Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 02–359–91 AND 02–368–91
HARUN HASHIM, MOHAMED AZMI AND EDGAR JOSEPH JR SCJJ
4 JULY 1992

Administrative Law *— Rules of natural justice — Breach thereof — Receivers and managers made personally liable even though not sued in their personal capacities — Whether orders against receivers and managers personally were fundamentally bad and ought to be set aside*

Civil Procedure *— Functus officio — Orders made against receivers and managers personally — Orders incorporated in grounds of judgment after extraction of order of court — Whether court was functus officio when making such orders — Whether such orders were fundamentally bad and ought to be set aside*

Civil Procedure *— Jurisidiction — Registered charge — Validity of charge unchallenged — Whether judge had jurisdiction to rewrite rights and obligations of parties to charge*

Civil Procedure *— Locus standi — Action for avoidance of debentures against bank — Plaintiff not party to debentures — Whether plaintiff had locus standi to sue bank*

Companies and Corporations *— Receivership — Adoption of agreement by receivers and managers — Agreement provided for transfer of property — Property passed by time receivers and managers were appointed — Whether there was any indication of adoption of agreement by receivers and managers — Whether court could order transfer of property*

Companies and Corporations *— Receivership — Appointment of receiver — Whether appointment under debenture was valid — Whether condition precedent satisfied*

Companies and Corporations *— Receivership — Priorities — Moneys due to plaintiff for work done for first defendant — Whether plaintiff had a right in the first defendant's property — Whether plaintiff an unsecured creditor*

Companies and Corporations *— Receivership — Receiver's personal liability — Carrying out a contract current at date of appointment — Whether receiver personally liable thereon*

Companies and Corporations *— Receivership — Specific performance — Possibility of specific performance of contract involving expenditure for which receiver might be personally liable — Whether order for specific performance ought to be made*

Contract *— Debenture — Validity thereof — Whether company's directors knew what they were signing — Whether there was economic duress exerted by bank on directors — Whether debenture signed by directors voluntarily*

Contract *— Privity — Debenture — Plaintiff not a party to debentures executed in favour of bank — Whether plaintiff could impugn debentures*

***Contract** — Settlement agreement — Agreement provided for transfer of property — Consideration unpaid — Whether passing of ownership in property may be prevented — Whether agreement contained Romalpa-type reservation of title clause*

By an agreement in writing dated 11 May 1982 between the plaintiff, Aidigi Sdn Bhd ('the contractor') and the first defendant, Emar Sdn Bhd ('the developer'), the contractor had agreed to construct and complete for the developer, a housing project on land belonging to the developer and which was charged to the second defendant, Perwira Habib Bank Bhd ('the bank') as security for a debt owed. The developer defaulted on payment of moneys due to the contractor for works already done by the latter as a result of which two settlement agreements ('the first and second settlement agreements'), both dated 20 October 1986, were executed by them both. Under the first settlement agreement, upon the taking of accounts, the developer had agreed, inter alia, to pay to the contractor and several creditors of the contractor, various sums of money and to transfer completed dwelling houses, in lieu of cash, in the aggregate value of $2.75m. Under the second settlement agreement, the developer had agreed to transfer to the contractor and/or its nominees 20 units of dwelling houses ('the 20 units') over which the developer had created a charge duly registered under the National Land Code 1965 in favour of the bank. The second settlement agreement further deemed the contractor to have sold all materials, plants, chattels and effects specified therein to the developer, in consideration of the developer's promise to complete the works on 20 specified units of dwelling houses within a stated time and to deliver vacant possession thereof upon completion. It had also been agreed that the developer would pay to the contractor liquidated damages for any delay in the completion of the said works. The 20 units were also the subject matter of various sale and purchase agreements, in which the purchasers were various nominees of the contractor, all of whom were non-Bumiputras.

In the result, the developer had to approach the bank for fresh facilities of $2.3m to settle its debt to the contractor under the first settlement agreement and to complete the housing project. A debenture was then created by the developer in favour of the bank on 27 November 1986 ('the first debenture'). The housing project, however, remained uncompleted as attempts to appoint a new contractor failed. Two other debentures were also created by the developer in the bank's favour.

The bank then issued a letter of demand dated 13 June 1987, to the developer demanding repayment of the sum of $3,374,164.38 within 24 hours from the date of the letter. Service of the letter of demand effected only on 16 June 1987 but on 15 June 1987, pursuant to the powers conferred upon it under the first debenture, the bank appointed receivers and managers for the developer. The housing project was subsequently completed by the receivers and managers with money advanced by the bank.

The contractor brought an action against the developer and the bank, the former for specific performance of the two settlement agreements and the latter for a declaration for avoidance of the three debentures and for consequential reliefs. It was contended that the debentures were void and thus the appointment of the receivers and managers was also void. The developer did not deny liability under the two settlement agreements and was ordered, inter alia, to transfer to the contractor the 20 units free from encumbrances as required under the second settlement agreement and to redeem the 20 units charged to the bank. The redemption sum payable by the developer to the bank was reduced by the judge so as to exclude interest accruing on the debt from the date of the appointment of the receivers and managers.

As for the first debenture, the court found it invalid in law because: (1) the resolution of the developer's board purporting to authorize the execution of the first debenture was not properly passed; (2) the developer's directors were ignorant of the nature, terms, conditions, effects and implications of the first debenture when signing it; and (3) the first debenture was signed as a result of economic duress by the bank. The court declared all three debentures null and void and further that the appointment of the receivers and managers was also null and void. In the alternative, it was held that even if the court was wrong in declaring the three debentures null and void, the appointment of the receivers and managers was bad in law because conditions precedent to their appointment under the first debenture had not been complied with by the bank, namely, that the developer had not been given the requisite time to pay up as by the time the letter of demand was served on the developer, the receivers and managers had already been appointed. Various consequential orders were also made against the bank.

The receivers and managers had not been sued in their personal capacity and no orders were made against them personally in open court but after the order of court had been extracted, the judge in his grounds of judgment made, inter alia, the following orders against the receivers and managers personally: full and immediate restoration of (a) all moneys paid by the receivers and managers from the account of the developer; and (b) payments to any party, including payments to themselves as fees or expenses and to the bank.

Both the developer and the bank lodged separate appeals against the judgment of the court.

Held, allowing the bank's appeal in full and the developer's appeal in part:

(1) The contractor had no locus standi to maintain the suit against the bank and, on this ground alone, the judge ought to have dismissed the suit against the bank.

(2) As for the contractor, its status in law was that of an unsecured creditor with no specific right in the developer's property and, in

particular, no right in any fund standing to the creditor of the developer.

(3) The order of the judge requiring the transfer of the 20 dwelling houses by the developer to the contractor pursuant to the second settlement agreement, is in substance and effect an order for specific performance. It is clear law that specific performance will not be ordered against a company in receivership if the performance of contract by the company, would involve expenditure for which the receiver might be personally liable. Having regard to the financial position of the developer, the court considered that that too would be a valid objection to the order for transfer of the 20 dwelling houses.

(4) The developer's directors who signed the first debenture were not country yokels but educated businessmen, each being a director of a development company at the material time. The finding of the judge that neither of them knew what a debenture was, did seem to fly in the face of the evidence. The court was of the view that the developer's directors knew and approved of the contents of the first debenture when they signed it and they did so voluntarily.

(5) If the judge were correct in holding that the first debenture was invalid, then each of the three grounds upon which he did so would have rendered the first debenture not *void* but *voidable* and that too at the instance of the developer *only* and *not* the contractor who was not a party to the first debenture. At no time did the developer ever seek to impugn the first debenture and the stance adopted by counsel of the developer before the court assumed that the debenture was valid and binding in law, so that any right that the developer might have had to do so must be taken to have been waived.

(6) The bank owed no duty of care to the contractor. The bank never interfered in the performance of the settlement agreements entered into by the contractor and the developers. The developer's failure to fulfill its obligations under the settlement agreements was due to its financial problems and not because of the execution of the debentures in favour of the bank. The bank is absolved, of the finding of bad faith against it.

(7) The bank's right to interest on the redemption sum in respect of the 20 dwelling houses was based on a valid charge under the National Land Code 1965 executed by the developer well before the debentures were executed and which was not open to challenge either by the developer or the contractor. The judge had jurisdiction, whether on his own motion or otherwise to rewrite the rights and obligations of the parties to the charge, the validity of which was never in question.

(8) The order made by the judge against the bank for the payment of interest to the contractor was wrong because the bank was not a party to either of the settlement agreements. For the same

reason, the order made by the judge against the bank for the payment of damages for delay in the delivery of the dwelling houses is unsustainable. A claim for damages for delay in the delivery of dwelling houses would only arise for decision if, and when, an action is brought by purchasers under sale and purchase agreements executed pursuant to the two settlement agreements but not otherwise.

(9) The judge fell into error in ordering the bank to refund to the developer all moneys received by it after the appointment of the receivers and managers for, in reality, not only had the developer not suffered any loss by reason of such payments, but that it had in fact benefitted thereby.

(10) Upon the facts, there was nothing to indicate adoption by the receivers and managers of the second settlement agreement especially since by the time the receivers and managers had been appointed the property referred to in the second settlement had passed to the developer.

(11) It is trite law that, save in exceptional circumstances which do not apply here, merely by causing the company concerned to carry out a contract current at the date of his appointment, a receiver and manager does not render himself personally liable thereon, as would be the case with a de novo contract.

(12) The rules of natural justice demanded that if the contractor were to be entitled to remedies against the receivers and managers personally, its pleadings had to be properly framed so as to disclose a cause of action against them personally and thereby affording them, the opportunity of being heard in their defence. It was only after the court was functus officio that the judge had decreed by his grounds of judgment that the receivers and managers were to personally make payment of substantial sums of money. It was obvious that the orders made against the receivers and managers personally were fundamentally bad and must be set aside.

(13) The fact that the consideration stipulated in the second settlement agreement had not been paid did not prevent the passing of the ownership in the property save and except where recourse is had to the device of the reservation of title clause. The court cannot agree that the preamble to the second settlement agreement contained a Romalpa-type clause for there was nothing therein to indicate that ownership of the property concerned would only be transferred to the developer when it has met all its obligations contained therein.

(14) It would be unnecessary to consider the question whether the letter of demand for repayment of the loan was bad in law but the court would have held that even if the developer had been given a letter of demand stipulating a period of sufficient length and been promptly served, the developer was in no position to have complied therewith by making the payment demanded.

A **[Bahasa Malaysia summary**

Dalam perjanjian bertulis, pada 11 Mei 1982, di antara plaintif, Aidigi Sdn Bhd ('kontraktor itu') dan defendan pertama, Emar Sdn Bhd ('syarikat itu'), kontraktor itu telah membuat perjanjian dengan syarikat itu untuk membina dan menyiapkan suatu projek perumahan di atas sebidang tanah yang dimiliki oleh syarikat itu dan yang telah digadaikan kepada defendan kedua, Perwira Habib Bank Bhd ('bank itu') sebagai jaminan untuk hutang. Syarikat itu gagal membayar wang yang patut diberikan kepada kontraktor itu untuk kerja yang telah dibuat oleh kontraktor itu dan akibat itu, dua persetujuan penyelesaian ('persetujuan penyelesaian pertama dan kedua'), kedua-duanya bertarikh 20 Oktober 1986, telah disempurnakan oleh kedua-dua pihak. Di bawah persetujuan penyelesaian pertama, setelah akaun dibuat, syarikat itu telah bersetuju, antara lain, untuk membayar kepada kontraktor itu dan beberapa pemiutang kontraktor itu, beberapa jumlah wang dan untuk memindah milik rumah kediaman yang telah siap, sebagai ganti wang, berjumlah $2.75 juta. Di bawah persetujuan penyelesaian kedua, syarikat itu telah bersetuju memindah milik kepada kontraktor itu dan/atau namaannya, 20 unit rumah kediaman ('20 unit itu') atas mana syarikat itu telah membuat gadaian yang didaftarkan seperti yang sepatutnya di bawah Kanun Tanah Negara 1965 memihak kepada bank itu. Persetujuan penyelesaian kedua di samping itu juga menganggap bahawa kontraktor itu telah menjual kesemua bahan-bahan, mesin, catel dan barang-barang yang ditetapkan di dalamnya kepada syarikat itu, sebagai balasan janji daripada syarikat itu supaya menyiapkan kerja ke atas 20 unit rumah kediaman yang telah ditentukan, dalam tempoh masa yang ditetapkan dan menyerahkan rumah-rumah itu dengan milikan kosong apabila disiapkan. Juga dipersetujukan bahawa syarikat itu akan membayar kontraktor itu ganti rugi jumlah tertentu untuk sebarang kelewatan menyiapkan kerja tersebut. 20 unit itu juga merupakan perkara beberapa perjanjian jual-beli, di mana pembeli adalah beberapa namaan kontraktor itu, dan kesemuanya bukan Bumiputra.

Disebabkan itu, syarikat itu terpaksa berjumpa dengan bank itu untuk mendapat kemudahan yang baru sebanyak $2.3 juta untuk membayar hutang kepada kontraktor itu di bawah persetujuan penyelesaian pertama dan untuk menyiapkan projek perumahan itu. Suatu debentur telah diberi oleh syarikat itu memihak kepada bank itu pada 27 November 1986 ('debentur pertama itu'). Akan tetapi, projek perumahan itu tetap tidak disiapkan kerana kegagalan melantik kontraktor yang baru. Dua lagi debentur telah diberi oleh syarikat itu meihak kepada bank itu.

Bank itu kemudiannya telah menghantar surat tuntutan bertarikh 13 Jun 1987, kepada syarikat itu menuntut supaya jumlah sebanyak $3,374,164.38 dibayar balik dalam tempoh 24 jam daripada tarikh surat itu. Penyampaian surat tuntutan itu hanya dilaksanakan pada 16 Jun 1987 tetapi pada 15 Jun 1987, mengikut kuasa yang diberi dalam debentur pertama, bank itu telah melantik penerima dan pengurus

untuk syarikat itu. Projek perumahan itu kemudiannya telah disiapkan oleh penerima dan pengurus dengan wang pendahuluan dari bank. Kontraktor itu telah memulakan tindakan tindakan terhadap syarikat itu dan bank itu, yang pertama untuk pelaksanaan spesifik kedua-dua persetujuan penyelesaian itu dan yang kedua untuk deklarasi mengelakkan ketiga-tiga debentur itu dan untuk relief berbangkit. A

Telah ditegaskan bahawa debentur itu adalah tidak sah dan sebab itu, pelantikan penerima dan pengurus juga adalah tidak sah. Syarikat itu tidak menafikan liabiliti di bawah kedua-dua persetujuan penyelesaian itu dan telah diarahkan, antara lain, untuk memindahkan kepada kontraktor itu, 20 unit itu bebas daripada bebanan seperti yang dikehendaki di bawah persetujuan penyelesaian kedua dan untuk menebus 20 unit itu yang telah digadaikan kepada bank itu. Jumlah penebusan yang perlu dibayar oleh syarikat itu kepada bank itu telah dikurangkan oleh hakim supaya tidak termasuk faedah yang telah berakru ke atas hutang itu dari tarikh pelantikan penerima dan pengurus itu. B C

Tentang debentur pertama, mahkamah telah memutuskan bahawa ianya adalah tidak sah dari segi undang-undang kerana: (1) resolusi lembaga pengarah syarikat itu yang bertujuan memberi kuasa melaksanakan debentur pertama itu tidak diluluskan dengan betul; (2) pengarah syarikat itu jahil tentang sifat, terma, syarat-syarat, kesan dan implikasi debentur pertama apabila ianya ditandatangani; dan (3) debentur pertama ditandatangani kerana dures ekonomi dari bank itu. Mahkamah memutuskan bahawa ketiga-tiga debentur itu batal dan tidak sah dan bahawa pelantikan penerima dan pengurus adalah juga batal dan tidak sah. Sebagai alternatif, juga diputuskan bahawa walaupun mahkamah tersilap apabila memutuskan bahawa ketiga-tiga debentur batal dan tidak sah, pelantikan penerima dan pengurus adalah salah dari segi undang-undang kerana syarat-syarat terdahulu bagi pelantikan mereka di bawah debentur pertama itu tidak dipatuhi oleh bank itu, iaitu, syarikat itu tidak diberi masa yang diperlukan untuk melunaskan hutang kerana apabila surat tuntutan itu disampaikan kepada syarikat itu, penerima dan pengurus itu telah pun dilantik. Beberapa perintah berbangkit juga telah dibuat terhadap bank itu. D E F G

Penerima dan pengurus itu tidak didakwa atas sifat peribadi mereka dan perintah tidak dibuat terhadap mereka secara peribadi dalam mahkamah terbuka tetapi selepas perintah mahkamah telah diambil, hakim dalam alasan penghakimannya membuat, antara lain, perintah yang berikut terhadap penerima dan pengurus itu secara peribadi: pengembalian yang penuh dan segara bagi (a) kesemua wang yang telah dibayar oleh penerima dan pengurus dari akaun syarikat itu; dan (b) bayaran kepada sebarang pihak, termasuk bayaran kepada diri mereka sendiri sebagai upah atau perbelanjaan dan kepada bank itu. H

Kedua-dua syarikat itu dan bank itu telah mengemukakan rayuan yang berasingan terhadap keputusan mahkamah itu. I

Diputuskan, membenarkan rayuan bank itu sepenuhnya dan sebahagian dari rayuan syarikat itu:

(1) Kontraktor itu tidak mempunyai locus standi untuk mempertahankan guaman itu terhadap bank itu dan, atas alasan ini sahaja, hakim sepatutnya menolak guaman terhadap bank itu.

(2) Bagi kontraktor itu, statusnya dari segi undang-undang adalah sebagai pemiutang tidak bercagar dengan tidak mempunyai hak spesifik dalam harta syarikat itu dan, terutamanya, tidak mempunyai hak dalam sebarang dana yang wujud untuk pemiutang syarikat itu.

(3) Perintah hakim yang mengkehendaki pindah milik 20 rumah kediaman itu oleh syarikat itu kepada kontraktor itu mengikut persetujuan penyelesaian kedua itu, adalah pada am dan hakikatnya suatu pelaksanaan spesifik. Adalah jelas dari segi undang-undang bahawa pelaksanaan spesifik tidak akan diarahkan terhadap sebuah syarikat yang berada dalam kuasa penerima jika pelaksanaan kontrak oleh syarikat itu, akan melibatkan perbelanjaan yang mana penerima mungkin bertanggungan sendiri. Dengan mengambil berat terhadap kedudukan kewangan syarikat itu, mahkamah berpendapat bahawa itu juga adalah suatu bantahan yang sah terhadap arahan supaya 20 rumah kediaman itu dipindah milik.

(4) Pengarah syarikat itu yang telah menandatangani debentur pertama bukanlah orang kampung tetapi ahli perniagaan yang berpelajaran, setiap satu merupakan pengarah syarikat pembangunan pada masa yang material itu. Keputusan hakim bahawa tidak satupun daripada mereka mengetahui apanya debentur, bertentangan dengan keterangan yang ada. Mahkamah berpendapat bahawa pengarah syarikat itu tahu dan bersetuju dengan kandungan debentur pertama itu apabila mereka menandatanganinya dan mereka melakukannya secara suka-rela.

(5) Jika hakim itu betul dalam memutuskan bahawa debentur pertama itu tidak sah, setiap satu daripada ketiga-tiga alasan atas mana beliau membuat sedemikian akan menyebabkan debentur pertama itu *boleh dibatalkan* dan bukan *tidak sah* dan itu pun atas permintaan syarikat itu *sahaja* dan *bukan* kontraktor itu yang bukan pihak dalam debentur pertama itu. Syarikat itu tidak pernah mempersoalkan debentur pertama itu dan pendirian yang diambil oleh peguamcara syarikat itu di hadapan mahkamah menganggap bahawa debentur itu sah dan mengikat dari segi undang-undang, dan oleh itu, sebarang hak yang mungkin dipunyai oleh syarikat itu untuk melakukan sedemikian mestilah dianggap telah diketepikan.

(6) Bank itu tidak terhutang kewajipan berjaga-jaga kepada kontraktor itu. Bank itu tidak pernah campur tangan dalam pelaksanaan persetujuan penyelesaian yang telah diikat oleh kontraktor itu dan syarikat itu. Kegagalan syarikat itu untuk menunaikan kewajipannya di bawah persetujuan penyelesaian itu disebabkan oleh masalah kewangan dan bukan kerana pelaksanaan debentur-debentur memihak kepada bank itu. Bank itu dibebaskan dari pendapat niat jahat terhadap mereka.

(7) Hak bank itu kepada faedah atas jumlah penebusan berhubungan dengan 20 rumah kediaman itu berdasarkan suatu gadaian yang sah di bawah Kanun Tanah Negara 1965 yang disempurnakan oleh syarikat itu lama sebelum debentur itu disempurnakan dan ianya tidak boleh dicabar oleh syarikat itu ataupun kontraktor itu. Hakim mempunyai bidang kuasa, sama ada atas usulnya sendiri ataupun sebaliknya, untuk menulis semula hak dan kewajipan pihak-pihak gadaian itu, yang mana keesahannya tidak pernah dipersoalkan.

(8) Perintah hakim terhadap bank itu supaya faedah dibayar kepada kontraktor itu salah kerana bank itu bukan suatu pihak di dalam kedua-dua persetujuan penyelesaian itu. Atas sebab yang sama, perintah hakim terhadap bank itu supaya ganti rugi dibayar kerana kelewatan dalam menghantar serah rumah-rumah kediaman itu tidak boleh dipertahankan. Tuntutan ganti rugi untuk kelewatan menghantar serah rumah-rumah kediaman itu hanya muncul untuk diputuskan jika, dan apabila, suatu tindakan dibawa oleh pembeli di bawah persetujuan jual-beli yang disempurnakan mengikut kedua-dua persetujuan penyelesaian itu, dan bukan sebaliknya.

(9) Hakim tersilap apabila mengarahkan supaya bank itu membayar balik kepada syarikat itu wang yang telah diterima olehnya selepas pelantikan penerima dan pengurus kerana, pada hakikatnya, syarikat itu bukan sahaja tidak mengalami sebarang kerugian disebabkan oleh bayaran sedemikian, tetapi ianya telah mendapat faedah daripadanya.

(10) Berdasarkan fakta kes ini, tidak terdapat apa-apa yang menunjukkan bahawa penerima dan pengurus telah menerima persetujuan penyelesaian kedua itu terutamanya kerana apabila penerima dan pengurus itu dilantik, harta yang dirujukkan di dalam persetujuan penyelesaian kedua itu telah berpindah kepada syarikat itu.

(11) Adalah undang-undang biasa yang, kecuali dalam keadaan luar biasa yang tidak terdapat di sini, hanya dengan menyebabkan syarikat berkenaan itu untuk melaksanakan kontrak yang wujud pada masa pelantikannya, seseorang penerima dan pengurus tidak menjadikan dirinya bertanggungan sendiri, yang mana akan terjadi di dalam kontrak de novo.

(12) Rukun-rukun keadilan asasi mewajibkan supaya jika kontraktor itu berhak mendapat remedi daripada penerima dan pengurus secara peribadi, plidingnya terpaksa dirangka dengan betul supaya mendedahkan kausa tindakan terhadap mereka secara peribadi dan seterusnya memberi mereka peluang untuk didengar dalam pembelaan mereka. Hanya selepas mahkamah menjadi functus officio hakim telah mengeluarkan dekri dalam alasan penghakimannya bahawa penerima dan pengurus itu terpaksa membayar beberapa jumlah wang yang besar secara peribadi. Adalah nyata bahawa perintah yang dibuat terhadap penerima dan peng-

urus secara peribadi itu adalah pada dasarnya salah dan mesti diketepikan.

(13) Walaupun balasan yang ditetapkan di dalam persetujuan penyelesaian kedua itu tidak dibayar, permindahan pemilikan harta itu masih boleh dilangsungkan kecuali jika fasal perizaban hakmilik digunakan. Mahkamah tidak bersetuju yang mukadimah persetujuan penyelesaian kedua itu mengandungi fasal jenis Romalpa kerana tidak terdapat apa-apa di dalamnya yang menunjukkan bahawa pemilikan harta bekenaan itu hanya akan dipindah milik kepada syarikat itu apabila semua kewajipan yang terkandung di dalamnya telah dipenuhi.

(14) Soalan sama ada surat tuntutan untuk pembayaran balik pinjaman itu adalah salah dari segi undang-undang tidak payah dipertimbangkan tetapi mahkamah pasti memutuskan bahawa walaupun syarikat itu diberi surat tuntutan yang menetapkan tempoh masa yang cukup dan telah disampaikan dengan segera, syarikat itu tidak berkedudukan untuk mematuhinya dan untuk membuat bayaran yang dituntutkan.]

Notes

For cases on functus officio, see 2 *Mallal's Digest* (4th Ed) paras 1005–1006.

For cases on locus standi, see 2 *Mallal's Digest* (4th Ed) paras 1508–1510.

For cases on appointment of receiver, see 3 *Mallal's Digest* (4th Ed) paras 139–141.

For a case on the receiver's personal liability, see 3 *Mallal's Digest* (4th Ed) para 147.

For cases on priorities in receivership, see 3 *Mallal's Digest* (4th Ed) paras 144–146.

Cases referred to

1 *Pao On & Ors v Lau Yiu Long & Ors* [1979] 3 All ER 65; [1980] AC 614; [1979] 3 WLR 435 (refd)

2 *Alec Lobb (Garages) Ltd & Ors v Total Oil GB Ltd* [1983] 1 All ER 944; [1983] 1 WLR 87 (refd)

3 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (refd)

4 *Hawkesbury Development Co Ltd v Landmark Financial Pty Ltd & Ors* [1969] 2 NSWLR 782 (refd)

5 *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 (refd)

6 *Mister Broadloom Cpn (1968) Ltd v Bank of Montreal et al* (1979) 25 OR (2d) 198 (refd)

7 *George Barker (Transport) Ltd v Eynon* [1974] 1 All ER 900; [1974] 1 WLR 462 (distd)

8 *William H Parsons & Ors v Sovereign Bank of Canada* [1913] AC 160 (refd)

9 *Rother Iron Works v Canterbury Precision Engineers* [1973] 1 All ER 394; [1974] QB 1; [1973] 3 WLR 281 (refd)
10 *Lim Foo Yong & Sons Realty Sdn Bhd v Datuk Eric Taylor* [1990] 1 MLJ 168 (folld)
11 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552; [1976] 1 WLR 676 (refd)
12 *Macleod v Alexander Sutherland Ltd* (1977) SLT (notes) 44 (refd)
13 *Freevale Ltd v Metrostore (Holdings) Ltd & Anor* [1984] Ch 199; [1984] 1 All ER 495; [1984] 2 WLR 496 (refd)
14 *Airlines Airspares Ltd v Handley Page Ltd* [1970] 1 Ch 193; [1970] 1 All ER 29; [1970] 2 WLR 163 (refd)

Appeal from: Civil Suit No 22-40-1987 (High Court, Malacca)

K Anantham (*Skrine & Co*) for the appellant in Civil Appeal No 359/91.
N Nagarajah (*CS Lim* with him) (*Shook Lin & Bok*) for the appellant in Civil Appeal No 368/91.
Haji Abdul Kariem Bashir and *B Thangaraj* (*Bashir & Co*) for the respondent in both civil appeals.
Benjamin Dawson (watching brief) for Nik Hussain & Partners.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): In the High Court at Malacca, the plaintiff, a building contractor ('the contractor'), had sued the first defendant, a developer ('the developer'), and the second defendant, Perwira Habib Bank Bhd ('the Bank'), the former for specific performance of two settlement agreements in writing and the latter for a declaration for avoidance of three debentures and for consequential reliefs.

The essential facts underlying the suit are taken, in substance, from the statement of agreed facts and may be stated thuswise.

By an agreement in writing dated 11 May 1982 ('the principal agreement') entered into by the contractor of the one part and the developer of the other part, the contractor had, for the consideration stated therein, agreed to construct and complete for the developer, a proposed housing project on certain land comprised in Lot No 2051, Mukim Bemban, District of Jasin, the property of the developer ('the land').

The developer having defaulted on payment of moneys due to the contractor in respect of works already done by the contractor, the contractor requested to be released and discharged from further performance of the principal agreement and that accounts be taken between the parties, and the developer agreed. Accordingly, two settlement agreements ('the first and the second settlement agreements'), both dated 20 October 1986, were executed by the contractor and the developer.

Under the first settlement agreement, upon the taking of accounts, the developer had agreed to pay to the contractor, and several creditors of the contractor, various sums of money and to transfer completed dwelling houses, in lieu of cash, in the aggregate value of $2.75m. The only sums of

money payable to the contractor were $710,000 and $215, 000, though the time for payment was unspecified.

More particularly, under the first settlement agreement, the developer had agreed to transfer 20 units of dwelling houses to the creditors of the contractor, in satisfaction of debts of $801,591.32 and $108,000 due from the contractor to these creditors. This transfer was, however, conditional upon payment of various sums of money by these creditors to the developer.

We note, in passing, that a sum of $771,160.06 payable by the developer to Hock Chuan Seng Realty Sdn Bhd, a creditor of the contractor, was already the subject matter of a judgment in the Malacca High Court in Civil Suit No 428/85 against the developer in respect of which there is still owing a sum of $446,000.

Under the second settlement agreement, the developer had agreed to transfer to the contractor and/or its nominees, 20 units of dwelling houses over which the developer had created a charge duly registered under the National Land Code 1965 in favour of the bank.

More particularly, under the second settlement agreement, it had further been agreed between the contractor and the developer, that the contractor was deemed to have sold all materials, plants, chattels and effects specified in the First Schedule therefore to the developer, the consideration for the same being the developer's promise to complete the works on 20 intermediate units of single-storey three-bedroomed terrace dwelling houses specified in the Second Schedule thereto on or before 31 December 1986, and to deliver vacant possession thereof to the contractor upon completion. It had also been agreed that the developer would pay to the contractor the sum of $5 per day for any delay in the completion of works for each unit of the dwelling houses, by way of liquidated damages.

It is pertinent to note that the dwelling houses referred to in the second settlement agreement were subject to a charge duly registered under the National Land Code 1965 in favour of the bank and were also the subject matter of various sale and purchase agreements, the purchasers under which were various nominees of the contractor, all of whom were non-Bumiputras.

It was said that these sale and purchase agreements might also be subject to restriction against transfer generally and transfer to non-Bumiputras in particular. Consequently, it was agreed that the developer was to pay to the contractor $54,000 within six months of the date of the rejection of any application for transfer.

However, the developer had not paid the redemption sum in respect of any of the lots referred to in the first and the second settlement agreements, nor had the required consent been obtained for the transfer of any of the dwelling houses, the subject matter of the sale and purchase agreements, notwithstanding that no such transfer was possible without such consent.

In the result, the developer was compelled to have recourse to the bank for fresh facilities of $2.3m ('standby facility') to settle its debt to the contractor under the first settlement agreement and to complete the housing project. At that point of time, the developer already owed the bank

$2.3m as security for which, as we have said, the bank held a charge over the land upon which the housing project stood. A

Then followed discussions between the bank and the developer for the standby facility which, however, did not result in any concluded agreement because the developer could not fulfill the condition imposed by the bank that it provide an undertaking in writing from Hock Chuan Seng Realty Sdn Bhd that it would not sue the developer and also waive its entitlement to damages. B

Perhaps, not surprisingly, the developer defaulted in the payment of the sum of $710,953.69 to the contractor under the first settlement agreement which led to the solicitors for the contractor serving upon the developer a letter before action demanding payment thereof. C

The next event worthy of note was the creation of a debenture by the developer in favour of the bank on 27 November 1986 ('the first debenture'), the validity of which was an issue of central importance in the court below and to which we shall have to give serious consideration, when examining the grounds of judgment of the trial judge (Haji Mokhtar bin Haji Sidin J) and the attack thereon by counsel for the developer and the bank. D

Now, for some months since December 1986, attempts had been made by the developer and the bank to appoint a new contractor to complete the project on which work had ground to a halt, but to no avail; apparently, because the terms demanded by the contractor concerned were unacceptable to the bank. E

In the upshot, the bank, by a notice in writing dated 13 June 1987 addressed to the developer and served on it, apparently, on 16 June 1987, demanded repayment of the sum of $3,374,164.38 within 24 hours from the date of the notice but, understandably, this was not complied with.

On 15 June 1987, pursuant to the powers conferred upon it under the first debenture, the bank appointed receivers and managers. On the next day, the receivers and managers took possession of the developer's premises. F

The validity of the appointment of the receivers and managers by the bank was also thought by the judge to be an issue of central importance in the case, and we shall therefore have to return to this question when we come to consider the grounds of judgment in detail. G

Now, upon the appointment of the receivers and managers, one Mustapha bin Ali (PW1) had been employed by the receivers and managers as the general manager of the developer with effect from 15 June 1987, and functioned as such during most of the receivership of the developer.

It is also worthy of note that following their appointment, the receivers and managers had completed what was said to be the abandoned project in August 1989 at a cost of $5.4m with the assistance of the bank which had advanced some $3.4m for this purpose. H

It was alleged by counsel for the developer, and not challenged by counsel for the bank or the contractor, that at the trial, the financial position of the developer vis-a-vis the bank and the purchasers of the dwelling houses was as follows: I

A (a) moneys in the hands of the receivers and managers — $1.1m
(b) moneys due to the bank from the developer — $5m
(c) moneys due to the bank pursuant to borrowings of the receivers and managers — $3.3m
(d) moneys still to be collected from purchasers — $3.3m
B (e) proceeds from foreclosing the contra lots — $2.3m

The moneys due from the developer to other unsecured creditors presently stands in the vicinity of $3m excluding LAD claims.

To resume the narrative of events, two other debentures were executed by the developer in favour of the bank; that is to say, a debenture dated 22 January 1987 ('the second debenture') and yet another debenture dated C 13 June 1987 ('the third debenture') but, for reasons which will become apparent later in this judgment, we do not consider them material to the issues arising for decision in this case.

We must now mention the contractor's claims against the developer and the bank and then proceed to state the judge's reasons for allowing them.

D The contractor's claims against the developer were, of course, based upon the two settlement agreements upon which we have briefly touched at the outset. In the court below, the developer did not attempt to deny liability under the two settlement agreements. Accordingly, in his grounds of judgment, the judge ordered that the contractor do recover from the developer the sum of $2.75m subject to those deductions as agreed by the E parties in the first settlement agreement and interest at the rate of 8% pa from the data thereof until 17 June 1987. The contractor and the developer were further ordered to comply with the terms and conditions of the first settlement agreement.

The judge made the following further orders, regarding this part of the F case:

(1) that the developer was to transfer to the contractor 20 intermediate units of single-storey three-bedroomed terrace houses free from encumbrances as required under the second settlement agreement;
(2) the developer was to pay the bank the amounts owing under the charge G in respect of those dwelling houses as on 14 June 1987 in order to redeem the same;
(3) the bank, however, was not to be entitled to impose any interest or other charges in respect of those dwelling houses after 14 June 1987;
(4) the developer was to be entitled to use the fund in its account to redeem those dwelling houses;
H (5) in default of the developer or the bank executing the necessary transfers, the senior assistant registrar was to execute the same on behalf of the developer; in which event, the bank was to release all the issue documents of title to those dwelling houses to the senior assistant registrar;
I (6) the bank was to be entitled to debit the account of the developer for the charges in respect of those dwelling houses after the contractor's claim had been settled; and

(7) lastly, the judge ordered the developer to pay to the contractor damages for delay at the rate of $5 per day for each unit of the dwelling houses from 31 December 1986 to 17 June 1987.

In making the orders aforesaid, the judge had pointed out, quite correctly, that the claims of the contractor against the developer were based upon the two settlement agreements, the first being for the payment of compensation, debts and arrears due to the contractor and the second being for the payment of assets, machineries, vehicles and supplies belonging to the contractor but taken over by the developer, when both the parties had agreed to release the contractor from its obligations under the principal agreement.

The judge had also pointed out that counsel for the receivers and managers had conceded that they were bound by the terms of the two settlement agreements and that the developer — meaning no doubt the receivers and managers — was willing to honour its obligations thereunder but did not possess the wherewithal to do so.

It was for the foregoing reasons that the judge made the orders aforesaid against the developer in favour of the contractor.

We now turn to the orders made by the judge against the receivers and managers and his reasons for doing so.

In his grounds of judgment dated 19 November 1991, although not in the extracted order of court dated 6 September 1991, which had been extracted before the grounds of judgment were signed and delivered, the judge had made the following orders against the receivers and managers *personally* in favour of the contractor, even though they had not been sued in their personal capacity:

(1) accounts and enquiries by the senior assistant registrar to determine all moneys paid by the receivers and managers from the developer's account;
(2) all moneys paid by the receivers and managers from the account of the developer must be restored to the account of the developer in full, immediately;
(3) where money had been paid by the receivers and managers to any party, including payments to themselves as fees or expenses and to the bank, the same had to be stored to the developer; and
(4) where money had been paid by the receivers and managers to any party and had not been refunded by such party, the receivers and managers had to make good those sums of money to the last cent.

In order to understand the reasons why the judge made the orders aforesaid against the receivers and managers personally, it is necessary to consider the contractor's claims against the bank and his reasons for allowing them. In doing so, some repetition will be inevitable.

The judge observed that it was the debentures which caused the problems which led to the suit; in particular, the appointment of the receivers and managers 'on the initiative of the bank' and their subsequent actions. He pointed out that it was the contractor's claim that the debentures were void and so the appointment of the receivers and managers (under the first

A debenture) was also void, with the result that 'payments made by them to the bank were under a misconception of priority and so wrong in law'.

The judge upheld these claims and went on to hold that 'the contractor's claims had priority over all other'. The judge noted that the bank 'was brought into the suit' because it was instrumental in the appointment of the receivers and managers. He also noted that it was common ground that B after the appointment of the receivers and managers, they had paid out of the developer's fund substantial sums of money to the developer and to the bank.

Accordingly, the judge considered that the validity of the appointment of the receivers and managers by the bank had a bearing upon the issues C arising for decision in the suit. He noted that the validity of the appointment of the receivers and managers depended, first of all, on the validity of the debentures or, more correctly, upon the validity of the first debenture.

Explaining more fully why the contractor was entitled to succeed against the bank, the judge began by pointing out that the first debenture had been created after the two settlement agreements had been executed by the D contractor and the developer. He then went on to find that the rights of the contractor under the two settlement agreements had been adversely affected by the three debentures and the bank had, at the material time, knowledge of the two settlement agreements.

He reasoned that the bank well knew that the sums of money payable by E the developer to the contractor under the two settlement agreements were quite substantial, so that the creation of the three debentures would hinder payment to the contractor, yet the bank proceeded to procure the execution of the three debentures. He went on to find that the acts of the receivers and managers under the debentures had, in fact, prevented payment to the contractor under the two settlement agreements, and, for that reason, the F contractor had the right to seek the remedies against the bank which it was praying for.

More particularly, the judge made the following orders in favour of the contractor against the bank:

(1) a declaration that all three debentures were null and void;
G (2) a declaration that the appointment of the receivers and managers under the three debentures was also null and void;
(3) payments of all moneys received by the bank after 15 June 1987 from various parties (presumably purchasers) and intended for the developer;
H (4) damages for delay at the rate of $5 per day for each dwelling house from 15 June 1987 until payment in full;
(5) interest at the rate of 8%pa on the sum of $2.75m from 15 June 1987 until payment in full; and
(6) a declaration that the bank was not entitled to charge interest or add other charges after 14 June 1987 in respect of those dwelling houses I specified in the second settlement agreement.

In the event, both the developer and the bank lodged separate appeals against the judgment of the judge but, for the sake of brevity and convenience, we heard them together.

It would be more convenient if we first considered the bank's appeal before considering the developer's appeal. First of all, we shall consider the validity of the first debenture, which we would observe, is the only debenture relevant to the issues which arise for decision.

In the words of the judge, the background facts which led to the creation of the first debenture, were these:

> There is no dispute that at that time the first defendant (the developer) experienced extreme difficulties to complete the housing project. The first defendant (the developer) had released its contractor, the plaintiff, (the contractor) from its obligations to complete the housing project under the two settlement agreements. The plaintiff (the contractor) was pressured by their creditors to pay the amounts due to them. The first defendant (the developer) then turned to the second defendant (the bank) who had been their financial backer from the beginning. The first defendant (the developer) requested the second defendant (the bank) for a standby facility of $2.3m to settle some of its debts and to complete the housing project. There is no denial that at that moment the first defendant (the developer) still owed the second defendant (the bank) a sum of approximately $3.34m which had been secured by charges on those lands where the housing project had been developed. No evidence had been adduced to show that security given was not sufficient to cover that amount. It was not disputed that negotiations took place on several occasions between the directors of the first defendant (the developer) and the officers of the second defendant (the bank). The first defendant (the developer) submitted a project paper and recommended the name of several contractors to replace the plaintiff (the contractor). Those negotiations were an ongoing process. PW1 and PW2 who were the directors of the first defendant (the developer) and the persons involved in the negotiations on behalf of the first defendant (the developer) were under the impression that their request for the standby facility was being considered favourably by the officers of the second defendant (the bank) since there was no rejection by the second defendant (the bank).
>
> Thus, when Messrs Nik Hussain and Partners called both PW1 and PW2 to its office, both of them readily went, in the expectation that their request for the standby facility had been approved by the second defendant (the bank). Both PW1 and PW2 were told to bring along the necessary resolution and were willing to execute any documents so as to enable them to obtain the $2.3m standby facility on behalf of the first defendant (the developer) in order to complete the housing project.

Now, at the trial, the contractor had called as its witnesses, Mustapha bin Ali (PW1) and Haji Mohd Ramli bin Sumat (PW2) who were, at the material time, directors of the developer, and who testified as to the circumstances attending the execution of the first debenture.

Touching on the events which transpired in the office of the bank's solicitors at and about the time of the execution of the first debenture, the judge said this:

> Mr Choo Kong Chee of Messrs Nik Hussain and Partners, the solicitor who prepared the debenture, admitted in his evidence that he substituted the resolution brought by both PW1 and PW2. He stated that the resolution brought by PW1 and PW2 was not acceptable to the second defendant and because of that he prepared another resolution which he asked both PW1 and PW2 to sign. Due to the desperate situation the first defendant through PW1 and PW2 signed the resolution.

The judge found that the first debenture was not valid in law, on three separate grounds, none of which were pleaded by the contractor, namely:

(1) the resolution of the developer's board purporting to authorize the execution of the first debenture was was not properly passed;
(2) when PW1 and PW2 signed the first debenture, they did not know its 'nature, terms, conditions, effects and implications' and 'were virtually forced to sign it'; and
(3) PW1 and PW2 had signed the first debenture as a result of economic duress within the meaning of *Pao On & Ors v Lau Yiu Long & Ors*[1] and *Alec Lobb (Garages) Ltd & Ors v Total Oil GB Ltd*,[2] exerted by the bank upon them.

In consequence, the judge expressed his conclusions in this way:

(1) whatever action had been taken by the bank pursuant to the first debenture, including the appointment of the receivers and managers, was null and void;
(2) so whatever moneys had been paid by the receivers and managers to any party, including payments to the bank and payments made to the receivers and managers as fees and expenses, had to be refunded to the developer;
(3) where money had been paid by the receivers and managers to any party and had not been refunded by such party, the receivers and managers had to make good those amounts to the last cent;
(4) the moneys due to the developer under (2) and (3) above, had to be deposited into the developer's account to be used to settle the contractor's claim 'which was to have priority' over all other claims;
(5) the bank was to pay to the contractor damages for loss suffered by the latter from the time the receivers and managers were first appointed; and
(6) lastly (as regards the first debenture), the receivers and managers were to immediately furnish accounts showing all moneys paid out by them from the developer's account; and
(7) order for the taking of accounts and enquiries before the senior assistant registrar.

By way of alternative, the judge went on to hold that even if he were wrong in declaring the three debentures null and void, the appointment of the receivers and managers was bad in law because three separate conditions precedent for their appointment under the first debenture had not been complied with by the bank, namely, the requirements of cl 7.5 which, inter alia, provides:

> At any time after the bank shall have demanded payment of any money hereby secured the bank may by writing appoint any person or persons to be receivers and/or managers of the premises hereby charged or any part thereof and remove any receivers and/or managers so appointed and appoint another or others in his or their places and ... .

The letter of demand dated 13 June 1987 addressed to the developer from the bank said this:

> Your Bridging Loan II outstanding as at 31 May 1987 is $1,944,207.06 and your Bridging Loan III outstanding as at 31 May 1987 is $1,429,957.32 with further interest at the rate of 12.75% per annum on monthly rest or at other *interest rate as determined by the bank until full settlement.*
>
> We hereby demand repayment of the total sum of $3,374,164.38 *within twenty four (24) hours from date hereof together with* further interest as of 1 June 1987, failing which we will proceed to take legal action to recover the same. (Emphasis supplied.)

The judge found that the letter of demand reached the developer's office as late as 16 June 1987, by which time the receivers and managers had already been appointed; this, he said, was not even giving the developers the 24 hours stipulated in the letter of demand to pay up. He therefore concluded that the letter of demand was bad in law for non-compliance with the requirements of the debenture. So, the appointment of the receivers and managers was also bad in law.

But, the judge did not stop there for he went on to find that 'it was the intention of the bank not to give the developer any opportunity to raise the necessary funds' and so he considered it was 'clear that there was bad faith on the part of the bank'.

The judge failed to recognize that if he were correct in holding that the first debenture was invalid, then each of the three grounds upon which he did so would have rendered the first debenture not *void* but *voidable* and that too at the instance of the developer *only* and *not* the contractor who was not a party to the first debenture. We would add that at no time, right down to the trial and before us, did the developer ever seek to impugn the first debenture and, indeed, the stance adopted by counsel for the developer before us assumed that the debenture was valid and binding in law, so that any right that the developer might have had to do so must be taken to have been waived.

Seventy-seven years ago, Viscount Haldane LC speaking for the House of Lords in the celebrated case of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*[3] said this at p 853:

> My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request.

Even more to the point as regards this part of the case, is *Hawkesbury Development Co Ltd v Landmark Financial Pty Ltd & Ors*[4] where the facts as summarized in the headnote were these:

> D1, a company incorporated under the Companies Act 1936, borrowed money from D2 on the security of a debenture jointly with two associated companies. Alone it borrowed more on the security of a second debenture. P purchased all the shares in D1 and lent it money without security. Default was made under the debentures and D3, on behalf of D2, entered into possession of D1 as receiver-

A manager. P sought to have the debentures declared void and to have D3 restrained from continuing to act as receiver-manager on the grounds that the debentures had been invalidly executed and, additionally as to the first debenture, that the grant of the debenture was ultra vires D1. D1 filed a submitting appearance but D2 and D3 contended that the suit was wrongly constituted and that D1 and not P should have been plaintiff.

B In the course of his judgment, Street J referred to the rule in *Foss v Harbottle*[5] in these terms:

> I have been referred during the course of argument to a great many authorities and learned writings upon the principle known as the rule in *Foss v Harbottle.* The classic statement of that rule is in the words of Lord Davey in *Burland v* C *Earle* [1902] AC 83 at pp 93–94: 'It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal D principles are laid down in the well-known case of *Foss v Harbottle.*

His Lordship then proceeded to demonstrate how the rule in *Foss v Harbottle*[5] applied to the facts of the case before him at p 788, in these words:

> In challenging the two debentures given by Landmark Finance, Hawkesbury is E asserting a right or entitlement in favour of Landmark Finance as against UDC and Smith. The relief sought falls within the general description used by Lord Davey, '... in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company ...'. It is the company's cause of action against UDC and Smith that Hawkesbury seeks to litigate.

Next, his Lordship considered whether, given the facts of the case before F him, a departure from the rule in *Foss v Harbottle*[5] could be justified on the basis that justice so required. This is how he introduced the issue at p 790:

> The other suggested basis for justice requiring a departure from the rule is that Landmark Finance is in the hands of a receiver and manager, and is accordingly unable to bring these proceedings in its own name.

G His Lordship then made the following observations upon the office of receiver and manager, the extent of his powers over the affairs of the company, particularly the powers of the directors to institute proceedings on behalf of the company and to retain a solicitor:

> There are directors of Landmark Finance currently in office. Indeed, it was the H managing director, RJ Blackburn, who gave instructions for the submitting appearance to be filed on behalf of Landmark Finance. Receivership and management may well dominate exclusively a company's affairs in its dealings and relations with the outside world. But it does not permeate the company's internal domestic structure. That structure continues to exist notwithstanding that the directors no longer have authority to exercise their ordinary business-manage- I ment functions. A valid receivership and management will ordinarily supersede, but not destroy, the company's own organs through which it conducts its affairs. The capacity of those organs to function bears a direct inverse relationship to the validity and scope of the receivership and management.

> If the present attack on the debenture be well founded, then the interference by Smith in the affairs of Landmark Finance is wrongful, and Landmark Finance both has the power to bring and ought to bring the challenge in its own name.
>
> If the case is well founded, then the directors undoubtedly have the capacity and power to bring it in the name of Landmark Finance. But even if the attack on the debentures is not wellfounded, and ultimately fails, I am still of the view that the directors of Landmark Finance have the capacity, notwithstanding the apparently all-embracing terms of the debenture and the appointment of the receiver and manager, to cause proceedings to be instituted in the company's name challenging the debenture. It would be strange to contemplate a debenture, or, for that matter, any other engagement, being permitted to stand on such a high plane as to be immune from challenge by the party entering into it.

And further down, in the same paragraph, he said this:

> Its validity is perhaps well demonstrated by postulating a situation in which a debenture is invalid, and inquiring by whom the proceedings to challenge it are to be instituted. It borders on the absurd to contemplate the receiver and manager having the power to institute proceedings in the name of the company, challenging the very debenture to which he owes his office; and if the power does not reside in him to use the company's name to challenge it, it would seem that it must remain with those who control whatever residual aspects of the company's affairs are not caught by the debenture; that is to say, it must remain with the directors.

In the circumstances, having regard to the principles enunciated by Street J, we are satisfied that the contractor had no locus standi to maintain the suit against the bank and, on this ground, alone, the judge ought to have dismissed the suit against the bank, and we so hold.

Accordingly, it would be unnecessary for us to consider the further submission of counsel on the question whether the letter of demand for repayment of the loan was bad in law as the period stated therein was insufficient or that, in any case, it had been served upon the developer only after the receivers and managers had been appointed and therefore too late.

But, had it been necessary to do so, we would have held that in the circumstances, the attempt to impugn the letter of demand would have been repelled by the reply that even if the developer had been given a letter of demand stipulating a period for payment of sufficient length and been promptly served, the developer was in no position to have complied therewith by making the payment demanded.

More particularly, the background facts that led to the bank appointing the receivers and managers should not be lost sight of, namely, that when the two settlement agreements were signed, the developer had only some $37,000 in its kitty, with no access to funds other than from the bank, to which it was already indebted to the tune of some $3.4m, and that the contractor well knew about these facts.

Such being the position, even the prompt service of a letter of demand of ample duration would have availed the developer nothing.

We are thus reminded of the principles enunciated by Linden J in the Canadian case of *Mister Broadloom Cpn (1968) Ltd v Bank of Montreal et al*,[6] an action for damages for failure of a creditor to give reasonable time for the

repayment of a demand loan. In that case, a creditor reasonably, though mistakenly, apprehending a high risk of default, demanded payment of $600,000 to be made 'now', and the debtor, who though able to raise the money within a few days, failed to explain this ability or ask for a specific time for payment, the creditor was held not to have acted unreasonably in assuming that the debtor was unwilling or unable to pay and in exercising its rights under a debenture to appoint a receiver.

Linden J, who tried the case, recognized that the bank was obliged to give the debtor some reasonable time to repay the loan even though the loan was a demand loan. He went on to hold that in assessing what length of time was reasonable in a particular fact situation various factors must be analyzed, namely:

(1) the amount of the loan;
(2) the risk to the creditor of losing his money or the security;
(3) the length of the relationship between the creditor and the debtor;
(4) the character and reputation of the debtor;
(5) the potential ability of the debtor to raise the money required in a short period;
(6) the circumstances surrounding the demand for payment; and
(7) any other relevant factors.

We must next consider the submission of counsel for the contractor based upon the case of *George Barker (Transport) Ltd v Eynon*[7] which it was said supported the proposition that the rights of the bank as debenture holder were subject to the rights of the contractor under the two settlement agreements which were acquired before the appointment of the receivers and managers.

In *George Barker*'s case,[7] the plaintiffs were transport contractors, who, under a contract with the company, were engaged to deliver certain goods. The contract provided that the plaintiffs were, in certain circumstances, to have a general lien on the goods of the company held by them. A receiver was appointed under a floating charge of the company's assets, and subsequently a lien arose under the contract. The Court of Appeal held that the lien had priority over the charge and this was so even if the contract confers an express power of sale on the holder of the lien in addition to the mere right of retention which he has at common law.

It would appear that this decision goes a long way to impairing the security afforded by a floating charge. However, the basis on which Stamp LJ put the above conclusion is significant. His Lordship said (at p 910):

> In my judgment, counsel for the plaintiffs was right in his contention that the assignment to the company brought about by the appointment of the receivers was subject to the rights already given by the company to other persons under ordinary trading contracts. As agent, the carriers could have withheld the goods against payment, and, in my judgment, the debenture holder as assignee from the company can be in no better position.

For that proposition, Stamp LJ relied on *William H Parsons & Ors v Sovereign Bank of Canada*[8] and the *Rother Iron Works* case.[9]

Clearly, therefore, *George Barker*'s case[7] is readily distinguishable, for unlike the present case, the court there was concerned with a contractual lien and recognition of the assignment which was a prerequisite to the enforcement of the contract by the receivers and managers.

We would add that in principle a company may choose to pay any of its creditors as it deems fit unless it is deemed a preference payment upon it being wound up.

As for the contractor, its status in law was that of an unsecured creditor with no specific right in the developer's property and, in particular, no right in any fund standing to the credit of the developer.

We are therefore of the view that the judge fell into error in ordering the bank to refund to the developer all moneys received by it after the appointment of the receivers and managers for, in doing so, he overlooked the following plain facts:

(a) at the time of the appointment of the receivers and managers, the only cash reserve of the developer was the sum of $36,049 which sum still remains with the developer;
(b) the bulk of the moneys paid by the developer to the bank were the proceeds of sale of dwelling houses the construction of which had been completed by the receivers and managers with the aid of overdraft facilities provided by the bank; and
(c) that the refund of all moneys received by the bank to the developer would be tantamount to conferring upon the developer the benefit of a complete housing project and the proceeds of sale without the obligation of paying for the cost of the same or the redemption sums for the dwelling houses which were discharged by such payment.

Had the judge taken into account the plain facts hereinbefore mentioned, he would have arrived at the inevitable conclusion that, in reality, not only had the developer not suffered any loss by reason of the payments received by the bank after the appointment of the receivers and managers, but that it had in fact benefitted thereby.

Moreover, the bank owed no duty of care to the contractor. The bank certainly never interfered in the performance of the settlement agreements entered into by the contractor and the developer.

Manifestly, the developer's failure to fulfill its obligations under the settlement agreements was due to its financial problems and not because of its execution of the debentures in favour of the bank. The truth of the matter was that the developer was already in breach of the settlement agreements well before the execution of the debentures. Furthermore, the execution of the debentures did not in any way prevent the developer from performing its obligations under the two settlement agreements. We must therefore absolve the bank of the finding of bad faith against it.

It is convenient if, at this stage, we considered the finding of the judge that there was collusion or conspiracy or fraud on the part of the developer and the bank.

That finding does seem to us to fly in the face of the evidence having regard to the testimony of Mustapha bin Ali, one of the two directors of the

A developer who had executed the first debenture, who was called by the contractor, and who categorically stated that there was no collusion or conspiracy as alleged.

There was also the evidence that following the appointment of the receivers and managers, further financial support had been granted by the bank to the developer (under receivership) to enable it to complete the B housing project, which went to negative the collusion or conspiracy alleged or at all.

We must next examine the adverse finding of the judge against the solicitor for the bank, Mr Choo Kong Chee, who prepared and attested the first debenture.

C The judge found that the document described as a resolution of the developer authorizing the execution of the first debenture 'was not properly passed'. He noted that the solicitor had himself admitted that that resolution had, upon the bank's instructions, been substituted for another resolution brought in by Mustapha bin Ali and Haji Mohd Ramli bin Sumat, and furthermore, that no meeting of the developer's board had in fact been D convened to pass the resolution concerned. And also, that contrary to what had been certified by the secretary of the developer, neither Mustapha bin Ali nor Haji Mohd Ramli bin Sumat had signed the resolution in the presence of the secretary although presumably this was a requirement of the articles of association of the developer.

E The judge further found that prior to the execution of the first debenture, the solicitor had not explained, in detail, the contents thereof to Mustapha bin Ali and Haji Mohd Ramli bin Sumat who had claimed that they did not know what a debenture was. In consequence, the judge found that both these individuals did not know 'the nature, terms, conditions, effect and implications' of the document they were signing.

F Indeed, the judge found that the first debenture was 'shoved down the throats' of Mustapha bin Ali and Haji Mohd Ramli bin Sumat, that they were 'virtually forced to sign the same', and that they had been induced by 'economic duress' exerted by the bank, through its solicitor, into so signing — a fact which was never pleaded by the contractor.

G In this regard the judge found that the solicitor had failed to explain either to Mustapha bin Ali or Haji Mohd Ramli bin Sumat, what the effect was of their signing the first debenture and that this was 'tantamount to misrepresentation' by the solicitor. Indeed, he went so far as to brand the solicitor as 'the main culprit' in the transaction.

For the reasons stated, the judge concluded that the first debenture was H null and void, and so, whatever actions had been taken by the receivers and managers pursuant to it, were also invalid.

To recapitulate, we have already found that:

(1) it was not open to the contractor who was a stranger to the debentures, to impugn them;

I (2) none of the grounds upon which the judge found the first debenture to be invalid had been pleaded by the contractor;

(3) the claim that neither Mustapha bin Ali nor Haji Mohd Ramli bin Sumat knew or approved of the first debenture or the further claim that

they had been forced into signing it, was also never pleaded by the contractor. A

That being so, strictly speaking, it would be unnecessary for us to examine the merits of the judge's finding regarding this part of the case. However, as the judge had passed serious strictures in regard to the conduct of the solicitor, who is an officer of the court, which, if correct, would amount to professional misconduct, it behoves us, to examine the judge's finding to see if it can withstand scrutiny. B

In the first place, we note that neither Mustapha bin Ali nor Haji Mohd Ramli bin Sumat were country yokels, but educated businessmen, each being a director of a development company, at the material time.

In the second place, the finding of the judge, that neither Mustapha bin Ali nor Haji Mohd Ramli bin Sumat knew what a debenture was, does seem to fly in the face of the evidence since, even prior to the execution of the first debenture, Mustapa bin Abidin (PW1) had written a letter dated 9 December 1986 to the bank's managers at Kuala Lumpur and Malacca wherein he had said, inter alia, this: C D

> Debenture agreement
>
> As per your proposal on p 3 under 'Security' para 3, you have mentioned that the company is to execute a fresh debenture for $5,450,000 however the company has already executed a debenture for $3.3m. We suggest that a supplementary debenture be made for the difference of $2.15m. E

In our view, Mustapha bin Ali and Haji Mohd Ramli bin Sumat knew and approved of the contents of the first debenture when they signed it and they did so voluntarily.

In the circumstances, we consider that the strictures passed by the judge against the solicitor, cannot be supported having regard to the unchallenged evidence. F

We hasten to add, however, that whether or not the solicitor was careless in substituting the document described as a resolution of the developer authorizing the execution of the first debenture for the one which had been handed to him by Mustapha bin Ali and Haji Mohd Ramli bin Sumat, in the manner he had done, is a question upon which we express no opinion, as it is unnecessary to do so for purposes of the present appeal. G

We need hardly say that the bank's right to interest on the redemption sum in respect of the 20 dwelling houses was based upon a valid charge under the National Land Code 1965 executed by the developer well before the debentures were executed and which was not open to challenge either by the developer or the contractor. H

Thus, the judge had no jurisdiction, whether on his own motion or otherwise to, as it were, rewrite the rights and obligations of the parties to the charge, the validity of which was never in question. Nevertheless, this is precisely what he did when he decreed reduction of the redemption sum payable by the developer under the charge in favour of the bank so as to exclude interest accruing on the debt from the date of the appointment of the receivers and managers. I

A Similarly, the order made by the judge against the bank for the payment of interest to the contractor was plainly wrong because the bank was not a party to either of the settlement agreements.

For the same reason, the order made by the judge against the bank for the payment of damages for delay in the delivery of the dwelling houses is unsustainable. A claim for damages for delay in the delivery of dwelling houses would only arise for decision if, and when, an action is brought by purchasers under sale and purchase agreements executed pursuant to the two settlement agreements but not otherwise.

It follows that the orders made by the judge against the bank for:

C (a) the reduction of the redemption sum payable by the developer under the charge in favour of the bank so as to exclude interest accruing on the loan secured by the charge;
(b) the payment to the contractor of interest;
(c) the payment to the contractor of damages for delay in the delivery of the dwelling houses; and
D (d) the refund to the developer of all moneys received by the bank after the appointment of the receivers and managers are hereby set aside.

We must next turn to the orders made by the judge against the receivers and managers personally which we have reproduced above.

We have already pointed out that the receivers and managers were never E sued in their personal capacity and also that nowhere in the orders pronounced in open court, as reflected in the order extracted, had any orders been made against the receivers and managers personally. Yet, in his grounds of judgment, signed and delivered long after the order of court had been extracted, the judge proceeded to make the orders aforesaid against the receivers and managers personally.

F It goes without saying that the rules of natural justice demanded that if the contractor were to be entitled to remedies against the receivers and managers personally, its pleadings had to be properly framed so as to disclose a cause of action against them personally and thereby affording them the opportunity of being heard in their defence.

G In the event, it was only *after* the court was functus officio that the judge had decreed by his grounds of judgment that the receivers and managers were to personally make payment of substantial sums of money.

It is obvious therefore that the orders made against the receivers and managers personally were fundamentally bad and must be set aside (see *Lim Foo Yong & Sons Realty Sdn Bhd v Datuk Eric Taylor*[10]).

H We must now turn to consider the case of the contractor against the developer. The orders made by the judge in favour of the contractor against the developer, in his own words, were these:

> 1 The sum of $2.75m subject to those deductions as agreed by the parties in the agreement as contained in the first settlement agreement and the schedules therein and interest at the rate of 8%pa from the date of the agreement until 17 June 1987. Since that agreement had not been disputed both the plaintiff and the first defendant must comply with the terms and conditions therein.

I

2 The transfer of the said 20 intermediate units of single-storey three-bedroomed terrace houses free from encumbrances as stated in the second settlement agreement and its schedule. The developer to pay the bank the charges on those houses as on 14 June 1987 in order to redeem those houses. The bank is not entitled to impose any interest or other charges on those houses after 14 June 1987. The developer is entitled to use the fund in its account to redeem those houses. Failure on the part of the developer and the bank to execute the necessary transfer, the senior assistant registrar will execute the necessary transfer on behalf of the developer. Bank to release all the titles to those houses to the senior assistant registrar and bank is entitled to debit the account of the developer for the charges on those houses after the contractor's claim had been settled.

3 Damages for delay at $5 per day for each unit of house from 31 December 1986 to 17 June 1987.

The judge correctly recognized that the claims of the contractor against the developer were based upon the two settlement agreements. However, in ordering the developer to pay the contractor the sum of $2.75m, the judge had wrongly included in that sum, the sum of $143,295 previously paid by the developer to the contractor *and* also the sum of $771,160.06 payable to Hock Chuan Realty Sdn Bhd which had obtained judgment for the recovery thereof against the developer in Malacca High Court Civil Suit No 428/85 and had received partial satisfaction in the sum of $326,000 to account of the judgment debt thereby reducing the same to $446,000.

It would appear therefore that the appropriate order for the payment of a monetary sum which ought to be made in favour of the contractor and against the developer should be $1,835,544.94 ($2.75m – $143,295 – $771,160.06).

But, reflection reveals that this would not be the appropriate order to make because the sum of $1,835,544.94 would include the sums of $801,591.32 and $108,000 which, according to a strict reading of cl 2(c) and (e) of the first settlement agreement, were to be paid in kind by the transfer of dwelling houses and not money.

If, therefore, the court enters judgment for the monetary sum of $1,835,544.94 in favour of the contractor against the developer, we envisage that complications could arise, for the individual purchasers under their respective agreements of sale and purchase of the dwelling houses who are not parties to this litigation and would not, therefore, be bound by any orders made herein, may institute proceedings for specific performance of their respective agreements of sale and purchase executed pursuant to the second settlement agreement in respect of lots whereon stand the dwelling houses listed in the Second Schedule thereto.

It would appear, therefore, that if we consider that the contractor is entitled to the transfer of the dwelling houses and not the sums of $801,591.32 and $108,000, then the appropriate monetary award to make in favour of the contractor against the developer should be $925,953.62 ($1,835,544.94 – $801,591.32 – $108,000) and an order for transfer of the dwelling houses.

But, again, reflection reveals that even if the monetary award of the sum of $1,835,544.94 were reduced to the extent indicated, no order for trans-

fer of the dwelling houses ought to be made in favour of the contractor for reasons we shall now state.

The contractor's claim against the receivers and managers was based on adoption of the second settlement agreement and this is made clear in para 15 of the re-re-amended statements of claim. On the other hand, the developer denied adoption and this too is made clear in para 11 of its defence.

Upon the facts we detect nothing to indicate adoption by the receivers and managers of the second settlement agreement especially so since by the time the receivers and managers had been appointed the property referred to in the second settlement agreement had passed to the developer.

We need hardly add that the fact that the consideration stipulated in the second settlement agreement had not been paid does not prevent the passing of the ownership in the property save and except where recourse is had to the device which has given considerable trouble to receivers and managers; namely, the reservation of title clause, popularly referred to as a Romalpa-type clause after the name of the defendant in the leading case of *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd.*[11] We regret we cannot agree with counsel for the contractor that para 1 of the preamble to the second settlement agreement contained a Romalpa-type clause for there was nothing therein to indicate that ownership of the property concerned would only be transferred to the developer when it has met all its obligations contained therein.

In this context, we would advert once again to the case of *George Barker Ltd*[7] cited by counsel for the contractor and would repeat that it is of no assistance to the contractor for the reasons stated.

Furthermore, it is trite law that, save in exceptional circumstances which do not apply here, merely by causing the company concerned to carry out a contract current at the date of his appointment, a receiver and manager does not render himself personally liable thereon, as would be the case with a de novo contract (see Kerr on the *Law and Practice as to Receivers and Administrators* (17th Ed) pp 375, 376).

Next, counsel for the developer has pointed out, and we agree, that the order of the learned judge in the form that it took requiring the transfer of the 20 dwelling houses by the developer to the contractor pursuant to the second settlement agreement, is in substance and effect an order for specific performance. It is clear law that specific performance will not be ordered against a company in receivership if the performance of contract by the company would involve expenditure for which the receiver might be personally liable (see p 175 of *Specific Performance* by Gareth Jones and William Goodhart, quoting *Macleod v Alexander Sutherland Ltd*[12] referred to in *Freevale Ltd v Metrostore (Holdings) Ltd & Anor*[13]). Having regard to the financial position of the developer, we consider that this, too, would be a valid objection to the order for transfer of the 20 dwelling houses.

But, the matter does not rest there because the order of the judge regarding this part of the case — which, we would repeat, was in substance and effect an order for specific performance — had imposed an obligation on the receivers and managers to use the fund of the developer to discharge

the redemption sum payable under the charge, and would have had the effect of treating the contractor as a priority creditor, which it clearly is not. But, it is settled law that payment from a particular fund can only be ordered where the claim concerned is a proprietary claim (see eg *Payment Obligations in Commercial and Financial Transactions* by Professor RM Goode at p 10 and *Airlines Airspares Ltd v Handley Page Ltd*[14] at p 198).

Counsel for the developer also drew our attention to the somewhat alarming possibility were an order for transfer of the dwelling houses to the contractor to stand. What he said was that in such an event the developer ran the risk of being held liable twice over since there was no way of preventing purchasers who had entered into contracts of sale and purchase with the developer from bringing claims against the receivers and managers for the transfer of the same dwelling houses because such purchasers were not parties to these proceedings and so would not be bound by any orders which might be made herein. Counsel for the contractor has described this possibility as 'far fetched'.

The fact of the matter, however, is that the developer had entered into contracts of sale and purchase with several purchasers pursuant to the second settlement agreement. We can therefore see nothing improbable in such purchasers instituting suits against the receivers and managers for the transfer of their dwelling houses, and, bearing in mind that such purchasers are not parties to the suit herein, they would in no way be bound by any orders therein. This aspect of the case — which we would not regard as in any way 'far fetched' — may well constitute an impediment to the making of an order for transfer of the dwelling houses in favour of the contractor being made and was clearly overlooked by the judge.

We therefore consider that it would not be appropriate to make an order for the transfer of the dwelling houses in favour of the contractor as the judge had done and so we also set aside that part of his judgment.

In consequence, the order for damages for delay in delivery of the dwelling houses must also be set aside.

This will, of course, leave the door open to the purchasers concerned to institute suits to enforce claims arising under their respective contracts of sale and purchase pursuant to the second settlement agreement, against the receivers and managers who will, no doubt, in considering these claims pay due regard to the merits of each claim, not forgetting, that at all material times every such purchaser well knew that the dwelling houses they were buying were subject to a charge under the National Land Code 1965 in favour of the bank.

It follows, therefore, that the proper order for us to make in favour of the contractor against the developer would be for the recovery of $925,953.62 ($1,835,544.94 – $801,591.32 – $108,000) and we accordingly substitute that order for the orders made by the judge against the developer.

In the result, the appeal by the bank is allowed whilst the appeal by the developer is allowed, in part, to the extent we have stated.

As for costs, the judge made no order for costs against the developer because, if not for the stance adopted by the receivers and managers, who were appointees of the bank, they would have been willing to honour the two settlement agreements.

A We consider that the contractor has succeeded and yet has failed in its action against the developer and so the contractor and the developer should each bear their own costs both here and in the court below.

As against the bank, however, the contractor has completely failed in all its claims, and so there must be an order for costs of the action to be paid by the contractor to the bank both here and in the court below. Deposits B paid by way of security for costs of the appeals must be refunded to the developer and to the bank.

Bank's appeal allowed; developer's appeal allowed in part.

C Reported by Prof Ahmad Ibrahim

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