A

CHANG YUN TAI & ORS

v.

HSBC BANK (M) BHD & OTHER APPEALS

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDIN FCJ
RAUS SHARIF FCJ
[CIVIL APPEAL NOS: 02(f)-15-2011 (W), 02(f)-16-2011 (W)
C & 02(f)-17-2011 (W)]
9 AUGUST 2011

CONTRACT: *Sale and purchase agreement - Illegality - Allegation of - Whether consequently, financing agreement signed by appellants with*
D *respondents void and of no effect - Whether duty on respondents as loan providers to ensure SPA free from legal infirmities - Whether SPA and financing agreement two distinct and separate contracts - Whether finance agreement valid regardless of alleged illegality of SPA - Whether respondent acted in pari delicto - Contracts Act 1950, s. 24 - Whether*
E *applicable*

CONTRACT: *Agreement - Finance agreement - Appellants obtained end financing from respondents for purchase of apartments - Allegation of sale and purchase agreement void in law - Whether consequently, the financing*
F *agreement appellants signed with respondents void and of no effect - Whether duty on respondents to ensure SPA free from legal infirmities - Whether SPA and financing agreement two distinct and separate contracts - Whether finance agreement valid regardless of alleged illegality of SPA - Whether respondent acted in pari delicto - Contracts Act 1950, s. 24 -*
G *Whether applicable*

BANKING: *Agreement - Finance agreement - Whether valid - Alleged irregularities in sale and purchase agreement - Whether validity of finance agreement affected - Whether irrelevant to appellants' obligation under financing agreement - Whether appellants remained liable under financing*
H *agreements*

CIVIL PROCEDURE: *Striking out - Appeal against - Rules of the High Court 1980, O. 18 r. 19(1)(a) - Seeking declaration for financial agreements between plaintiff and respondents as null and void - Whether*
I *respondents as loan providers have a duty to ensure sale and purchase agreement (SPA) free from legal infirmities - Whether finance agreement valid regardless of alleged illegality of SPA - Whether appeal dismissed*

The three appeals herein were heard together. The appellants in all three appeals were the same parties while the respondents in Appeal No. 02(f)-15-2011(W), Appeal No. 2(f)-16-2011 (W) and Appeal No. 02(f)-17-2011(W) were HSBC Bank (M) Berhad, Alliance Bank Berhad and Malayan Banking Berhad respectively. It was agreed by all parties that the decision in Appeal No. 02(f)-15-2011 would bind the other two appeals. The appellants were the purchasers of the medium-cost apartments ("the apartments") in a housing development project known as Bandar Universiti Teknologi Legenda in Mantin, Negeri Sembilan undertaken by the developer, Dataran Mantin Sdn Bhd ('the developer'). The appeal by the appellants was against the decision of the Court of Appeal in upholding the decision of the High Court to strike out the appellants' action against the respondent under the Kuala Lumpur High Court Civil Suit No. 08-22-1498-2005 ('the D8 action') on the ground that there was no reasonable cause of action against the respondent pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980. In the D8 action, the appellants instituted action against the respondent and 21 others as defendants for various declarations in respect of sale and purchase agreement ("SPA") entered into between each of the appellant as purchaser and the developer. The appellants had also obtained end financing from various financial institutions including the respondents *vide* the respective loan cum assignment agreements ("the Financing Agreement"). The appellants alleged in essence that the SPA entered between the appellants and the developer was void in law for having contravened the Powers of Attorney Act 1949, the Local Government Act 1976 and the Companies Act 1965 and consequently the Financing Agreements which the appellants signed with the financial institutions was void and of no effect. The declaration sought in the D8 action against the respondents was to declare the Financing Agreements null and void and accordingly the respondents should be stopped from enforcing the Financing Agreements. The issues that arose herein were, *inter alia* (i) whether the respondents were under a duty to enquire and/or ensure that the SPA was free from illegalities as a pre-condition to the end financing being granted; (ii) where the sale and purchase agreements of properties between housing developer and the purchasers were illegal and/or contrary to public policy, whether the Financing Agreements for the purchase of such properties were also void for illegality and/or contrary to public

A policy and (iii) whether the consideration and object of the loan given by the respondent to the appellants were of such a nature that if permitted would defeat any law contrary to the provision of s. 24(b) of the Contracts Act 1950 ('Contracts Act').

B **Held (dismissing the appeal)**
Per Zulkefli Makinudin FCJ delivering the judgment of the court:

(1) The respondent was not a party to the SPA. The SPA was the respective appellant's contract with the developer. Therefore, the duty was cast on the appellants rather than the respondent to ensure that the SPA was free from any legal infirmity. If they omitted to do so, they could not rely on their default to defeat the respondent's claim to repay their loans (*Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd*). The respondent had no duty to advise the appellants as borrowers in the present case because it was merely a financing bank and not an advisory bank. The SPA had already been executed before the end financing facilities were granted. Therefore, the respondent could presume that the SPA which the appellants had entered into had been ascertained by the appellants to be valid. It would be too onerous to require the respondent to investigate or enquire into a transaction or contract to which they were not a party. Banking business would be rendered impracticable and burdensome if this was so. The courts should not impose such a requirement that may impede the flow of commerce (*Co-operative Central Bank Ltd (In receivership) v. Feyen Development Sdn Bhd*). Thus, the respondent was not under a duty to enquire that the SPA was free from illegalities as a pre-condition to the end financing being granted. (paras 13 & 15)

(2) The SPA and the Financing Agreements were two distinct and separate contracts. The SPA was strictly a matter between the appellants and the developer. The alleged illegality, if any, went to the validity or otherwise of the SPA and not to the Financing Agreements. Since the monies were released to the developer at the request of the appellants, they remained liable under the Financing Agreements regardless of the alleged illegality of the SPA. The relationship between the respondent as the lending bank and the appellants as borrowers was a

contractual one. It was one of debtor and creditor. The respondent did no more than to lend the monies as requested. In return, the appellants promised to repay the monies lent. The alleged illegality of the SPA was irrelevant to the appellants' obligation under the Financing Agreement. The Financing Agreement was valid and not void regardless of the alleged illegality of the SPA. (paras 20 & 21)

(3) It was the appellants' contention that the respondent would not be able to assert the rights under the Financing Agreement without showing that it was entered into to finance the purchase of the apartments under the SPA which the appellants had alleged as being illegal and to which the respondent itself was a party. This court could not agree with the appellants' contention. The appellants and the respondent in the first place did not have any intention to advance any unlawful purpose. The respondent had not acted in *pari delicto* as alleged by the appellants. There was no illegal object or consideration under the Financing Agreement. Consequently, the provision of s. 24 of the Contracts Act did not apply. (paras 26 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Ketiga-tiga rayuan di sini didengar bersama-sama. Perayu-perayu di dalam ketiga-tiga rayuan adalah pihak yang sama manakala responden-responden di dalam No. Rayuan 02(f)-15-2011(W), No. Rayuan 2(f)-16-2011(W) dan No. Rayuan 02(f)-17-2011(W) adalah HSBC Bank (M) Berhad, Alliance Bank Berhad dan Malayan Banking Berhad masing-masing. Ia telah dipersetujui oleh semua pihak bahawa keputusan di dalam No. Rayuan 2(f)-15-2011 akan mengikat dua rayuan-rayuan yang lain. Perayu-perayu adalah pembeli-pembeli pangsapuri-pangsapuri kos sederhana ('pangsapuri-pangsapuri') di dalam satu kawasan pembinaan rumah yang dikenali sebagai Bandar Universiti Teknologi Legenda di Mantin, Negeri Sembilan yang dijalankan oleh pemaju, Dataran Mantin Sdn Bhd ('pemaju'). Rayuan oleh perayu-perayu adalah terhadap keputusan Mahkamah Rayuan mempertahankan keputusan Mahkamah Tinggi membatalkan tindakan perayu-perayu terhadap responden di dalam kes Mahkamah Tinggi Kuala Lumpur Guaman Sivil No. 08-22-1498-2005 ('tindakan D8') atas alasan bahawa tiada kausa tindakan munasabah timbul terhadap responden di bawah A. 18 k. 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980. Di dalam

A tindakan D8, perayu-perayu memulakan tindakan terhadap responden dan 21 yang lain sebagai defendan-defendan untuk pelbagai pengisytiharan berhubungan dengan Perjanjian Jual Beli ('PJB') yang dimeterai di antara setiap perayu sebagai pembeli dengan pemaju. Perayu-perayu juga telah memperolehi pembiayaan
B akhir daripada pelbagai institusi kewangan termasuk responden-responden melalui pinjaman merangkap perjanjian penyerahan hak ("Pinjaman Kewangan"). Intipati dakwaan perayu-perayu adalah bahawa PJB yang dimasuki perayu-perayu dan pemaju adalah terbatal dari segi undang-undang kerana telah melanggar Akta
C Surat Kuasa Wakil 1949, Akta Kerajaan Tempatan 1976 dan Akta Syarikat 1965 dan akibatnya perjanjian-perjanjian kewangan yang ditandatangani dengan institusi-institusi kewangan adalah terbatal dan tiada kesan. Deklarasi yang dipohon di dalam tindakan D8 terhadap responden-responden adalah untuk mengisytiharkan
D Perjanjian-Perjanjian Kewangan adalah batal dan tak sah dan sewajarnya responden-responden perlu dihentikan daripada menguatkuasakan Perjanjian-Perjanjian Kewangan. Isu-isu yang timbul di sini adalah, antara lain (i) sama ada responden-responden bertanggungjawab untuk menanyakan dan/atau memastikan bahawa
E PJB bebas dari ketidaksahan sebagai satu prasyarat bagi pembiayaan akhir dibenarkan; (ii) di mana perjanjian-perjanjian jual beli hartanah di antara pemaju perumahan dan pembeli-pembeli adalah tidak sah dan/atau bertentangan dengan polisi awam, sama ada Perjanjian Kewangan untuk pembelian hartanah-hartanah
F sebegitu juga tidak sah kerana ia melanggar undang-undang dan/atau bertentangan dengan polisi awam dan (iii) sama ada balasan dan objek pinjaman yang diberi responden kepada perayu-perayu jika dibenarkan bersifat mengalahkan mana-mana undang-undang bertentangan dengan peruntukan s. 24(b) Akta Kontrak 1950
G ('Akta Kontrak').

Diputuskan (menolak rayuan)
Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

H
(1) Responden bukan pihak kepada PJB. PJB adalah kontrak antara perayu dan pemaju. Oleh itu, kewajipan adalah atas perayu-perayu dan bukan responden untuk memastikan PJB bebas dari apa-apa kelemahan dari segi undang-undang. Jika
I mereka gagal berbuat demikian, mereka tidak boleh bergantung pada keingkaran mereka untuk menyangkal tuntutan responden

untuk membayar balik pinjaman mereka (*Golden Vale Golf Range v Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd*). Responden tidak mempunyai tanggungjawab untuk menasihati perayu-perayu sebagai peminjam-peminjam di dalam kes ini kerana ia hanyalah bank pembiaya dan bukan bank penasihat. PJB telah dilaksanakan sebelum kemudahan-kemudahan pembiayaan akhir diberikan. Oleh itu responden boleh menganggap PJB yang dimasuki perayu-perayu telah dipastikan sahih oleh perayu-perayu. Ia terlalu membebankan untuk responden menyiasat atau menyoal transaksi atau kontrak di mana mereka bukan salah satu pihak. Perniagaan perbankan akan menjadi mustahil dan membebankan jika ini berlaku. Mahkamah-mahkamah tidak sepatutnya mengenakan keperluan sebegitu yang boleh menghalang pengaliran perdagangan (*Co-operative Central Bank Ltd (In receivership) v. Feyen Development Sdn Bhd*). Oleh itu, responden tidak mempunyai kewajipan untuk menyoal sama ada PJB bebas dari tindakan-tindakan yang melanggar undang-undang sebagai satu prasyarat bagi pembiayaan akhir dibenarkan.

(2) PJB dan Perjanjian-Perjanjian Kewangan adalah dua kontrak berasingan dan berbeza. PJB adalah dengan tegas satu perkara antara perayu-perayu dengan pemaju. Tindakan-tindakan yang melanggar undang-undang yang didakwa, jika ada, adalah mengenai kesahihan atau sebaliknya PJB dan bukan Perjanjian-Perjanjian Kewangan. Oleh kerana wang telah dikeluarkan kepada pemaju atas permintaan perayu-perayu, mereka tetap bertanggungjawab di bawah Perjanjian-Perjanjian Kewangan tanpa mengira tindakan-tindakan yang melanggar undang-undang yang didakwa terdapat dalam PJB. Hubungan antara responden sebagai bank peminjam dan perayu-perayu sebagai peminjam-peminjam adalah kontraktual. Ia adalah antara penghutang dan pemiutang. Responden hanya meminjam wang seperti diminta. Sebagai balasan, perayu-perayu membuat perjanjian mereka akan membayar balik wang-wang yang dipinjamkan. Tindakan-tindakan PJB yang didakwa melanggar undang-undang tidak relevan untuk kewajipan perayu-perayu di bawah Perjanjian Kewangan. Perjanjian Kewangan adalah sah dan tidak terbatal tidak kiralah tindakan-tindakan PJB yang didakwa melanggar undang-undang.

(3) Ia adalah hujahan perayu-perayu bahawa responden tidak akan dapat menegaskan hak-hak di bawah Perjanjian Kewangan tanpa menunjukkan ia dimasuki untuk membiayai pembelian pangsapuri-pangsapuri di bawah PJB yang perayu-perayu mendakwa telah melanggar undang-undang di mana responden sendiri merupakan pihak. Mahkamah ini tidak bersetuju dengan hujahan perayu-perayu. Perayu-perayu dan responden dari permulaan lagi tidak mempunyai niat untuk memajukan mana-mana tujuan menyalahi undang-undang. Responden tidak bertindak dalam *pari delicto* seperti yang didakwa oleh perayu-perayu. Tiada objek atau balasan haram di bawah Perjanjian Kewangan. Akibatnya, peruntukan s.24 Akta Kontrak tidak terpakai.

Case(s) referred to:

Canadian Imperial Bank of Commerce v. Mannone [1992] OJ No 1328 ***(refd)***

Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd [2008] 6 CLJ 31 CA ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd [1996] 4 CLJ 52 HC ***(dist)***

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

Redmand v. Allied Irish Bank Plc [1987] FLR 307 ***(refd)***

Rimba Muda Timber Trading v. Lim Kuoh Wee [2006] 3 CLJ 93 FC ***(refd)***

Sarat Chunder Dey v. Gopal Chunder Laha [1892] 19 LR Ind App 203 ***(refd)***

Suwiri Sdn Bhd v. Government Of The State Of Sabah [2008] 1 CLJ 123 FC ***(refd)***

The Co-operative Central Bank Limited (In receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24(b)

Rules of the High Court 1980, O. 18 r. 19(1)(a)

For the appellants - Malik Imtiaz Sarwar (M Lavendran & Jenine Gill with him); M/s Ngeow & Tan

For the respondents - Benjamin John Dawson (Koh San Tee & Elaine Choong with him); M/s Benjamin Dawson

[Editor's note: For the Court of Appeal judgment, please see Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals [2011] 5 CLJ 589.]

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] These three appeals were heard together and it was agreed by all parties that the decision in Appeal No. 02(f)-15-2011 (W) will bind Appeal No. 02(f)-16-2011 (W) and Appeal No. 02(f)-17-2011 (W). The appellants in all these three appeals are the same parties. They are the purchasers of the medium-cost apartments ("the apartments") in a housing development project known as Bandar Universiti Teknologi Legenda in Mantin, Negeri Sembilan undertaken by the developer called Dataran Mantin Sdn Bhd ("the developer"). The respondent in Appeal No. 02(f)-15-2011 (W) is HSBC Bank (M) Berhad. The respondent in Appeal No. 02(f)-16-2011 (W) is Alliance Bank Berhad. The respondent in Appeal No. 02(f)-17-2011 (W) is Malayan Banking Berhad. For the purpose of arguments in these appeals, all the parties agreed that they would be referring to the appeal records of the appellants in Appeal No. 02(f)-15-2011 (W).

Background Facts

[2] The Appeal No. 02(f)-15-2011 (W) is an appeal by the appellants against the decision of the Court of Appeal in upholding the decision of the High Court to strike out the appellants' action against the respondent under the Kuala Lumpur High Court Civil Suit No. 08-22-1498-2005 ("the D8 action") on the ground that there is no reasonable cause of action against the respondent pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ("RHC 1980").

[3] The appellants were the 178 plaintiffs who instituted the D8 action against the respondent and 21 others as defendants for various declarations in respect of sale and purchase agreement ("SPA") entered into between each of the appellant as purchaser and the developer for the purchase of the apartments.

[4] The appellants had also obtained end financing from various financial institutions including the respondents *vide* the respective loan cum assignment agreements ("the financing agreement") entered into between them and these financial institutions for the purchase of the apartments under the SPA.

[5] In the D8 action the appellants alleged against the developer, the two companies connected with the developer including their directors and the local authority, that is Majlis Perbandaran Nilai ("Majlis Perbandaran"), that they had conspired to defraud the appellants by way of a scheme aimed at inducing the appellants into purchasing the apartments from the developer under the SPA. They contended that the SPA was void *ab initio* for being contrary to law and/or public policy by reason of the fact that the Majlis Perbandaran is not empowered to execute the Power of Attorney ("PA") by reason of its character as a local authority under the provisions of the Local Government Act 1976. In this case the SPA was entered into by the developer for and on behalf of Majlis Perbandaran, the owner of the subject land pursuant to the PA executed in favour of the developer by the Majlis Perbandaran. It was also alleged that the PA was not executed in compliance with the provisions of the Power of Attorney Act 1949. The appellants further alleged that the SPA was an investment contract within the meaning of Companies Act 1965 when considered in the context of the Guaranteed Return Scheme Agreement ("GRSA") entered into by the appellants with the companies connected with the developer and such investment contract contravened the provisions of the Companies Act 1965.

[6] It is the appellants' case as against the developer and its connected companies that the developer had represented to them a university township would be established in the vicinity of the intended housing development project and this would provide an attractive market for tenanting out their apartments. It is also the appellants' case that under the GRSA they were promised there would be a guaranteed return in investment of 8% of the purchase price of the apartments per annum for a period of 15 years. According to the appellants these representations were not true since the university was never established and the development of the university township was abandoned.

[7] As against the financial institutions including the respondent in the D8 action, the appellants alleged in essence that the SPA entered into between the appellants and the developer was void in law for having contravened the Power of Attorney Act 1949, the Local Government Act 1976 and the Companies Act 1965 and consequently the financing agreements which the appellants signed with the financial institutions is void and of no effect. The declaration sought in the D8 action against the respondent and

the other financial institutions was to declare the financing agreements null and void and accordingly the respondent and the financial institutions should be estopped from enforcing the financing agreements.

Leave To Appeal

[8] On 23 February 2011, the appellants were granted leave to appeal to this court against the decision of the three cases of the Court of Appeal dated 20 October 2010 in the Court of Appeal Civil Appeal Numbers W-02-561-2008, W-02-562-2008 and W-02-563-2008 on the following questions:

(i) Where the sale and purchase agreements of properties between housing developer and the purchasers ("the SPA") are illegal and/or contrary to public policy, whether the financing agreements for the purchase of such properties are also void for illegality and/or contrary to public policy.

(ii) If the financing agreements are not enforceable and/or liable to be set aside on the ground that it is void for illegality or contrary to public policy, whether the appellants are bound to make restitution and/or otherwise to pay the respondents.

(iii) Whether the respondents are under a duty to enquire and/or ensure that the SPA are free from illegalities as a pre-condition to the end financing being granted.

Decision

[9] It is pertinent to note at the outset that the questions posed for our determination as agreed by both parties have been framed on the assumption that the SPA is illegal and/or contrary to public policy. This court as such is not called upon to determine whether the alleged contraventions of the statutory provisions referred to in the statement of claim do have that effect on the case against the remaining defendants in the D8 action pending before the High Court.

[10] Learned counsel for the appellants submitted that the appellants' case against the respondent is not plainly and obviously unsustainable and ought not to have been struck out. The question of whether the alleged contraventions of the statutory provisions do have effect is a mixed question of fact and law. The

A fact pattern has not been determined conclusively at this juncture as this necessarily involves the other defendants in the D8 action and the process of a trial which is pending.

[11] Before dealing with the issues raised in this appeal we would B like to highlight the following undisputed facts relating to the position of the parties based on the pleadings in the D8 action as follows:

(i) The appellants' cause of action against the respondent as a financial institution is premised not on any impropriety on the C respondent's part but simply on the assertion that it is expected in law to know as a matter of law of the alleged illegality. (See the statement of claim at pp. 277-279 of the Appeal Record Volume 3).

D (ii) In the statement of claim, it was not asserted that the respondent knew of the alleged illegality when the financing agreement was entered into. The appellants were also not aware of the alleged illegality at the material time. Both the appellants and the respondent therefore were ignorant of such E alleged illegality.

(iii) In the financing agreement, the appellants gave an undertaking that they have a good right and title to assign the property and made representation to the respondent that the security F documents are not in contravention of any law. (See cl. 10(a) of the loan cum assignment agreement at p. 597 of the Appeal Record Volume 7).

(iv) The respondent did not provide a bridging loan to the developer, the party who allegedly broke the law. The G respondent had nothing to do with the developer. The respondent's contractual relationship is solely with the appellants to whom end financing facility was granted.

[12] We shall first deal with the third question framed in this H appeal as this deals with the duty of any of the respondents to enquire. The appellants take the view that there is a duty on the part of the respondent to enquire into the legality of the SPA. It is our considered view this is not a tenable proposition for the following reasons.

I

[13] The respondent is not a party to the SPA. The SPA is the respective appellant's contract with the developer. Therefore, the duty is cast on the appellants rather than the respondent to ensure that the SPA is free from any legal infirmity. If they have omitted to do so, we are of the view they cannot rely on their default to defeat the respondent's claim to repay their loans. On this point we would cite the case of *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31 wherein Gopal Sri Ram, JCA (as he then was) at p. 39 had this to say:

> If this clause is to be given effect to, it would mean that Airport Auto could rely on its own failure to complete the sale and thereby defeat the defendant's claim for specific relief. It would mean that Airport Auto could rely on its own wrong to its advantage. Settled authority has held that a party cannot rely on its own wrong to defeat its opponent's claim.

[14] It is also our considered view that the respondent has no duty to advise the appellants as borrowers in the present case because it is merely a financing bank and not an advisory bank. Generally speaking, in a commercial loan a lender is entitled to seek and obtain the best terms it can. It may have regard solely to its own commercial interest. It is not the lender's obligation to ensure that the borrower has made a correct or wise commercial decision based upon a full understanding of all risks unless the borrower has specifically sought the lender's advice. (See the case of *Redmand v. Allied Irish Bank Plc* [1987] FLR 307).

[15] It is to be noted the SPA has already been executed before the end financing facilities were granted. Therefore the respondent can presume that the SPA which the appellants had entered into has been ascertained by the appellants to be valid. It would be too onerous to require the respondent to investigate or enquire into a transaction or contract to which they are not a party. Banking business will be rendered impracticable and burdensome if this was so. In this regard the courts should not impose such a requirement that may impede the flow of commerce. On this point Edgar Joseph Jr FCJ in *The Co-operative Central Bank Limited (In Receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300 in delivering the judgment of this court cautioned at p. 313 as follows:

> ... a commercial Judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community.

[16] We are of the view the respondent in the present case can also rely on the representation made by the appellants that the security documents are not in contravention of any law without further enquiry. On this issue we would refer to the decision of the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha* [1892] 19 LR Ind App 203. There are similarities between the present case and *Sarat Chunder Dey* in three vital aspects:

(a) Both creditors released the loan on the strength of the security executed by the person who is complaining that the security given is invalid.

(b) The legal objection by the complainant was not raised at the time of the execution of the security.

(c) The complainant was not aware of the legal objection to the security at the material time.

[17] The Privy Council in *Sarat Chunder Dey* held that in executing the security the mortgagor (through her Power Attorney) had represented to the creditor that she had a good title to the security. As the creditor released the monies on the strength of the security the complainant is prevented from contending that the security is invalid. This was so notwithstanding that the complainant was not aware of the legal infirmities of the security at the material time. The relevant passage in *Sarat Chunder Dey*'s case at p. 212 is quoted as follows:

> Their Lordships are very clearly of opinion that these actings on the part of Ahmed create an estoppel against him, or any one claiming in his right, from disputing the title of Arju Bibi to grant the mortgage to Kalimuddin. They amounted to a distinct declaration by him to the lender that the hiba in favour of Arju Bibi was a valid deed, or in any view, that if the document was open to legal objections, Ahmed, as the person entitled to challenge the deed, waived his right to do so, and consented for his interest to represent and to hold the hiba as valid, and consequently as giving a legal right to Arju Bibi, as the proprietor, to grant the mortgage. There was a distinct representation by Ahmed professing to act as his mother's attorney, that she was the owner in possession, having a good title to create a valid mortgage affecting the lands. It is, in their Lordships' opinion, impossible to take any other view of the effect of Ahmed's conduct in the whole transaction, and particularly his signing the mortgage and taking payment of the money; and it is equally clear that the transaction was concluded on the footing of that representation, and that the creditor was thereby induced to lend

> the money on the security of the mortgage. It has been frequently said, in cases of this class, that the creditor is bound to make inquiry into the validity of such a title as Arju Bibi, the borrower, here possessed, and the obligation applies with great force in this case, in which the hiba was granted without consideration, and, as the least inquiry would have shown, without any possession having followed on it. But any inquiry, or, indeed, any anxiety as to the title of Arju Bibi to grant the mortgage as proprietor in virtue of the hiba in her favour, was made quite unnecessary by the representation and conduct of Ahmed, who was (so far as his share of the property was concerned) the sole person having a title or interest to challenge the validity of the hiba, and to object to the granting of the mortgage which he himself signed and delivered in exchange for the money paid to him.

[18] From the factual circumstances of this case it would not be unreasonable for us to state herein that the appellants as borrowers have purchased the apartments more for its commercial value and return and not for its residential purpose. For this they can be expected to be vigilant in safeguarding their own investment and if that goes awry, they cannot later disown their investment at the expense of the respondent.

[19] Many have forgotten in such a transaction as end financing between a borrower and a bank, is that the bank lends to the borrower to purchase the property. The property then is charged to the bank as security for the loan. The loan could have been given without requiring the security or it could be a different security of another property in which case there is no relationship between the loan and the property purchased.

[20] We shall now deal with the first question. As we had mentioned in the preceding paragraph we are of the view the SPA and the financing agreement are two distinct and separate contracts. The SPA is strictly a matter between the appellants as borrowers and the developer. The alleged illegality if any goes to the validity or otherwise of the SPA and not to the financing agreement. Since the monies were released to the developer at the request of the appellants, they remained liable under the financing agreement regardless of the alleged illegality of the SPA. In *Canadian Imperial Bank of Commerce v. Mannone* [1992] OJ No 1328, the defendants who were borrowers resisted the bank's claim on the grounds that the loan was used to purchase units of a limited partnership which was established contrary to Securities Act. O'Driscoll J held that the defence failed and gave his reasons at p. 6 as follows:

> Whether Mithras XI's prospectus did or did not breach s. 53 of the Act and/or s. 14(g) of the Regulations is, in my view, a red herring hidden in a thick fog. There is no evidence that the plaintiff bank was a joint venture with Mithras XI ... There is no evidence that the plaintiff bank did anything in this whole scenario other than:
>
> (i) Agree to loan money to the male defendant;
>
> ...
>
> In the circumstances of this case, whether the investment was good or bad, legal or otherwise void or voidable, are questions that do not touch or affect the plaintiff bank. Those are questions that may be pertinent as between the defendants and Equion Securities and/or Mithras XI and/or Robert Thiessen, but not as between the plaintiff bank and these defendants.

[21] The relationship between the respondent as the lending bank and the appellants as the borrowers is a contractual one and is purely commercial in nature. It is one of debtor and creditor. The respondent did no more than to lend the monies as requested. In return, the appellants promised to repay the monies lent. The alleged illegality of the SPA does not in any way discharge the appellants' obligation. It would be odd and indeed unjust if the appellants can be permitted to transfer the loss under their investment due to the alleged illegality to their financiers. The alleged illegality of the SPA is irrelevant to the appellants' obligation under the financing agreement or to use the words of O'Driscoll J in *Canadian Imperial Bank of Commerce*'s case is "a red herring hidden in thick fog".

[22] It is to be noted that the respondent's claim for payment of the monies borrowed does not depend on the alleged illegal SPA. The respondent merely relied on the SPA as a basis for his claim against the appellants under the financing agreement. In *Rimba Muda Timber Trading v. Lim Kuoh Wee* [2006] 3 CLJ 93 this court in deciding on a similar issue affirmed the decision of the courts below in allowing the claim of the respondent. Arifin Zakaria FCJ (as he then was) in delivering the judgment of the court at p. 511 had this to say:

> The claim by the respondent could not be defeated purely on the ground that the relevant contract was illegal as the respondent did not ground his claim on the illegal contract. The respondent here merely relied on the contract as a basis for his claim to the property right in the logs.

[23] We find there is fallacy in the appellants' argument in saying that the financing agreement is subsidiary to the SPA. The appellants have described the SPA as the "primary instrument". This is clearly wrong. Both the financing agreement and the SPA are distinct, independent and primary instruments on their own involving different parties. The SPA is between the appellants and the developer whilst the financing agreement is between the respondent and the appellants. Under the SPA, the appellants have an obligation to pay the purchase price to the developer whereas under the financing agreement they are required to pay the monies borrowed to the respondent. Both are distinct contracts.

[24] We find that the alleged illegality of the SPA is irrelevant to the appellants' obligation under the financing agreement is also consistent with the principles of privity of contract. In *Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 CLJ 123 this court held at p. 131:

> The doctrine of privity of contract states that as a general rule, a contract cannot confer rights or impose obligations on strangers, ie, persons who are not parties to it.

Therefore, in the present case the respondent who is a stranger to the SPA cannot be imposed with the burden of the alleged illegality.

[25] The appellants relied on the case *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd* [1996] 4 CLJ 52 to support their case. The facts in *Keng Soon Finance* are poles apart and distinguishable. There, the financier granted a bridging finance to an unlicensed developer. The decision of the High Court in *Keng Soon Finance* was therefore premised on the finding that the plaintiff (*Keng Soon Finance*) was aiding and abetting or assisting the unlicensed housing developer. In short, the financier there acted in *particeps criminis* with the developer in an illegal transaction. Furthermore, in *Keng Soon Finance* the financier there took a charge which was executed by the chargor contrary to the provisions of the Housing Developers (Control and Licensing) Act 1966 ("the HDA"). The HDA expressly prohibits the creation of the charge without the consent of the purchasers.

[26] It was also argued for the appellants that the consideration and object of the loan given by the respondent to the appellants were such of a nature that if permitted would defeat any law contrary to the provision of s. 24(b) of the Contracts Act 1950 ("Contracts Act"). Learned counsel for the appellants contended that the "*in pari delicto*" rule applies to this case in that the respondent would not be able to assert the rights under the financing agreement without showing that it was entered into to finance the purchase of the apartments under the SPA which the appellants had alleged as being illegal and to which the respondent itself was a party. With respect, we could not agree with the appellants' contention. We find that the appellants and the respondent in the first place did not have any intention to advance any unlawful purpose. The respondent have not acted *in pari delicto* as alleged by the appellants. Consequently, the provision of s. 24 of the Contracts Act in our view does not apply.

[27] It is to be noted there is no illegal object or consideration under the financing agreement. It strains credulity to suggest that the consideration or object of a loan facility to advance money to the appellants to enable them to purchase the apartments is unlawful. This is unlike providing financing for the purchase of illegal drugs or illegal arms. The object or consideration of the SPA for the sale and purchase of the apartments is also not unlawful. In *Kin Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181, Salleh Abas CJ (Malaya) (as he then was) considered the application of s. 24 of the Contracts Act and at p. 186 held:

> 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 section 24 quoted above, although the appellant may well be guilty of an offence under Rule 17 for contravening Rule 11(1) of the Housing Developers (Control and Licensing) Rules, 1970.

[28] On the applicability of the provision of s. 24(b) of the Contracts Act to the present case the learned judge of the High Court had rightly summed up at para. 30 of his judgment as follows:

> It is clearly repugnant to good reason and common sense to find a cause of action based purely on the assertion that the banks were expected to know of those alleged irregularities and should

therefore be stopped from enforcing their rights under the loan agreements. I would agree entirely with the submission of counsel for the banks that the consideration and object of the loan given by the banks to the plaintiffs were clearly not of such a nature that, if permitted, would defeat any law contrary to s. 24(b) of the Contracts Act 1950.

Conclusion

[29] For the reasons abovestated it is our judgment that the first question should be answered in the negative. The financing agreement is valid and not void regardless of the alleged illegality of the SPA. Since we hold that the financing agreement is valid we find that the second question need not be answered. As regards the third question, we would also answer it in the negative. The respondent is not under a duty to enquire that the SPA is free from illegalities as a pre-condition to the end financing being granted. In the result we would dismiss the appeal with costs. We award a sum of RM25,000 as costs for each of the three appeals totaling RM75,000. The deposit is to be paid to the respondent towards costs.