I accept them to be accurate in all material respects. They are as follows. The plaintiffs, all Singaporean nationals, had purchased the properties from the first and second defendants and six separate sale and purchase agreements were signed between the parties.

[9] Clause 2 and the addendum to each of the sale and purchase agreements required the first and second defendants to ensure each property to be free from encumbrances before giving vacant possession to the plaintiffs. Clause 10 further required good and registrable memorandums of transfer to be given to the plaintiffs.

[10] AmBank as financier of the housing project had granted a loan of RM28.8 million to the first defendant where the second defendant and two other related companies, namely Hiliran Makmur Sdn Bhd ("Hiliran Makmur") and Kumpulan Hiliran Jaya Sdn Bhd ("Hiliran Jaya") charged three master titles, ie, PTD 62209 ("master title 62209"), PTD 62210 ("Master Title 62210") and PTD 62211 ("master title 62211") to AmBank as securities for the loan. Hiliran Jaya is related to the first and second defendants with the same directors and shareholders.

[11] The letters of offer by AmBank dated 28 September 1995 and 25 January 1996 unequivocally provided that all sales proceeds for the housing project were assigned to AmBank by the first defendant. The first and second defendants defaulted on the loan.

[12] By the time the trial started, the housing project had long been abandoned by the first and second defendants. It was incomplete, with defects involving some additional works, street lightings, repainting works, sewage treatment plant, etc and the first and second defendants were already under receivership. The receivers and managers were appointed by AmBank.

[13] Initially on 20 February 2001 AmBank appointed Chong Kwong Chin and Chong Tet On as receiver and manager for the first defendant. However, on 16 May 2005 the bank replaced them with Heng Ji Keng and Michael Joseph Monteiro.

[14] The total amount already paid by the plaintiffs to the first and second defendants for the purchase price of the properties was approximately RM1.8 million. The evidence is that the receiver and manager for the first defendant had obtained "confirmation on sale and purchase transactions" from the plaintiffs, which detailed all the payments that had already been made by the plaintiffs to the first defendant. The first and second defendants did not dispute this confirmation of payments.

[15] The first and second defendants purported to give vacant possession of the properties to the plaintiffs on 10 November 1999 but as of the date of hearing, the vacant possession was not free from encumbrances as promised, nor has good registrable title been given to any of the plaintiffs. The properties could not be occupied for the following reasons:

(a) the properties had not been completed in full; and

(b) there was no proper action nor effort by the first defendant or the developer to apply expeditiously for the certificate of fitness of occupation ("the CF").

[16] The CF for all the units (not just for the plaintiffs) were only issued on or about 14 January 2004, pursuant to which the plaintiffs took possession of their respective properties and occupied them as legal owners. They have, since 2004:

(i) paid the quit rent and assessment for the upkeep of the said properties;

(ii) paid all utilities including electricity and water bills;

(iii) obtained postal addresses for the properties; and

(iv) used the properties as their own.

[17] Although the CF had been obtained in 2004, the first and second defendants have still not fulfilled the following ends of their bargain under the sale and purchase agreements:

(i) To deliver vacant possession of the properties to the plaintiffs free from encumbrances immediately prior to the handing over of vacant possession to the plaintiffs; and

(ii) To deliver to the plaintiffs valid and registrable memorandums of transfer together with the relevant issue documents of title, free from encumbrances. A valid and registrable memorandum of transfer could only be given if the property was free from encumbrances.

[18] In an attempt to get each purchaser to pay a "top up" redemption sum of RM104,700, AmBank used the receiver and manager for the first and second defendants to collect the sums from the purchasers, including the plaintiffs. But the attempt came to naught when the plaintiffs flatly refused to pay as they felt, rightly in my view, that they were not obliged to do so.

[19] Consequently, AmBank sued the first, third and fourth defendants *vide* Johor Bahru Suit No. MT-33-582-2001 ("Suit 582") and obtained judgment in default against the first and fourth defendants on 5 February 2002 and 11 June 2002 respectively. The first defendant was sued as the principal borrower while the third and fourth defendants and one Kalsom bt Abd Wahab ("Kalsom", now deceased) were sued as guarantors.

[20] After the CF had been issued and after appointing receivers and managers to take over the first and second defendants, AmBank began foreclosure proceedings against the second defendant *vide* Johor Bahru High Court Originating Summons No. MT2-24-2567-2004 on 21 September 2004 ("the foreclosure action"), although the receivers were appointed by them to manage the affairs of the first and second defendants. And this was done in spite of its knowledge of the plaintiffs' interest in the properties.

[21] The plaintiffs intervened in the foreclosure action but the High Court allowed the order for sale on 13 October 2006. The plaintiffs' appeal to the Court of Appeal against the order was dismissed on 11 December 2012.

[22] The plaintiffs' case is that when their appeal to the Court of Appeal was filed, they were not aware that AmBank had entered into a settlement agreement dated 12 December 2008 with the third and fourth defendants and Kalsom, all of whom were directors of the second defendant whereby these guarantors agreed to pay RM6 million to AmBank as full and final settlement of suit 582.

[23] Neither were the plaintiffs aware that that the subsequent receipts of monies by AmBank after 13 October 2006 were not accounted for by the first and second defendants as well as by AmBank. The third defendant who was

a party to the settlement agreement gave evidence at the trial that this settlement globally settled "everything" and that there is no more debt due from the first and second defendants to AmBank.

[24] Until recently, ie, prior to the trial of the present suit, and which matters could not have been raised in the foreclosure action, the plaintiffs were also unaware that the following events had taken place:

(i) Pursuant to a supplemental agreement dated 17 January 1997, AmBank had given consent to subdivide master title 62211 to two other titles, namely HS(D) 257522 PTD 75800 and HS(D) 257523 PTD 75801. These new titles were charged to AmBank by Hiliran Jaya for a full sum of RM25.8 million.

(ii) On or about 2 May 2008, these two titles were sold to a third party, namely Strait Bay Sdn Bhd ("Strait Bay") and the charge was discharged by AmBank on the same day. There was no disclosure at all by the first and second defendants and AmBank about the sale of the charged properties to Strait Bay and the discharge of the charge. Obviously, the loan sum of RM25.8 million granted by AmBank had been paid off simply because no bank would effect a discharge and make no further outstanding claim against Hiliran Jaya when the charge was for RM25.8 million if there were still sums due to AmBank. In any event, these sums were not accounted for by AmBank.

[25] The plaintiffs had also found out much later that:

(i) The master title 62209 where the properties were located was charged twice for two loans given by AmBank to the first defendant based on a third party charge by the second defendant;

(ii) The first loan was for the sum of RM18.8 million pursuant to a letter of offer dated 28 September 1995 and a loan agreement dated 13 October 1995 between the first defendant and AmBank where the charge was registered on or about 20 October 1995;

(iii) The second loan was for an additional sum of RM7 million pursuant to a loan agreement dated 12 February 1996 where the charge was registered on or about 14 February 1996;

(iv) These two loans which totalled RM25.8 million were secured by charges over three pieces of property, namely:

(a) Master title 62209 which belonged to the second defendant.

(b) Master title 62210 which belonged to Hiliran Makmur.

(c) Master title 62211 which belonged to Hiliran Jaya.

(v) The first defendant wanted to subdivide master title 62209 and for this purpose, the first and second defendants and AmBank together with Hiliran Makmur and Hiliran Jaya entered into the supplemental agreement dated 17 January 1997;

(vi) Thereafter, master title 62209 was subdivided to 96 individual titles and the properties purchased by the plaintiffs were part of these individual titles;

(vii) On or about 29 January 1997, the second defendant charged all 96 individual titles to AmBank, which means the individual titles were already subdivided and individually charged to AmBank even before each of the sale and purchase agreements was executed by the plaintiffs.

[26] There can be no argument that when AmBank granted the loan of RM25.8 million to the first defendant, they knew that it was to be utilised for the development of the housing project. The loan could not be for any purpose other than for the residential development on master titles 62209, 62210 and 62211.

[27] After receiving the settlement sum of RM6 million, AmBank *vide* court order dated 23 September 2010 confirmed that all suits including suit 582 (which was also against the first defendant) had been settled. The first defendant since 2008 had not made any further payment to AmBank as endorsed in form 63.

[28] Suit 582 it will be noted was the very High Court case taken by AmBank against the first defendant for the same subject matter, ie, the loan granted by AmBank to the first defendant where default judgment had been obtained for the sum of RM21 million. Yet there is no evidence that after the case, AmBank took further action against the first defendant. Nor has it been explained why RM6 million was agreed to be received by AmBank or why the guarantors were let off the hook so easily if indeed the debt is much more that, ie, purportedly exceeding RM30 million.

[29] It is important to appreciate that all facts and circumstances that the plaintiffs relied on in the present suit were facts and circumstances that took place from 2008 onwards, ie, after the order for sale of the properties was obtained by AmBank on 13 October 2006. They could not therefore, have been brought up in the foreclosure action as they were unknown to the plaintiffs at the time. The question of *res judicata* therefore, does not arise at all. It is clear that the cause of action in the present suit is different from the foreclosure action and any other action between the parties.

[30] In fact, it is in the present suit that for the first time all five defendants were being sued together. In any event, *res judicata* will not be applied by the court even if applicable where it would lead to an unjust result: See *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 where the court cited with approval the following passage in *Carl-Zeiss Stiftung v. Rayner & Keeler Ltd* (No 2) [1966] 2 All ER 536 at p. 573 (per Lord Upjohn):

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see lord Maugham LC's observations in the *New Brunswick* case ([1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21)). All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

[31] It is an undisputed fact that the order for sale dated 13 October 2006 was based on the same letter of offer and loan account which was the subject matter of suit 582, which had been amicably settled. This means that the two loans given by AmBank had been settled entirely and there was no more debt owing to the bank in respect of the properties. There is therefore, no case for any further foreclosure by AmBank.

[32] Of crucial importance to note is the fact that PTD 75800 and PTD 75801 were charged for RM25.8 million, ie, the full loan sum and it is not in dispute that both lands were discharged on 2 May 2008 when they were transferred to Strait Bay. This sale was confirmed by the third defendant who testified that under these sales, all the loans to AmBank were settled. The first and second defendants' witness SD1 alleged that the sale was for RM4 million only but provided no proof, nor could he explain how the sum was accounted for by AmBank since it was supposed to reduce the sum owing to AmBank. No weight should therefore, be given to this part of SD1's evidence.

[33] The evidence is clear and I find it proved that the plaintiffs had fully paid the purchase price of the properties to the first defendant in accordance with the sale and purchase agreements and that no further sum was due from any of them. In other words, none of them still owe any money to anyone in respect of the properties, in particular to the first and second defendants. I have no reason to doubt the plaintiffs' evidence on this point. I find the first plaintiff, who gave evidence on behalf of himself and on behalf of the other plaintiffs to be an honest witness whose evidence on all material matters I find safe to rely on. He is a simple elderly man whose only concern from my observation is to get justice from the court.

[34] The obvious question that calls for a candid answer from each of the defendants is, what happened to the monies that the plaintiffs had already paid to the first defendant for the purchase of the properties? Since the purchase monies had been paid in full to the first defendant by the plaintiffs, the burden therefore shifted to the defendants to account for the monies. What happened to these monies should be within their special knowledge.

[35] However, by the time the last defence witness finished giving evidence, no answer was forthcoming from any of the defendants. None of them could account for the purchase monies, nor could any of them confirm if the monies had been paid over to AmBank to discharge the charges on the plaintiffs' respective properties. AmBank in particular, could not show proof nor furnish any documentary evidence in respect of the following:

(i) How much had actually been received from the various sale or foreclosure of the other units (apart from the plaintiffs' units), ie, the sale of the other houses after it obtained the order for sale on 13 October 2006, and at what price?

(ii) How was the RM6 million obtained from the guarantors (third and fourth defendants) utilised to reduce or extinguish the purported debt of the first defendant after 13 October 2006?

(iii) How much of the proceeds from the sale of PTD 75800 and PTD 75801 to Strait Bay had been collected to reduce or extinguish the alleged debt of the first defendant?

(iv) How much was due for each of the properties, ie, the six terrace houses purchased by the plaintiffs, since the plaintiffs have paid up their purchase price in full in accordance with the sale and purchase agreements?

[36] Despite going through a protracted trial and being given full opportunity to prove the debt due, AmBank could not even account as to how much was due to it, nor could it produce figures for the redemption sums in respect of the properties. All it could come up with were bare allegations and bare certificates of indebtedness. This is pathetic given the bank's stature as an established financial institution.

[37] The certificate of indebtedness produced by AmBank alleged a final figure of over RM35 million purportedly due from the first defendant. But AmBank's own witnesses repeatedly admitted during cross-examination that there was no account, not even basic account to support this colossal sum of RM35 million. DW3 even admitted that AmBank's unilateral statements of account do not bind the plaintiffs. Under the circumstances, clearly AmBank is estopped from proceeding with any auction or to sell the properties, which is an attempt at unjust enrichment and to prejudice the plaintiffs.

[38] It is incredible that none of the defendants could provide any account or any form of documentary proof to show that the plaintiffs still owe them money in connection with the purchase of the properties. An adverse inference must be drawn against all the defendants. It must be inferred that if the documents were produced, the evidence would be adverse against them.

[39] What is patently clear from the evidence is that AmBank worked closely with the first defendant and they even shared solicitors. Even the cause papers for suit 582 and the foreclosure action were never served on the receivers and managers of the first and second defendants but to their registered address. This is odd as AmBank knew full well that the board of directors of the first and second defendants was defunct when the receivers and managers were appointed, and appointed by itself on top of everything else.

[40] Previously, in an attempt to stop AmBank from auctioning the properties, the plaintiffs had filed seven *ex parte* originating summons to challenge the foreclosure proceedings but was withdrawn with liberty to re-file. What is significant to note is that in these actions, Messrs Sukumaran & Co (who are solicitors for AmBank in the present suit) were the solicitors for the first defendant, while Messrs Ranjit Ooi & Robert Low (who are solicitors for the first and second defendants in the present suit) were the solicitors for AmBank. Both legal firms it appears were acting interchangeably for AmBank and the first and second defendants.

[41] This remarkable coincidence of legal representation shows a pattern of co-operation between the first and second defendants and AmBank in pursuing a common goal, hands in glove so to speak, to the detriment of the plaintiffs. On the facts, it is obvious that the first and second defendants were acting like agents for AmBank rather than to act in the interest of the first and second defendants under receivership.

[42] Instead of taking steps to fulfil its obligations to the plaintiffs pursuant to the sale and purchase agreements, including in particular to ensure that the properties were transferred in the names of the plaintiffs free from encumbrances, the first defendant's focus was to obtain payment of monies on behalf of AmBank, as shown by the following acts:

(a) After their appointment (by AmBank it must be emphasised), the first defendant's original receiver, Messrs Moore Stephens requested for and obtained a "confirmation on sale and purchase agreement transaction" from the plaintiffs, with *inter alia* a confirmation of the full amounts paid by the plaintiffs for the said properties;

(b) Despite the said confirmation from the plaintiffs, which showed that the full purchase price had been accounted and paid for by the plaintiffs, Messrs Moore Stephens sent a letter on behalf of AmBank dated 12 September 2003 demanding for a purported "redemption sum" of RM104,700 from each purchaser; and

(c) Each letter contained a threat that if the purchasers did not pay up the said "redemption sum" of RM104,700 within 14 days from the date of the letter, AmBank reserved the right to foreclose on the properties.

[43] What is also plain and obvious is the first and second defendants' vigour in defending the present action against them although the main defendant is AmBank, being the party intending to auction off the plaintiffs' properties. I must say a word on learned counsel who represented the first and second defendants. From his behaviour and conduct generally during the course of the trial, I get the distinct impression that his main objective other than to deflect liability away from the first and second defendants whom he represented, was to make sure that AmBank too would be cleared of liability, although AmBank had its own legal representation. There were times during the trial when he would get unduly personal with learned counsel for the plaintiffs. I do not find this to be surprising though given the fact that he acted for AmBank during the foreclosure action.

[44] On the evidence, it is clear that the first defendant under receivership made no real effort to investigate where the monies paid by the plaintiffs towards the purchase price had gone to and how were they utilised. It is clear that the first defendant was acting at the behest of AmBank in recovering the monies without regard for the plaintiffs' rights to the properties for which they had paid for in full.

[45] I find merit in the plaintiffs' contention that it is unreasonable for AmBank to suggest that for a property worth RM300,000 when purchased (and particularly a market value of RM550,000 to RM650,000 now) the redemption sum is now over RM35 million.

[46] When it was not even able to provide any explanation to the court as to how there is still a sum of RM35 million due to it in connection with the plaintiffs' purchase of the properties, how could AmBank, if it has any conscience at all, proceed with foreclosure on the properties when the plaintiffs had paid for them in full? It would be grossly improper and unconscionable for AmBank in the circumstances to proceed with any auction when it cannot even account nor prove any sum due. If foreclosure of the properties is obtained, a great injustice will be caused to the plaintiffs whereas AmBank will be unjustly enriched as it will appropriate all proceeds from the foreclosure to itself and as it wishes.

[47] Although the two loans had been settled by the time the consent order was obtained for suit 582, AmBank continued to sell the properties *vide* order for sale dated 13 October 2006. In this regard, I agree with learned counsel for the plaintiffs that this was the real reason why AmBank refused to provide the redemption statements for the properties to the plaintiffs – that their record shows that the plaintiffs do not owe any money to anyone in connection with the purchase of the properties.

[48] I find on the balance of probabilities (*Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 7 CLJ 584 FC) that AmBank had defrauded the plaintiffs, for the following reasons as proffered by learned counsel for the plaintiffs, which bears repetition:

(i) Although the two loans had earlier been settled and/or there is no more monies due thereon latest by 23 September 2010 (date of the consent order in suit 582), AmBank continued with efforts to sell the properties *vide* order for sale obtained on 13 October 2006;

(ii) This is the reason why AmBank as late as the date of hearing, unreasonably refused to provide redemption statements for the properties to the plaintiffs;

(iii) AmBank *vide* notice of application dated 29 April 2013 and affidavit in support of Nur Khairunnisa binti Ramblet affirmed on 25 April 2013 filed in the foreclosure action for the auction of the properties to proceed and to take place;

(iv) In the said affidavit in support of Nur Khairunnisa binti Ramblet, no disclosure was made of the material circumstances after the order for sale on 13 October 2006 including the sale to Strait Bay and the settlement and that there is no more valid debt due and therefore the right to auction the properties and without accounting for any debt due to the court;

(v) AmBank wished to proceed with the foreclosure deliberately and without any care for the rights of the plaintiffs;

(vi) AmBank wished to proceed with the foreclosure although the plaintiffs had paid up all the purchase price for the properties and all the purchase price paid to the first defendant had been assigned to AmBank;

(vii) AmBank wished to obtain unjust enrichment and is basically deceiving the plaintiffs who are members of the public;

(viii) AmBank also misled the court and it is an interference with the administration of justice for it to proceed with the auction when the debt had been fully settled or amicably settled or compromised;

(ix) AmBank avoided and refused to give redemption statements to the plaintiffs because it wished to continue to mislead and deceive the plaintiffs and the court in order to proceed with the auction to obtain further monies which it is not entitled to;

(x) As of the date of hearing, AmBank did not discharge the charges in relation to the properties, which ought to be free from encumbrances;

(xi) The first and second defendants through their receivers and managers who were appointed by AmBank acted like agents for AmBank and had assisted in the fraud or deceit as can be inferred from the following circumstances:

(a) The first and second defendants supported AmBank's action to foreclose the said properties although the two loans had been fully settled, amicably settled or compromised;

(b) The first and second defendants acted in the interest of AmBank and refused to transfer the titles to the properties to the plaintiffs, which properties ought to be free from encumbrances; and

(c) The first and second defendants had full knowledge or ought to have full knowledge that a settlement agreement had been entered into and suit 580 had also been settled.

[49] Although in law the receiver and manager ought to be the agents of the company under receivership, in this case, it is obvious that they acted at the behest of AmBank and for all intents and purposes were assisting AmBank at the expense of the plaintiffs.

[50] The plaintiffs had paid the purchase price of the terrace houses with their hard earned monies to the first and second defendants. Despite full and or substantial payments having been made, the houses are in real danger of being auctioned by AmBank where the third and fourth defendants as directors of the first and second defendants ought to have accounted or explained to the plaintiffs where the monies had gone to. As directors of the first and second defendants, clearly the third and fourth defendants cannot be heard to say "We don't know". This line of defence is simply not available to the third and fourth defendants.

[51] It is also clear from the evidence that the first and second defendants had under the direction and control of the third and fourth defendants defrauded the plaintiffs where the first defendant had taken the plaintiffs' monies and failed to account for them, and further failed to prove that the monies were used to redeem the properties from AmBank.

[52] The third and fourth defendants were clearly the directing minds and will of the first and second defendants. The corporate veil ought to be lifted to make them liable. It is trite law that when there is an issue of fraud involved and there is injustice, the corporate veil should be lifted.

[53] The third defendant alleged that there were "other brains" behind the first and second defendants but it remains a bare allegation unsubstantiated by evidence. He even tried to allege, again without proof, that Hiliran Jaya is the main company carrying out the housing project. That is the extent to which the third defendant would go in an attempt to exculpate himself from liability.

[54] All five defendants had raised the issue of limitation, which I find to be devoid of merit. In *Tengku Ismail Tengku Sulaiman & Ors v. Sia Cheng Soon & Anor* [2006] 3 CLJ 556; [2006] 5 MLJ 228, it was held that a defendant who fails to plead a limitation defence and allowed the case to proceed to be fought on the merits, is not to be permitted to fall back upon a plea of limitation as a second line of defence at the conclusion of the trial.

[55] In any event, the facts relating to the sale of Strait Bay and the global settlement took place in 2008 and the present suit was filed in 2013, well within six years from 2008. Further, the breach of the agreement is continuing as the first and second defendants' failure to provide the properties free from encumbrances is a continuing. Since the plaintiffs did not accept the breach and had insisted on performance, time would run afresh from the continuing breach.

[56] By not accepting the breach, the plaintiffs could elect to treat the agreements relating to the transfer of the properties as being repudiated (and sue for damages) or to treat the agreements as continuing and thus insist on their performance when the first and second defendants failed to transfer the properties to them free from encumbrances: *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363; [1983] 1 MLJ 151; *Waniwang Sdn Bhd v. Violet Holdings Sdn Bhd & Ors* [1993] 1 LNS 83; [1993] MLJU 78.

[57] In the alternative, the plaintiffs argued that time had not lapsed as their action was founded on recovery of land where the limitation period is 12 years and not six years. Reliance was placed on the High Court case of *Munah v. Fatimah* [1967] 1 LNS 108; [1968] 1 MLJ 54. In that case, the plaintiff took action for possession of land under a contract of sale 19 years earlier. The court held that since she was in occupation and had paid the purchase price, the vendor held the land on bare trust for the purchaser and hence time did not run at all. The principle laid down in that case had been affirmed by the Federal Court in *Tengku Mariah Sultan Sulaiman v. Halimah Abdullah* [1979] 1 LNS 114; [1980] 2 MLJ 234. See also *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 FC.

[58] Additionally, it was submitted, and I agree with the plaintiffs, that in cases of fraud such as the present suit, the period of limitation does not begin to run until the fraud was discovered: s. 29 of the Limitation Act 1953. Suspicion of fraud began where AmBank wanted to recommence foreclosure proceedings but did not wish to provide redemption sums requested by the plaintiffs. The critical facts were only disclosed in the defence and affidavit in reply filed and affirmed by the third defendant dated 12 July 2013 and 30 July 2013 respectively in this suit confirming that there is no more debt due to AmBank.

[59] AmBank cannot be innocent either when none of the other defendants could account for the monies paid over to them by the plaintiffs. Even if there was no element of fraud involved, clearly the first and second defendants who were aware of the plaintiffs' interest in the matter would be negligent in failing to provide the plaintiffs with good titles free from encumbrances.

[60] Given the complexity of the facts and the voluminous documents involved, I have given careful consideration to the written submissions of the parties and I am in agreement with the submissions of learned counsel for the plaintiffs, including in particular the following submissions in reply:

> The D's Submissions are, with respect, without merits and an attempt to avoid the critical issues before this Court. The D1/D2 is prevaricating and apparently assisting the D5. D3 & D4 wish to push their responsibilities away (*Inter alia*, D4 did not even turn up in Court as a witness to defend himself). D5 tries to avoid the fact that they did not and could not account for nor explain whether there is any further debt due to them. None of the Ds wishes to explain to the Court what happened to the Ps' purchase monies paid to D1 and whether it has been passed or paid over to D5. D1/D2 and D5 do not wish to show the accounts/records for this.

[61] Where there is any material conflict between the submissions of the plaintiffs and the submissions of the defendants on all material issues of law and fact, I accept the submissions of learned counsel for the plaintiffs, whom I find to be completely honest and professional in his handling of this particular case despite the aspersions cast on him by learned counsel for the first and second defendants at one point or another during the trial.

[62] For reasons aforesaid and for the other reasons given by learned counsel for the plaintiffs in his written submissions and submissions in reply which I omit to mention in this judgment but which I accept, the only fair decision to make in this case was for me to allow the plaintiffs' claim with costs. To decide otherwise would be to cause grave injustice to the plaintiffs.