DALAM MAHKAMAH RAYUAN MALAYSIA, PUTRAJAYA

(BIDANG KUASA RAYUAN SIVIL)

RAYUAN SIVIL NO. P-01(NCVC)(W)-39-01/2020

ANTARA

KIM GUAN CHOONG SDN BHD … PERAYU
(NO. SYARIKAT :11580 – P)

DAN

1. **PENGARAH PEJABAT TANAH DAN GALIAN PULAU PINANG**
2. **NG SEAH HUNG**
(NO. K/P:431206-07-5193)
3. **NG SEAH HOCK**
(NP. K/P: 540808-07-5003)
4. **SWISS LEISURE PRODUCTS SDN BHD**
(NO. SYARIKAT: 178923-V)
5. **LEOW TEOW HONG**
(NO. K/P: 521015-07-5069)
6. **LIM TIAN HUAT**
7. **B. RAJADURAI**
8. **KETUA PENGARAH JABATAN INSOLVENSI MALAYSIA**

9. CARAWAN VENTURE SDN BHD
(NO. SYARIKAT : 300744-U)

10. GEENTECH INDUSTRIES SDN BHD
(NO. SYARIKAT: 869514-U)

11. YAP MOH YIN
(NO. K/P: 5485519)

12. CHEN YEN MOOI
(NO. K/P: 5485519)

13. KERK CHIN LIONG
(NO. K/P: 8163803)

14. NG YIM KONG
(LS 00088343)(NO. K/P: 490424-08-5883)

… RESPONDEN-RESPONDEN

DIDENGAR BERSAMA

DALAM MAHKAMAH RAYUAN MALAYSIA, PUTRAJAYA

(BIDANG KUASA RAYUAN SIVIL)

RAYUAN SIVIL NO. P-01(NCVC)(W)-134-01/2020

ANTARA

KIM GUAN CHOONG SDN BHD … PERAYU

DAN

GREENTECH INDUSTRIES SDN BHD … RESPONDEN

DIDENGAR BERSAMA

DALAM MAHKAMAH RAYUAN MALAYSIA, PUTRAJAYA
(BIDANG KUASA RAYUAN SIVIL)

RAYUAN SIVIL NO. P-01(NCVC)(W)-135-01/2020

ANTARA

KIM GUAN CHOONG SDN BHD … PERAYU

DAN

GREENTECH INDUSTRIES SDN BHD … RESPONDEN

CORUM

YAACOB HAJI MD SAM, JCA

AHMAD ZAIDI BIN IBRAHIM, JCA

AZMAN BIN ABDULLAH, JCA

GROUNDS OF JUDGMENT

Introduction

[1] There are three (3) related appeals before us which are as follows:

i. Civil Appeal No. P-01(NCVC)(W) - 39 - 01/2020 ("Appeal 39");

ii. Civil Appeal No. P-01(NCVC(W)) - 134 - 01/2020 ("Appeal 134"); and

iii. Civil Appeal No. P-01(NCVC)(W) - 135 – 1/2020 ("Appeal 135").

Appeal 39 is the Appellant Kim Guan Choong Sdn Bhd's appeal against the decision of the High Court of Malaya, Penang in dismissing the Appellant's claim against the 1st Respondent, 2nd Respondent; 3rd Respondent, 4th Respondent, 5th Respondent, 6th Respondent, 7th Respondent, 9th Respondent, 8th Respondent, 10th Respondent, 11th Respondent, 12th Respondent, 13th Respondent and 14th Respondent and awarding costs of RM60,000.00 each to be paid by the Appellant to the respective R1, R2, R3, R5, R6, R8, R13 and R14 herein.

Appeal 134 is the Appellant Kim Guan Choong Sdn Bhd's appeal against the decision of the High Court of Malaya, Penang in allowing Greentech Industries Sdn Bhd (10th Respondent)'s claim against the Appellant with costs.

Appeal 135 is the Appellant Kim Guan Choong Sdn Bhd's appeal against the decision of the High Court of Malaya, Penang in allowing Greentech Industries Sdn Bhd (10th Respondent)'s claim against the Appellant with a total costs of RM80,000.00.

Background facts

[2] The Appellant (plaintiff) is a family-owned company incorporated by one, Ng Boon Kow, and after his demise on 31.5.1979, the following persons were the directors of the Appellant and remained as such until 30.05.1992:

(a) Madam Tan Soo Lang @ Tan Choon Lian;
(b) Ng Seah Hung ('R2');
(c) Ng Seah Hock ('R3');
(d) Ng Seah Kang;
(e) Ng Seah Kheng;
(f) Ng Seah Theam;
(g) Ng Seah Hai (PW1); and
(h) Oi Siah Cheng

[3] Meanwhile, the Respondents in this case, can be identified as follows:

Respondents/Defendants	Remarks
1. Pengarah, Pejabat Tanah dan Galian Pulau Pinang ('D1') ('R1')	D1 is the Director of Land Mining Pulau Pinang.
2. Ng Seah Hung ('D2') ('R2')	D2 is the former director of the plaintiff and was adjudgedbankrupt on 26.05.1989 .
3. Ng Seah Hock ('D3') ('R3')	D3 is the former director of the plaintiff and was adjudged bankrupt on 10.03.1993.

4. Syarikat Leisure Product Sdn. Bhd. " ('D4') ('R4')	D4 is a private limited company.
5. Leow Teow Hong ('D5') ('R5')	1. D5 is the Director of D4 and at all material times dealt with D2, D3, D6, D7, and D8. 2. D5 is also a shareholder in Powerama Holdings Sdn. Bhd, a shareholder of D4.
6. Lim Tian Huat ('D6') ('R6')	1. D6 is a Receiver and Manager of D4 and is also the Chairman of CLRC, Companies Commission of Malaysia; and 2. D6 was appointed as the Receiver and Manager of D4 on 16.04.1992.
7. B Rajadurai ('D7') ('R7')	1. D7 is an advocate and solicitor, practicing as such previously at Messrs. Durai & Associates, KL; 2. D7 was adjudged a bankrupt vide Adjudicating and Receiving Order dated 25.11.1999; and 3. The plaintiff had obtained the leave of Court vide Order of Court dated 09.03.2013 to bring and continue this action against D7.
8. Ketua Pengarah Insolvensi Malaysia (D8)('R8')	1. D8 is the Director General of the Department of Insolvency of Malaysia in Pulau Pinang, vested with the estates of D2 and D3; 2. D8's officer having conduct of D2 and D3 estate was one N. Dharmasegaran.
9. Cerawan Venture Sdn. Bhd. ('D9')('R9')	1. D9 is a private limited company; 2. The directors for D9 include Mr.Kalaiselvam a/l Suppiah and Philip a/l Eridianathan. Both were appointed as D9 directors on 07.03.2011; 3. Unfortunately, Kalaiselvan died on 05.03.2012.
10. Greentech Industries Sdn. Bhd. ('D10') ('R10')	D10 is a private limited company.
11. Kerk Chin Leong ('D13') ('R13'	D13 is the director of D4 appointed on/before 21.04.1990. D13 is also a shareholder of D4.
12. Ng Yim Kong ('D14') ('R14')	1. D14 was the former company secretary to the Plaintiff, appointed on 18.08.1995. 2. D14 was also the company secretary to D4, appointed on 28.11.1991.

[4] The subject matter in dispute, in this case, refers to the 2/3 portion of the land that belongs to the plaintiff which was transferred to R4 and subsequently transferred to R10. The title of the land has been changed several times as follows:

(a) The land was held under Temporary Title No. H.S (D) 120, Mukim 14, Daerah Seberang Perai, Pulau Pinang. was registered on 30.06.1978 under the plaintiff's name (**'HSD 120'**)**;**

(b) HSD 120 subsequently became known as HS(D) 296 Mukim 14 Daerah Seberang Perai, Negeri Pulau Pinang, and the date of the issuance of this title is 11.06.1990 (**'HSD 296'**);

(c) Thereafter, HSD 296 became known as Title No. 1487 (Plot 7) Seksyen 3, Bandar Butterworth, Seberang Perai, Pulau Pinang, Mak Mandin Industrial Estate Mukim 14 Daerah Seberang Perai **('Lot 1487**');

(d) Later, Lot 1487 was subdivided/partitioned and further issued under the separate document title as follows:

PN 6708 Lot 6147 (2/3 portion of the land (**'Lot 6147'**) registered under the name of D4 and after that D10); and

PN 6709 Lot 6148 (1/3 portion of the land registered under the plaintiff) (**'Lot 6148'**).

(e) Subsequently, there was a further subdivision of Lot 6147 into six (6) Lots by D10 (**Lot 10000, Lot 10001, Lot 10002, Lot 10004, Lot 10005 and Lot 10006**).

(The subject matter in dispute, in this case will be used interchangeably as 8.5 acres of the land or 2/3 portion of the land or Lot 6147)

The Appeals

The Appellant's case

[5] After the demised of Ng Boon Kow, R2 and R3 controlled and managed the Appellant.

[6] Based on Clause 87 (b) of the Appellant's Article of Associations, a member of the board of directors ceases to hold office if he becomes bankrupt or is legally deprived of the administration of his estate.

[7] R2 & R3 have been adjudged bankrupts on 26.05.1989 and 10.03.1993 respectively.

[8] However, R2 as bankrupt has acted for the Appellant in the following matters:

(a) on 26.09.1989, R2 entered into a sale and purchase agreement dated 26.09.1989 ('S&P dated 26.09.1986') (see pp. 142-155 of Ikatan Teras 1 of R6) with R4 for the sale of 8.5 acres of the land for the amount of RM 7.5 million; and

(b) on 24.10.1989, R2 executed a memorandum of transfer Form 14A ('MOT dated 24.10.1989') (see pp. 158-159 Ikatan

Teras 1 of R6) for the Appellant to transfer 8.5 acres of the land to D4 (Swiss Leasure Products Sdn Bhd). The MOT dated 24.10.1989 was registered on 11.05.1990.

[9] Appellant's further alleged that on 30.05.1992, R2 had removed four of the Appellant's directors which are Ng Seah Kang, Ng Seah Theam, Ng Seah Keng and Ng Seah Hai without their knowledge. R2 then appointed his wife and his daughter as the Appellant's directors.

[10] On 12.02.1994, R2**,** his wife, his daughter and one Gopalakrishnan entered into agreement with Merge Port (M) Sdn. Bhd. ('Merge Port**'**), to sell another portion of the land to Merge Port for purchase price of RM24 million. This caused, the late Tan Soo Lang, the Appellant's director entered a caveat on the land on 08.07.1994.

[11] On 14.09.1994, Tan Soo Lang also filed a motion No.: 25-57-94 against Pendaftar Hakmilik Tanah Pulau Pinang and Merge Port, for an order that the registration of transfer executed in favour of Merge Port be cancelled and alternatively be declared as null and void. On 17.10.1994, the High Court allowed the said application.

[12] The Appellant also commenced four (4) other lawsuits against R2 and R3 in 1994 and onwards. Appellant alleged that N. Dharmasegaran from R8 knew the lawsuits commenced by the Appellant against R2 and R3 because he appeared for R2 in all of the proceedings.

[13] On 03.11.1994, Ng Seah Kheng lodged a police report alleging that his signature in the MOT dated 24.10.1989 was forged. ('Police Report dated 03.11.1994').

[14] On 20.06.2001, the Appellant was wound up vide Court's Order dated 20.06.2001. The Appellant's solicitor had sent documents including the land titles, being assets of the Appellant to the Insolvency Officer. On 12.11.2010, the Appellant was released of its wound-up status vide Order of Court dated 12.11.2010.

[15] On 04.07.2011, R10 filed Originating Summon No.: 24-1263-2011 against the Appellant for an order of mandatory injunction, that is to order the Appellant to remove all buildings, toilets and lamp posts, gates, and all erections on Lot 6147, (**'**OS 1').

[16] As a result, the Appellant entered a caveat on Lot 6147 on 13.11.2011 ('caveat dated 13.11.2011').

[17] Later, R10 filed another OS No. 24-118-01/2012 on 20.01.2012 to remove Appellant's caveat dated 13.11.2011. R10 further claimed that he has purchased Lot 6147 (the 2/3 portion) through to Sale and Purchase Agreement dated 14.10.2009 executed between R10 and R9 (**'**S&P dated 14.10.2009')('OS2').

[18] The Appellant stated that upon perusing the cause papers of OS1 and OS2 filed by R10, the Appellant discovered the following:

(a) The S&P dated 14.10.2009 made an express reference to the High Court of Penang Suit No. 22-783-2005 ('Suit 783') between R4, R5 and R13 through R6, who is appointed as Receiver and Manager of R4 according to the Deed of Debenture dated 22.09.1989(**'**DOD dated 22.09.1989') and R9;

(b) The Appellant later conducts a file search on Suit 783 and discovered that there was a court order dated 14.07.1999 for Specific Performance of the S&P dated 26.09.1989 obtained against the Appellant vide Originating Summons No. (MT4)-24-1318-1998 ('Suit 1318') ('Order dated 14.07.1999') by R4 through R6. However, it was claimed that Order dated 14.07.199 was not served to the Appellant and the Appellant had no knowledge of such suit.

(c) The Appellant later discovered that Suit 1318 was served to the Appellant through the substituted service to the address at 22nd Floor, Bangunan Peransang Segamat, 69 Jalan Kampung Attap, 50460 Kuala Lumpur which is not the Appellant's registered address at that material time;

(d) Order dated 14.07.1999 also provides that all documents for the application to partition/subdivide the land shall be signed by the Senior Assistant Registrar if the Appellant failed to sign and hand over those documents within 30 days from the date of the order. However, the land was subdivided to Lot 6148 and Lot 6147 only on 25.02.2009 which is approximately 10 years after the date of the Order dated 14.07.1999;

(e) Further, Order dated 14.07.1999 clearly stated that R4 was only entitled to 8.5 acres of the land but the title of Lot 6147 issued by D1 showed that 2/3 portion of the land is measured more than 8.5 acres; and

(f) The Appellant also discovered that the whole land was mentioned as a fixed asset of R4 in the DOD dated 22.09.1989 in the event that the S&P dated 26.09.1986 was executed four (4) days after that.

[19] Upon looking at all of the documents through a file search conducted in court, the Appellant stated that they only knew about the fraudulent transferred of their land and subdivision sometime in 2011. Thus, they alleged that fraud had been committed by all of the Respondents either by themselves alone or that they had conspired with other Respondents to defraud the Appellant which had caused the 2/3 of the portion of the land was fraudulently transferred to R4 and subsequently to R10 by R9.

[20] As a result, the Appellant filed Civil Suit No. 21NCVC-13-03/2012 (Civil Suit 1) against all of the Respondents on 20.03.2012, primarily to recover 2/3 of the land which the Appellant alleged that had fraudulently transferred to R4 and subsequently to R10.

[21] The Appellant claims that all of the Respondents have fraudulently and/or unlawfully conspired to defraud and injure the Appellant as the beneficial and registered owner of 2/3 portion of the land.

[22] Wherefore, the Appellant seeks for the following declarations and reliefs (see paragraph 60 Amended Statement of Claim):

(a) that the Appellant is the legal and beneficial owner of the 2/3 portions of the land formerly held under Lot 6147 and later subdivided into Lots No. 10000, 10001, 10002, 10003, 10004 and 10005;

(b) the Order of Court dated 14.7.1999 obtained by R4 in the High Court of Penang Originating Summons No. (MT4)-24-1318-1998 be declared null and void and/or set aside;

(c) that the R1 be ordered to do the necessary acts to put the Appellant as the registered owner of the 2/3 portion of land formerly held under Lot 6147;

(d) that all subdivision of the land from Lot 6147 to Lots 10000, 10001, 10002, 10003, 10004 and 10005 to be called and Lot 6147 to be reinstated with the Appellant as the registered owner;

(e) that the Private Caveat Presentation Number 0799B201101293 dated 13.9.2011 lodged by the Appellant on Lots 10000, 10001, 10002, 10003, 10004 and 10005 shall remain until the disposal of this matter;

(f) the 10th Respondent be restrained by themselves and/or through their agents and/or employees and/or other from dealing with the said land in any manner whatsoever until disposal of this suit;

(g) the R1 to R14 pay the Appellant damages for fraud and/or damages for conspiracy to defraud the Appellant;

(h) The 10th Respondent rebuild and restore all buildings, toilet and lampposts and gates and all erections on the said land which

were demolished by the 10th Respondent and/or pay the equivalent value of the demolished buildings to the Appellant;

(i) Damages for loss of use of land;

(j) Costs;

(k) Any other relief which this Honourable Court deems fit and proper.

The Respondents' case

[23] In 1988, the Appellant was facing financial difficulties as its onion business was falling. Bangkok Bank notified the Appellant that if the Appellant failed to repay its outstanding loans, they will take legal action to enforce its securities under a Deed of Debenture and charges to impose the assets of the Appellant.

[24] As a result, the Appellant's directors and shareholders agreed to sell the entire land to one **Ng Kok Lian**, the Appellant's closed relative (cousin) at the purchase price of RM 5,600,000.00, to repay the Appellant's loan with Bangkok Bank.

[25] On the other side, Leow Teow Hong ('R5/D5' - shareholder in Powerama Holdings Sdn. Bhd) also shareholder of D4 was approached by Michael Cheong, Joachim Binder (**'**Binder**'**) and Thomas Peter Polasek ('Thomas'), whereby Thomas informed R5 of his intention to sell off and relocate plants and machinery from his company known as Royal Plastic SA in Switzerland into Malaysia and to explore the business opportunity in

Malaysia. Thomas requested R5, Michael Cheong, and Binder's help to find a place or factory to operate a business. In consideration of that, Thomas had promised three of them the sum of money as a commission. Given that D4 was formed on 21.02.1989.

[26] Somewhere in early 1989, R5 was introduced to Ng Kok Lian by Ng Kuang Boo, a bank officer at Chung Khiaw Bank. Ng Kok Lian informed R5 that the Appellant wanted to sell its land at a certain price. R5 however resigned from R4 on 05.06.1989.

[27] Ng Kok Lian later informed the Appellant that R4 was interested to purchase the 2/3 portion of the land for the sum of RM 7,500,000.00 to be paid by way of the issuance of 1,000,000.00 shares of RM 1.00 each at par credit as fully in R4 and the balance of RM 6,500,000.00 to be paid vide Messrs. Durai & Associates.

[28] As a result, R2 who is bankrupt acting on the advise of R7 (solicitors in Messrs. Durai & Associate) executed the S&P dated 26.09.1989 for the plaintiff with R4. According to R2, he had disclosed his status as a bankrupt to R7 and R3 and the S&P was executed for the benefit of the Appellant.

[29] According to the S&P dated 29.09.1989, the Appellant is required to apply for the partition of the land and to obtain a separate document title to the 2/3 portion of the land. If the Appellant failed to do so, the whole land will be charged for the financing of the purchase of the property by R4. The Appellant had failed to apply for a separate title.

[30] By a Facility Agreement dated 22.09.1989 (‘Facility Agreement dated 22.09.1989’), the lending banks agreed to grant R4 the term loan

facilities amounting to RM24,000,000.00 to finance D4's purchase of the 2/3 portion of the land from the Appellant. As security for the repayment of facilities, R4 entered into a Deed of Debenture dated 22.09.1989 ('DOD dated 22.09.1989'), whereby all of R4's assets and properties, including the land were charged and/or pledge for a sum of RM 24,000,000.00.

[31] On 11.10.1989, the 1st draw on the facilities for RM 17,100,000.00 was released by the lending banks to R4. R4 later paid the purchase price of 2/3 portion of the land to the Appellant in the manner as agreed by the parties.

[32] On 13.10.1989, Messrs. Durai & Associates paid RM 5,600,000.00 to Bangkok Bank, the redemption sum for the land that was placed as securities by the Appellant. According to such redemption, Bangkok Bank charges over the entire land were discharged on 20.11.1989. The remaining purchase price was paid to Ng Kok Lian as a commission and the Appellant's shareholders accordingly.

[33] R2 & R3 then executed MOT dated 24.10.1989 for the plaintiff to transfer 2/3 portion of the land to R4 and 1/3 portion of land back to the Appellant. The transfer was registered on 11.05.1990.

[34] Under the terms of the Facility Agreement dated 22.09.1989 and S&P, R4 and the Appellant created a charge dated 31.07.1990 over the land in favour of OBB and UAB which was registered on 01.08.1990, pending the partition of the land ('Charge dated 31.07.1990').

[35] On 06.04.1990, R2 filed his statement of affairs to R8 (Insolvency Department)**.** R3 also filed his statement of affairs with R8 on 12.01.1994.

[36] On 16.04.1992, D6 was appointed by the OBB as the Receiver and Manager ('R&M') of assets and properties of R4 under DOD dated 26.09.1989. Since his appointment, R6 had several times attempted to sell 2/3 portion of the land but the sales did not materialise since the land was not partitioned by the Appellant.

[37] As a result, R4 through R6 commenced Suit 1318 against the Appellant for an order for Specific Performance. R4 through R6 tried to serve the cause papers of Suit 1318 to the Appellant by hand, but the Appellant's registered address was changed. Therefore, R4 through R6 served the cause papers of Suit 1318 to the Appellant through a substituted service. An affidavit of service of the cause papers was filed to court by R4. R4 through R6 later obtained the Order dated 14.07.1999 which was also served to the Appellant's registered address via substituted service. R4 did not proceed to execute the Court's Order dated 14.07.1999 because R4 was under receivership and it was not cost-effective for R4 to incur the considerable costs and expenses of partitioning the land when 2/3 of the portion was intended to be sold and realised. However, the attainment of the Court's order dated 14.07.1999 enable any prospective purchaser to undertake the obligation of applying for partition of the land.

[38] R4 through R6 executed the Principal Agreement dated 11.11.2003, which was subsequently varied by the Supplemental Agreement dated 22.05.2005 with R9, for the sale of 2/3 of the land for a sum of RM 6,000,000.00. A dispute arose between R4 and R9 which resulted in the termination of the Principal Agreement dated 11.11.2003.

[39] The dispute between R4 and R9 was finally resolved. R4 and R9 later executed the S&P dated 05.10.2009 for the sale of 2/3 portion of the land for a sum of RM 6,000,000.00.

[40] Under the S&P dated 05.10.2009, R9 undertakes the obligation to apply for the partition of the land. Following such an application, the 2/3 of land was partitioned into Lot 6147 and Lot 6148.

[41] Later, R4 through R6 executed the Memorandum of Transfer dated 15.12.2009 (**'**MOT dated 15.12.2009') to transfer Lot 6147 to R10 as the nominee of R9 following the terms and conditions of the S&P dated 05.10.2009 and R9's letter dated 03.11.2009.

[42] On 04.07.2011, R10 as the registered owner of Lot 6147 filed OS1 against the Appellant for the trespass action.

[43] On 26.07.2011, R10 subdivided Lot 6147 into six (6) Lots (Lot 10000 - Lot 10005). Subdivided titles were issued on 26.07.2011. R10 also transferred five (5) out of 6 Lots to the various purchasers. However, the transfer was not successful because of the private caveat dated 3.11.2011 entered by the Appellant

[44] As a result, R10 filed OS2 against the Appellant for the removal of the caveat dated 13.11.2011.

[45] On 18.05.2012, R10 obtained leave from the High Court for OS2 to be converted to writ action and known as Civil Suit 2.

[46] On 14.08.2012, R10 also obtained leave from the High Court for the OS1 to be converted to writ action and was known as Civil Suit 3.

[47] It is the contentions of the Respondents that the Appellant's claim against R1, R5, R6, R8, R10, R13, and R14 is barred by the doctrine of laches and the limitation period of Section 2(a) of Public Authorities Protection Act 1948 (PAPA) and under Section 9 read with Section 29 and Section 32 of the Limitation Act 1956 (Act 254).

[48] The Respondents also contended that the Appellant had failed to prove the element of fraud or conspiracy to defraud against all of the Respondents and Lot 6147 of the land was not fraudulently transferred to R10, therefore, R10 is a bona fide purchaser and is protected with indefeasible title under Section 340 of the National Land Code.

The High Court's Proceeding

[49] The High Court directed that, the Civil Suit 2 and Civil Suit 3 be consolidated and be heard together with Civil Suit 1 and be determined accordingly.

[50] On 20.12.2019, the learned High Court Judge allowed the R10's claim against the Plaintiff for Civil Suit 2 and Civil Suit 3. On the contrary, the High Court dismissed the Appellant's claim against all of Respondents for Civil Suit 1.

Findings of the learned High Court Judge

A. Civil Suit 1

[51] The learned Judge of the High Court (**'**LJ') dismissed the Appellant's claim against all of the Respondents in Civil Suit 1 based on the following reason(s), inter alia:

(a) The Appellant's claim against R4, R7, and R9 was dismissed by the High Court with no order as to costs because:

(i) the Appellant did not enter a judgment in default against D4 although D4 has never entered an appearance for the claim filed by the plaintiff. Although the Court has the discretion to hear the matter in the absence of D4, the plaintiff still carries a burden to prove the alleged fraud against D4. However, the plaintiff failed to do so (*see paragraphs 200-208 of the High Court's Grounds of Judgment*);

(ii) the Appellant is unable to pursue their claims against R7 because R7 is an undischarged bankrupt and received no sanction from the Director of Insolvency under Section 38 (1)(a) of the Bankruptcy Act 1967 to defend himself against the action filed by the Appellant *(see paragraphs 354-357 of the High Court's Grounds of Judgment);* and

(iii) the R9's Statement of Defence was struck out by the High Court through the Court's Order dated 23.01.2017. However, the Appellant still carries a burden to prove the alleged fraud against R9, but the Appellant failed to do (*see paragraphs 412 and 419 of the High Court's Grounds of Judgment*)

(b) The Appellant, having known about the alleged fraud of S&P dated 26.09.1989 since 1994, that was when Tan Soo Lang entered a private caveat on 2/3 portion of the land, let 17 years pass by without initiating any legal steps (*see paragraphs 124-129 of the High Court's Grounds of Judgment*). This caused:

i. The Appellant's claim against R1 and R8 is barred by the limitation period under Section 2(a) of the Public Authorities and Protection Act 1948 ('Act 198')(*see paragraphs 131,138-139,386,391 of the High Court's Grounds of Judgment*);

ii. The Appellant's claim against R1, R5, R6, R8, R10, R13 and R14 is barred by the doctrine of laches and the limitation period under Section 9 read with Section 29 and Section 32 of the Limitation Act 1953 ('Act 254') (*see paragraphs 139,240,325-330, 391,455-459 of the High Court's Grounds of Judgment*)

iii. Learned High Court judge hold that based on this ground alone, the Appellant's claim against R1, R5, R6, R8, R10, R13 and R14 is liable to be dismissed. However, for the sake of completeness, the learned High Court judge also discussed

the Appellant's allegation of fraud and conspiracy to defraud against R1, R5, R6, R8, R10, R13 and R14.

(c) The Appellant failed to prove the element of fraud or conspiracy to defraud against all of the Respondents. The learned High Court judge held that:

i. R1 was merely carrying out its statutory duties in registering the transactions and instruments presented before him. R1 also complied with its statutory duties in registering the application for subdivision and partition of the land. Moreover, the transactions and instruments presented by the respective parties before R1 for registration were complete and proper under the law. R1 has no duty under the law to investigate every detail of the documents presented before him for registration (*see paragraphs 106, 115-119 of the High Court's Grounds of Judgment*);

ii. The MOT dated 24.10.1989 was signed, witnessed, and sealed by the Appellant when it was presented before R1 for registration *(see paragraphs 106, and 107 of the High Court's Grounds of Judgment*);

iii. The Appellant failed to prove the signature of Ng Seah Kheng in the MOT dated 24.10.1989 was forged *(see paragraphs 527-531 of the High Court's Grounds of Judgment*):

a) Ng Seah Khung was not called as a witness before the court, thus adverse inference under Section 114 (g) of the Evidence Act 1950 against the Appellant was invoked;

b) No handwriting expert was called to give evidence on the signature of Ng Seah Kheng; and

c) Ng Seah Kheng had withdrew his police report dated 03.11.1994 on 02.09.2006 and the matter was “Nor Further Action/NFA” by the police.

iv. The Appellant had received the full payment of the sale of 2/3 portion of the land from R4 *(see paragraph 522-526 of the High Court's Grounds of Judgment*);

v. The S&P dated 26.09.1989 executed by R2 on behalf of the Appellant is valid and enforceable because Section 127 of the Companies Act 1965 (‘Act 125’) does not prohibit a bankrupt to enter a contract on behalf of the company (see paragraphs *277-279 of the High Court's Grounds of Judgment*);

vi. R2, having known he was a bankrupt, had consulted and acted upon the advised of R7 when he executed S&P dated 26.09.1989 and MOT dated 24.10.1989. R2 also had obtained the consent of all the Appellant's directors to sell 8.5 acres of land to D4 to settle the Appellant's outstanding loan/debt amounting to RM 5.6 million with the Bangkok Bank. No evidence that the Appellant still owing the bank under the

facilities obtained (*see paragraphs 163 and 166 of the High Court's Grounds of Judgment*);

vii. R3, acting on the advised of R7 had executed both MOT dated 24.10.1989 and charge dated 31.07.1990 for the sole purpose of obtaining an amount of money to settle the Appellant's outstanding loan/debt with Bangkok Bank and had no intention to cheat or defraud the plaintiff (*see paragraphs 190-191 of the High Court's Grounds of Judgment*);

viii. Nothing stated in S&P dated 26.09.1986 that 2/3 portion of the land was lent to R4 to enable R4 to procure the loan facility amounting to RM 24,000.000 *(see paragraph 537 of the High Court's Grounds of Judgment*);

ix. R5 was not involved in S&P dated 26.09.1989, MOT dated 24.10.1989, and charge dated 31.07.1989. The involvement of R5 was only to introduce R2 to Thomas. R5 resigned from his position as the R4's director on 05.06.1989 (*see paragraphs 253, 255, 273, and 275 of the High Court's Grounds of Judgment*);

x. Based on the evidence tendered before the High Court, the service of the Court's Order dated 14.07.1999 by R4 through R6 was regular and duly served at the registered address of the plaintiff (see *the paragraphs 343 of the High Court's Grounds of Judgment*);

xi. No document shows that R8 has knowledge of the S&P dated 26.09.1989, MOT dated 24.10.1989, and charge dated 31.07.1990. Based on Section 8 of the Bankruptcy Act 1967, R8 shall be constituted as the receiver of the properties and assets of R2 and R3 and had nothing to do with the land which belongs to the Appellant (*see paragraphs 398,400-403 of the High Court's Grounds of Judgment*);

(d) Based on the evidence tendered, it was proven that the registered address of the Appellant was never changed by R14. The learned High Court reasonings are as follows:

i. The address at Lot 102-3, 1st Floor Kompleks Antarabangsa, Jalan Sultan Ismail 50250 is the address of Signet & Co. Sdn. Bhd., a company secretarial firm wherein R14 was employed and not the Appellant's registered address (*see paragraph 564 of the High Court's Grounds of Judgment; case* **Summit Co (M) Sdn Bhd v Nikko Products (M) Sdn Bhd** *[1985] 1 MLJ 68 FC)*;

ii. During the tenure of R14 with the plaintiff from 04.09.1995 until 12.08.2011, the registered address of the Appellant remained on the 22nd Floor, Bangunan Perangsang Segamat, 69 Jalan Kampung Attap, 50460 Kuala Lumpur (*see paragraph 561 of the High Court's Grounds of Judgment*);

iii. The Appellant's registered address at 22nd Floor, Bangunan Perangsang Segamat, 69 Jalan Kampung Attap, 50460 Kuala Lumpur remains unchanged until the lodgment of the Notice

in Form 44 made on 12.08.2011 by the Appellant's new secretary, notifying the Registrar of Companies that the Appellant's registered address was changed to No. 40-B, 2nd Floor, Jalan Lumut, Damai Kompleks, Kuala Lumpur (*see paragraph 562 of the High Court's Grounds of Judgment*); and

iv. It is a settled law that the effective date of change of the registered address of a company is the date of lodgment of the notice in Form 44 to the Registrars of the Company. However, there was nothing in the bundles placed before the High Court which showed that R14 signed Form 44 affecting a change of the Appellant's registered address (*see paragraphs 565-567 of the High Court's Grounds of Judgment*);

(e) Lot 6147 was not fraudulently transferred to R10, therefore, R10 is a bona fide purchaser of Lot 6147 and is protected with indefeasible title under Section 340 of the National Land Code. The learned High Court judge held that:

i. The Appellant failed to prove that Lot 6147 was fraudulently transferred from R4 through R6 to R10;

ii. D10 had purchased Lot 6147 at the market value fixed by the valuer ('SD13') appointed by the OCBC Bank;

iii. The Appellant also failed to prove that D10 had fraudulently subdivided Lot 6147 *(see paragraphs 468-473 of the High Court's Grounds of Judgment*);

iv. As of 25.02.2009, Lot 6147 was registered under R4 not R10 as alleged by the Appellant *(see paragraphs 477-478 of the High Court's Grounds of Judgment*).

B. Civil Suit 2 & Civil Suit 3

[52] Meanwhile, the basis for the learned High Court judge allowed R10's claim against the Appellant in Civil Suit 2 and Civil Suit 3 are as follows:

(a) since the land belongs to R10, the plaintiff has no caveatable interest in the land. As a such the entry of caveat by the Appellant on Lot 6147 is improper and ought to be struck out (*see paragraphs 491-492 of the High Court's Grounds of Judgment*);

(b) given that the registered owner of Lot 6147 is R10, the Appellant's action of erecting constructions on the land is considered a trespass on R10 rights over the land (*see paragraphs 405-498 of the High Court's Grounds of Judgment*).

The Appeal

[53] Aggrieved with the decision, on 17.01.2020, the Appellant filed notices of appeal to this Court against the whole decision of the High Court dated 20.12.2019. This Court directed for these three appeals be heard and determined together.

[54] Essentially, there were six main grounds of appeal listed by the Appellant in Memorandum of Appeal dated 17 March 2020 and Supplementary Memorandum of Appeal dated 25 July 2020:

(a) the learned High Court Judge erred in law and in finding of fact in holding that there is no fraud or conspiracy to defraud by the Respondents against the Appellant;

(b) the learned High Court Judge erred in law in holding that the Appellant's claim is barred by Limitation Act 1953;

(c) the learned High Court Judge erred in law in holding that the Appellant's claim against R1 and R8 is barred by the Public Authorities Protection Act 1948;

(d) the learned High Court judge erred in law in holding that the Appellant's claim against the Respondents is barred by laches;

(e) the learned High Court Judge erred in law in holding that section 340 of the National Land Code 1965 is applicable against the Appellant and that the 2/3 portion of the land has been purchased for valuable consideration and in good faith;

(f) whether based on the facts and evidence, the decision of the High Court is correct in law.

Our findings

(a) The learned High Court Judge erred in law and in finding of fact in holding that there is no fraud or conspiracy to defraud by the Respondents against the Appellant

[55] The law on fraud and conspiracy to defraud is trite.

[56] Section 17 of the Contract Act 1950 stipulates that:

> "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that is not true by one who does not believe it to be true;
>
> (b) the active concealment of any fact by one can having knowledge or belief of the fact;
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive; and

(e) any such act or omission as the law specially declares to fraudulent.

Explanation – Mere silence as to the facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

[57] In **PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd** [1980] 2 MLJ 136 the Federal Court held:

"Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean "actual fraud, i.e. dishonesty of some sort" for which the registered proprietor is party or privy. "Fraud is the same in all courts, but such expressions as 'constructive fraud' are…inaccurate;" but "fraud"…implies a willful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled." (per Romily M.R. in Green v Nixon (1857) 23 Beav 530 535 53 ER 208). Thus in Waimiha Sawmilling Co Ltd v Walone Timber Co Ltd [1926] AC 101 & 106 it was said that "if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent…".

[58] In **CIMB Bank Bhd v Veeran a/l Ayasamy** [2015] 7 CLJ 289 the Court of Appeal held as follows:

"The element of fraud and/or conspiracy must be proved by clear, cogent and convincing evidence. There must be something more than mere failure or an omission on the part of the third defendant. There can never be fraud and/or conspiracy cannot exist, where the intent to deceive does not exist."

[59] Thus, it is trite law the burden of proving a claim of conspiracy to defraud the Appellant against the Respondents remained at all time on the Appellant (see S. 101 Evidence Act 1950, **Tow Kong Liang & Yang lain v Fbo Land (Setapak) Sdn Bhd** [2018] 1 LNS 243 CA).

[60] On elements of tort of conspiracy, the Court of Appeal in **Renault Sa v Inokom Corp Sdn Bhd & Anor and Other Appeals** [2015] 5 CLJ 32 stated as follows:

> "In regard to the tort of conspiracy, the following need to be satisfied at the interlocutory stage:
>
> (a) an agreement between two or more persons (that is an agreement between Tan Chong and others);
>
> (b) an agreement for the purpose of injuring Inokom and Quasar;

(c) that acts done in execution of that agreement resulted in damage to Inokom and Quasar;

(d) damage is essential element and where damage is not pleaded in the Statement of Claim may be struck out (see **Yap JH v Tan Sri Loh Boon Siew & Ors** [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243)."

[61] In **SCK Group Bhd & Anor v Sunny Siew Pang & Anor** [2010] 9 CLJ 389, [2011] 4 MLJ 393, the Court of Appeal stated that:

"The tort of conspiracy was not constituted by conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object, or if not in itself unlawful, it must be brought by unlawful means : See Davies v Thomas [1920] 2 Ch 189 per Warrington LJ, and Seah Siang Mong v Ong Ban Chai & Another Case [1998] 1 CLJ Supp 295 per Ghazali J (now FCJ). There must be a co-existence of an agreement with an over act causing damage to the plaintiffs. Hence, the tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiff. On order to succeed in a claim based on tort of conspiracy, the plaintiffs must establish:

(a) an agreement between two or more persons;
(b) for the purpose of injuring the plaintiff; and
(c) acts done in the execution of that agreement resulted in damage to the plaintiff: Marrinan v Vibart [1962] 1 All ER 869 at p. 871 per Salmon J; and Halsbury's Law England (4th Ed) Vol 45 at p 271, as applied by Ghazali (now FCJ) in Seah Siang Mong."

[62] Guided by the clear settled principle of law enunciated in those authorities, the conspiracy must be proved by clear, cogent and convincing evidence that:

(a) there is an agreement between any of the Respondent or between all the Respondents;

(b) the predominant purpose of the agreement being for the purpose of injuring the Appellant; and

(c) the fraudulent acts were committed in executing the agreement for the purpose of injuring the Appellant.

[63] In **Sinnayah & Sons Sdn Bhd v Damai Setia Sdn Bhd** [2015] 7 CLJ 584 the Federal Court explained the standard of proof for fraud in a civil claim as follows:

> "As the correct principle to apply…where it was stipulated that at law, there are only two standard of proof, namely beyond reasonable doubt for criminal cases and on the balance of probabilities for a civil cases. As such, even if fraud is the subject in a civil claim, the standard of proof is on the balance of probabilities. There is no third standard. Therefore, it is up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim, to find whether the standard of proof has been attained. The criminal aspect of the allegation of fraud and the standard of proof required is irrelevant in the deliberation."

[64] Coming back to this case. The pivotal issue in this case concerns the validity of the S & P dated 26.9.1989 executed for the Appellant with R4 by R2 who was a bankrupt. Also on the validity of the MOT executed by R2 and R3 on 24.10.1989 ('MOT dated 24.10.1989') for the Appellant to transfer 8.5 acres of the land to R4. The MOT dated 24.10.1989 was registered on 11.05.1990. Appellant also contended that the S&P and MOT were executed without the Appellant's knowledge and approval.

[65] R2 was the Managing Director and Director in the Appellant until he was declared bankrupt on 26.5.1989. R2 is the second largest shareholder in the Appellant. It was contended by the Appellant that Article 87(b) Article of Association of the Appellant disqualify any director from continuing holding the position as director in the Appellant once he is adjudged as a bankrupt. Thus, it was argued by the Appellant that R2 has no capacity or authorization and acted under fraud in signing the S & P on behalf of the Appellant after he was declared as a bankrupt. It is not in dispute that all the Appellant's directors appointed in 1979, including R2 remained as such until 1995 when new directors appointed to take charge of the Appellant.

[66] R3 was a director of the Appellant from 1979 to 1996. The second MOT for Lot 6148 was executed on 24.10.1990 by R3 together with one Ng Seah Keng who is also the Appellant's director. R3 was declared bankrupt on 10.3.1993. He was discharged from bankrupt on 28.6.2010.

[67] It is not in dispute that R2 and R3 managed and controlled the business of the Appellant since 31.5.1979 and made all decisions for the

Appellant. This practice was accepted without protest by the rest of the directors and shareholder of the Appellant. This was admitted by Ng Seah Hai (PW1), the sole witness of the Appellant under cross-examination by R6's counsel –

> *"DC6 : Now you also testified that D2 (R2) and D3 (R3) manage and make all decisions for the Plaintiff (Appellant) from 1979 without consulting or informing the rest of the directors or shareholders. You agree?*
>
> *PW1 : Yes.*
>
> *DC6 : Therefore, these decisions were made unilaterally by D2 and D3 without consultation, without resolution?*
>
> *PW1 : Yes."*

[68] It is also not in disputed that the Appellant's land was subject to legal charges in favour Bangkok Bank, registered vide Presentation No. 6426/78 Jil 127 Folio 127, Presentation No. 5304/83 Jil 267 Folio 52 and Presentation No. 5305/83 Jil 267 Folio 53, as security for the facilities obtained by the Appellant. In 1988 the Appellant was facing financial difficulties as its onion business was failing and the Appellant defaulting its loans. Bangkok Bank notified the Appellant that if the Appellant fails to repay its outstanding loans, the bank will take legal action to enforce its securities under the Deed of Debenture and to foreclose the charged lands. To avoid the risk of losing the lands, the directors and shareholders agreed to sell the land to their close relative Ng Kok Lian at a price of RM5.6 million, as to repay Appellant's outstanding loans with Bangkok Bank. Following that, Ng Kok Lian then informed the Appellant that R4 had offered to buy the land at a purchase price of RM7.5 million to be paid

by way of the issuance of 1,000,000 shares of RM1.00 each at par to the Appellant and the balance purchase price to be paid to Messrs Durai & Associates. On 26.9.1989, the Appellant and R4 entered the S&P for the sale of the 2/3 portion of the land for purchase price of RM7.5 million.

[69] It is to be noted that clause 3.03(a) of the S & P requires the Appellant to apply for partition of the land but in the event the Appellant is unable to procure a separate document of title to the 2/3 portion of the land, the whole of the title will be charged for the financing of the purchase by R4. In such instance, R4 shall be authorized to sign all documents for partitioning and surrender the title to the issuing authority for a new document of title for the 2/3 portion of the land.

[70] On 13.10.1989, Messrs Durai & Associates issued a letter to Bangkok Bank forwarding the redemption sum payment. Pursuant to the redemption payment, Bangkok Bank charges over the land were discharged on 20.11.1989. This was acknowledged by the Appellant vide its letter dated 6.6.1990 to Messrs. Durai & Associates. On 19.1.1994, Messrs. Durai & Associates conforming the Appellant on the due completion of payment of purchase price. The learned High Court judge accepted that there was evidence of payment of the purchase price by R4 for the purchase of the 2/3 portion of the land (see paras 21-22, 150, 168 Grounds of Judgment).

[71] The Appellant's cause of action is premised on the underlying assumption that the Appellant is the rightful owner of the 2/3 portion of the land known as Lot 1487. The Appellant's case is that the S & P dated

26.9.1989 entered for the Appellant by R2 who was a bankrupt, with R4 was without Appellant's resolution to sell the 2/3 portion of the land and without the knowledge of the rest of the directors of the Appellant. The Appellant further alleged that the 2/3 portion of the land that was transferred to R4 and subsequently by R6 (the Manager and Receiver of R4) to R9 and later by R9 to R10 were procured fraudulently. It was contended by the Appellant that R4 and R5 had conspired with R2, R3, and R7 to fraudulently enter into the S & P dated 26.9.1989. Several authorities were cited to support the Appellant's argument: PJTB Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, CIMB Bank Berhad v Abdul Rafi a/l Abdul Razak & Ors [2012] MLJU 804, Yap Sau Choon @ Yap Bee Yong & Anor v Cheong Hong Mun & Ors [2016] MLJU 1203. Appellant had relied heavily on the evidence of PW1 (Ng Seah Hai) as its main witness. However, PW1 admitted that he had no personal knowledge over the S & P, MOT and the chargers and only averred relating the fraud or conspiracy based on what he heard from his mother and his brother Ng Seah Kheng. As such, the evidence of PW1 (Ng Seah Hai) are at best, hearsay and we find that that learned High Court judge was correct in not giving such evidence any weight.

[72] Coming back to the position of R2, any party dealing with the Appellant, including R4, the OBB (bank) as chargee, R6, R9 and R10 could not have known that R2 had ceased to be a director of the Appellant with effect from 26.5.1989 (bankruptcy order) and were entitled to assume that R2 had the apparent or ostensible authority to execute the S&P, MOT and charge on behalf of the Appellant. R2 was allowed to continue remain in control of the management and affairs of the Appellant until 1995 without any protest of the Appellant or any other directors of the Appellant.

The Appellant ought to be estopped from now suggesting that R2 lacks of authority to act for the Appellant. The learned High Court judge held, and we agree, that by virtue of indoor management rule/ Turquand's rule, and as enshrined under sections 20(1) and 127 of the Companies Act 1965 (now repealed by Companies Act 2016), the act of R2, in realizing the charged dan selling the 2/3 portion of the land to settle the Appellant's outstanding loan arrears with Bangkok Bank was valid (see Grounds of Judgment paras 335 – 337). On the facts of this case, we find that Turquand rule as decided in **Royal British Bank v Turquand** [1843-60] All EE 435, applies:

> "Persons dealing with the company were bound to make themselves acquainted with the statute and the deed of settlement of the company, but they were not bound to do more; a person, on reading the deed of settlement, would find, not a prohibition against borrowing, but a permission to borrow on certain conditions, and, learning that the authority might be made complete by a resolution, he would have right to infer the fact of a resolution authorizing that which on the fact of the document appeared to be legitimately done; and therefore, the company was liable whether or not a resolution had been passed."

[See also **Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors** [1998] 1 MLJ 465 FC].

[73] On the issue of authority or lack thereof of the R2, we can do no better than to reproduce the following excerpt from the judgment in **Phang**

Tat Meng t/a Tat Meng Company v Reka Cipta Solusi Sdn Bhd [2016] 1 LNS 88, the court held:

> "35. On the facts herein, the Defendants pointed that the fraud alleged by the Plaintiff is plainly answered by s. 127 of the Company Act 1965 which reads:
>
> '127. Validity of acts of directors and officers
>
> The acts of director or manager or secretary shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.'
>
> 36. Reading ss 125(1) and s. 127 of the Companies Act 1965 together, I am of the view that the statute contemplates only a penalty to be imposed on undischarged bankrupt who has acted on behalf of the company but the statute does not avoid contracts entered into by him on behalf of the company such as the case of the Consent Judgment herein. (para 77 GOJ).
>
> 37. Accordingly, provision in s.127 of the Companies Act 1965 is my view sufficient to negate the fraud argument raised by the Plaintiff in attempt to set aside the Consent Judgment. It is plain and obvious to me that the Plaintiff's action is hence unsustainable. Be that it may, the Plaintiff has also not adduced any evidence in the affidavits to illustrate how the Plaintiff was prejudiced or unduly influenced by the alleged fraud by deception through the non revelation or concealment of his

bankruptcy by the bankrupt director. It must be borne in my mind that the First Defendant as a company is a separate legal entity from its directors and shareholders.

38. For completeness, I further hold that s. 127 of the Companies Act 1965 herein override the common law specie of fraud due to concealment of material ...".

[74] In **Stem Resources Sdn Bhd v Kekal Lestari Sdn Bhd & Satu Lagi** [2013] 10 CLJ the court held-

"(1) Perbuatan SP2 menandatangani perjanjian tersebut tidak menjejaskan kesahan dan kesahihan perjanjian tersebut menurut kuasa peruntukan s. 127 Akta Syarikat 1965 (Akta 125). Seksyen 127 mempunyai kesan mengesahkan apa-apa perbuatan seseorang pengarah, pengurus atau setiausaha walaupun kemudiannya didapati ada kecacatan pada pelantikan atau kelayakannya. Seksyen 127 terpakai apabila terdapat pelantikan yang defektif seperti yang berlaku dalam hal pelantikan SP2 melalui resolusi bertarikh 15 Jun 2004. D1 dan D2 tidak boleh menyatakan perjanjian tersebut terbatal kerana s. 127 Akta 125 mempunyai kesan mengesahkan perbuatan SP2 menandatatangani perjanjan tersebut dan dengan perjanjian itu, perjanjian yang ditandatangani adalah sah dan mengikat defendan (see para 278 GOJ)."

(See also **Hock Hua Bank Bhd v Choo Meng Chong & Anor** [1999] 7 CLJ 300, **Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd** [1997] 3 CLJ Supp 174).

[75] Learned counsel for the Appellant was unable to cite any authority, on the contrary, to support her arguments that the S & P is invalid due R2's lack of authority to act for the Appellant. Thus, it is our considered view that the learned High Court judge did not erred in holding that the S & P dated 26.9.1989 is a valid and enforceable agreement.

[76] R6 particularly was appointed as Receiver & Manager (R&M) of R4 on 16.4.1992. The Facility Agreement, S & P, Deed of Debenture and Charge had all been entered into and executed by the Appellant with R4 prior to the appointment of R6. R4 was no longer the registered or beneficial owner of the 2/3 portion of the land with effect from 5.12.2009 following the transfer of ownership to R10. R6 ceased to be the R&M of the R4 on 27.12.2010. The subdivision of Lot 6147 which led to the issuance of titles Lot 10001 – Lot 10005 was applied by R10, and after R6 had ceased his responsibilities and duties as R&M of R4 with effect from 27.12.2010.

[77] In RHB Bank Berhad v Ali bin Abdul Kadir and Anor [2005] 1 LNS 391, the court held that the 2nd defendant-bank had no cause of action against the receiver and managers whose duty is limited to enforcing the security and the subject contract for sale of goods was entered into prior the appointment of the receiver and managers, no liability can be attached to receiver and managers by virtue section 183 of the Companies Act.

[78] Coming back to this case, the learned High Court judge held that R6 cannot be found guilty or liable to the Appellant for exercising his duties in good faith by enforcing the security in favour of OBB, which includes the

sale and transfer of the 2/3 portion of the land and well supported by section 183(1) of the Companies Act (see para 345-346 of Grounds of Judgment). Thus, it is impossible for R6 to be said that have been involved in any fraud or conspiracy to defraud the Appellant. The learned High Court judge held, and we agree, that the Appellant was not even able to establish that R6 knew the other Respondents, let alone that any agreement was reached between them to defraud and injure the Appellant (see paras 338-339 Grounds of Judgment).

[79] The learned High Court judge held that the Appellant had failed to discharge its burden of proving, on a balance probabilities, the basic element of a claim for fraud or conspiracy to defraud and injure the Appellant. Having considered the evidence in totality, the learned High Court judge made the following findings :

> "485. Daripada apa yang dinyatakan, Mahkamah dapati bahawa elemen-elemen frod tidak dipatuhi oleh Plaintif, begitu juga dengan kospirasi seperti yang didakwa oleh Plaintif.
>
> 486. Mahkamah dapati dari segi frod dan/atau kospirasi untuk memfrodkan Plaintif, Plaintif gagal membuktikannya atas imbangan kebarangkalian.
>
> 487. Dalam tindakan ini Mahkamah dapati Plaintiff gagal membuktikan frod dan/atau kospirasi memfrodkan ke atas Plaintif, maka dengan transaksi-transaksi untuk pindahmilik tanah tersebut merupakan transaksi yang bebas dari isu frod seperti yang didakwa oleh Plaintif. Defendan Kesepuluh telah

memberi balasan memberi balasan yang sepenuhnya kepada Defendan Kesembilan.

488. Maka dengan itu, Defendan Kesepuluh di dalam tindakan ini merupakan pembeli bona fide ke atas tanah tersebut daripada Defendan Kesembilan."

[80] The learned High Court judge found no credible evidence that there was in existence of fraud or conspiracy to defraud by any of the Respondents on the Appellant. Her Ladyship had considered the testimonies, the contemporaneous documents and the whole circumstances and probabilities of the case (Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229). We had carefully perused the grounds of judgment of the learned High Court judge. We find that there is no appealable error to warrant any appellate interference on the findings.

(b) *The learned High Court Judge erred in law in holding that the Appellant's claim is barred by Limitation Act 1953*

[81] Respondents had expressly pleaded that they were relying on the Limitation Act and laches as a defence (paragraph 42 p. 462 6th Respondent' Core Bundle of Documents (Vol.1)(Encl. 203 o Appeal Records)). For any action that is based upon fraud or conspiracy to defraud of the defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it. Learned counsel for the Appellant submitted that the Appellant discovered the actual fraud in 2012 after the Appellant saw the Deed of Debenture dated

22.9.1889 and the High Court Order dated 14.9.1999 for Specific Performance of the S & P dated 26.9.1989. Thus, the Appellant's claim is not barred by Limitation Act 1953 or laches. PW1, the Appellant's sole witness admitted that the directors and shareholders of the Appellant first knew or discovered the alleged fraud in relation to the sale and purchase of the 2/3 portion of the land to R4 since 8.7.1994 when Tan Soo Lang entered a private caveat on the 2/3 portion of the land.

[82] The learned High Court judge in her grounds of judgment had considered this issue and made the following findings:

> "380. Alasan permohonan Tan Soo Lang untuk memasukkan kaveat persendirian (Ikatan B3 muka surat 574 – D264) dengan alasan seperti berikut" "alasan-alasan tuntutan saya atas tanah/kepentingan itu ialah berdasarkan tanah itu adalah kepunyaan syarikat Kim Guan Choong Sdn. Bhd. Dan sebahagian tanah itu sedang dijual secara frod dan sebahagian lagi telah dijual secara frod.
>
> 381. Menurut Surat Akuan dari Tan Soo Lang di dalam permohonan untuk kemasukan kaveat persendirian beliau, beliau mengaku bahawa kaveat tersebut dimasukkan bagi pihak Plaintif. Beliau merupakan pemegang saham dan Pengarah asal Syarikat Plaintif tersebut.
>
> 382. Jadi dari keterangan yang dikemukakan, saya dapati kali pertama Plaintif ketahui yang penjualan 2/3 bahagian Lot 1487

yang dikatakan dilakukan secara frod itu telah diketahui oleh Plaintif sejak 8.7.1994 lagi." (emphasis added)

[83] PW1 further admitted that despite the alleged fraud in 1994, there is no legal action taken by the Appellant to recover or challenge the validity of the S&P, MOT and the creation and registration of the charge and the transfer of the 2/3 portion of the land to R4 until this action was filed by the Appellant against all the Respondents.

[84] The Appellant's action herein was filed in March 2012, which is more than 18 years from the first discovery of the alleged fraud. As such, it is clearly that the Appellant's claim for the discovery of the 2/3 portion of the land is barred by limitation pursuant to section 9 of the Limitation Act 1953 and section 29 of the Act.

[85] Section 9(1) of the Limitation Act 1953 stipulates that-

"9(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claim, to that person."

[86] Section 29 of the Act provides postponement of limitation period in case of fraud or mistake, as follows-

“29. Where, in case of any action for which a period of limitation is prescribed by this Act, either-

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims as aforesaid; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it: Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by

a person who did not know or have reason to believe that mistake had been made."

[87] The learned High Court judge held that the Appellant's action is barred by section 9 read and section 29 of the Limitation Act 1953. Her Ladyship held as follows:

"237. Mahkamah ini dapati tarikh 8.7.1994 (sic) inilah Plaintif ketahui tentang frod yang didakwa oleh Plaintif dilakukan oleh Defendan-Defendan dalam penjualan 2/3 bahagian tanah tersebut kepada Defendan Keempat.

238. Tindakan ini difailkan pada bulan Mac 2012.

239. Manakala kali pertama Plaintif tahu tentang apa yang dikatakan frod dilakukan terhadap Plaintif adalah pada 8.7.1994. Ini bermakna selepas 18 tahun lebih Plaintif mendapat tahu tentang frod barulah Plaintif memfailkan tindakan terhadap Defendan Kelima. Ini adalah jelas menujukkan yang Plaintif dihalang oleh had masa 12 tahun dari tarikh 8.7.1994 untuk Plaintif menuntut terhadap Defendan Kelima. Jadi, Mahkamah dapati atas isu had masa ini Plaintif dihalang oleh had masa untuk menuntut terhadap Defendan Kelima.

240. Dengan itu, Mahkamah dapati tuntutan Plaintif terhadap Defendan Kelima telah dihalang oleh had masa mengikut Seksyen 9 dan Seksyen 29 Akta Had Masa 1953 dan dengan itu tuntutan Plaintif terhadap Defendan Kelima ditolak dengan kos."

[88] Having considered the facts and the applicable law on this issue, we find that the learned High Court judge is perfectly correct in holding that the Appellant's action against the Respondents, likewise, is barred pursuant to section 9 and section 29 of the Limitation Act 1953 (see Nasri v Mesah [1971] 1 MLJ 32 FC, Nadefinco Ltd v Kevin Corporation Sdn Bhd [1978] 2 MLJ 59 FC, Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409). We find no appealable error of law or fact in the findings of the learned judge which was based on evidence.

(c) *The learned High Court Judge erred in law in holding that the Appellant's claim against R1 and R8 is barred by the Public Authorities Protection Act 1948*

[89] It was contended by R1 and R8 that the Appellant's action against R1 and R8 is barred pursuant to section 2 of the Public Authorities Protection Act 1948 (Act 198). For the Appellant, it was argued that R1 has statutory power to investigate the validity of the MOT and the application for subdivision of Lot 1487 and should not allowed the applications pending their investigation. The case of Goh Seng Chue & Ors v Pentadbir Tanah Hulu Selangor and Ors [2017] MLJU 1390 was cited to support the argument.

[90] We reproduce Section 2 of the Act which provides as follows-

> "Where, after the doming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuant or execution or intended execution of any written law on of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provision shall have affect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuation of injury or damage, within thirty-six months next after the ceasing thereof."

[91] Section 38 of the Act provides-

"Limitation of actions

Any written law relating to the limitation of time for bringing proceedings against public authorities may be relied upon by the Government as a defence in any civil proceedings against the Government."

[92] In **Credit Corporation (M) Bhd v Fong Tak Sin** [1991] 1 MLJ 409, the court held –

"The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly to have a definite end to litigation. The rationale of the limitation law should be appreciated and enforced by the Courts."

[93] In **Selvarajoo Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor** [2006] 2 CLJ, the Court of Appeal held-

"The provision of s. 2(a) PAPA 1948 and very clear and do not provide for any court discretion as they are mandatory in name."

[94] In Tasja Sdn Bhd v Golden Approach Sdn Bhd [2011] 3 CLJ 751, the Federal Court held-

> "If it is based on Section 2(a) of the Public Protection Act 1948 or Section 7(5) of the Civil Law Act 1956, where the period of limitation is absolute then in a clear and obvious case such application should be granted without having to plead such a defence. However, in a situation where limitation is not absolute, like in a case under the Limitation Act, such application for striking out should not be allowed until and unless limitation is pleaded as required under section 4 of the Limitation Act 1953."

[95] The Appellant's action herein was filed in March 2012, which is more than 18 years from the first discovery of the alleged fraud. As such, it is clearly that the Appellant's action against R1 and R8 being a public

authorities and acted in the performance of its public duty i.e. accepted and registered the MOT dated 24.10. 1989 and the Specific Performance Order dated 14.7.1999 for the subdivision of Lot 1487, is barred by limitation pursuant to section 2(a) of the Public Authorities Protection Act 1948 (Act 198)(Revised 1978). We agree with the learned High Court judge that R1 has no duty to enquire further on Form 14A that is fit for registration pursuant to section 301 of the National Land Code (**Hamdan bin Jaafar & Ors v Osman bin Mohamed & Ors** [2012] 1 LNS 1108).

[96] We also agree with the learned judge on her findings that the Appellant's action on R1 and R8 is barred pursuant to section 9 of the Limitation Act 1953.

(d) The learned High Court judge erred in law in holding that the Appellant's claim against the Respondents is barred by laches

[97] The doctrine of laches was succinctly explained by His Lordship Edgar Joseph Jr J (as he then was) in **Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd** [1989] 2 MLJ 202 as follows:

> "Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the

consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy put the other party in a position in which it would not be reasonable to place him if remedy were afterwards to be asserted : 14 Halsbury's Law of England (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'in action with one's eyes open'."

[98] Section 32 of the Limitation Act 1953 provides as follow-

> "Nothing in this Act shall effect any equitable jurisdiction to refuse relief on the ground of acquiescence laches or otherwise."

[99] Despite being aware since July 1994 of the sale of the 2/3 portion of the land to R4, the Appellant did not take any timely action to recover the 2/3 portion of the land or set aside R4's registered ownership of the 2/3 portion of the land or the charge created in favour of OBB over the land. There is undue delay of more than 18 years on the part of the Appellant in filing this action. During the period of delay, R6 had in his capacity as R&M and agent of R4 and in the believe that the Appellant did not intend to make any claim in respect of the 2/3 portion of the land, altered the position of R4 to its detriment by selling the 2/3 portion of the land to R9, paying the redemption sum to OUB, as registered charge, for the discharge of the charge registered and transferred the 2/3 portion of the land into the name of R9's nominee, R10. The issue of laches was raised by R10 in their defence to the Appellant's claim.

[100] In Faber Merlin (M) Sdn Bhd & Ors v Lye This Sang & Anor and Tan Kim Chua Realty (M) Sdn Bhd v Lye Thai sang & Anor [1985] 2 MLJ 380, the Supreme Court invoked the doctrine of laches and found that the plaintiffs were estopped because they were guilty of laches in that since 1978, although the plaintiffs knew that the acts of the defendant were contrary to the agreement, no action had been taken against the defendant until 23 May 1983 where the plaintiff filed an originating summons against the defendant praying to declaratory judgment. The court refused to exercise its discretion to grant declaratory relief on the grounds that there was evidence of "laches, acquiescence and delay."

(see also: **Wu Shu Chen (Sole Executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin** [1997] 2 MLJ 487; Soon Poy Yong @ **Soon Puey Yong v Westport Properties Sdn Bhd & Ors** [2015] 1 MLJ 196).

[101] The learned High Court judge had addressed on the issue of laches and made the following findings-

> "459. Di dalam kes semasa ini, pihak Plaintif setelah apa yang didakwa sebagai pindahmilik 2/3 bahagian Lot 1487 dikatakan dibuat secara frod telah diketahui oleh Plaintif sejak tahun 1994 lagi, maka kegagalan Plaintif untuk mendakwa atas perlakuan frod itu setelah lebih kurang 18 tahun telah berlalu dari tarikh Plaintif mengetahui tentang apa yang dikatakan perlakuan frod itu menjadikan tuntutan ini tertakluk kepada doktrin kelewatan yang tidak munasabah. Maka Seksyen 32, Akta Had Masa 1953 akan

terpakai disini dan Mahkamah atas isu ini sahaja boleh menolak tuntutan Plaintif terhadap Defendan Kesepuluh."

[102] Having considered the facts and the applicable law on the issue, we find that the learned High Court judge is perfectly correct in holding that the Appellant's action is barred pursuant to doctrine of laches to defeat the Appellant's declaratory relief (which is an equitable remedy) to recover the 2/3 portion of the land. We therefore find no basis to conclude that the judge was plainly wrong on the issue of laches.

(e) The learned High Court Judge erred in law in holding that section 340 of the National Land Code 1965 is applicable against the Appellant and that the 2/3 portion of the land has been purchased for valuable consideration and in good faith by R4, R9 and R10.

[103] Learned counsel for the Appellant submitted that the title registered under R4 and subsequently R10 was obtained by fraud and therefore defeasible and the proviso under section 340(3) of the National Land Code 1965 does not apply. Several authorities were cited to support the argument: Tan Yin Hong v Tan Sian San & Ors [2010] 2 MLJ 1 [2010] MLJU 10 FC, Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 4 CLJ 626 CA. The learned High Court judge held that R10 (subsequent purchaser) who had purchase the 2/3 portion of the land Lot 6147 from R9 (immediate purchaser) in good faith and for valuable consideration of RM8.5 million has acquired an indefeasible title under the provision of section 340(3) of the National Land Code 1965 and therefore the

Appellant is precluded from seeking recovery of the 2/3 portion of the land from R10.

[104] In this respect, the Federal Court decision in Tan Ying Hong v Tan Sian Sian San & Ors [2010] 2 MLJ 1 is instructive. In departing from Adorna Properties, the Federal Court held that the rights and title of a subsequent purchaser who acquires a title in good faith and for valuable consideration from the purchaser, is indefeasible pursuant to the proviso under section 340(3) of the National Land Code (see also: **Yap Ham Seow v Fatimawati Ismail & Ors and Another Appeal** [2014] 1 MLJ 645).

[105] In this respect, the learned High Court judge held-

> "488. Di dalam tindakan ini Mahkamah dapati Plaintif gagal membuktikan frod dan/atau konspirasi menfrod ke atas Plaintif, maka dengan itu transaksi-transaksi untuk pindahmilik tanah tersebut merupakan transaksi yang bebas dari isu frod seperti yang didakwa oleh Plaintif. Defendan Kesepuluh telah memberi balasan yang sepenuhnya kepada Defendan Kesembilan.
>
> 489. Maka dengan itu, Defendan Kesepuluh di dalam tindakan ini merupakan pembeli bona fide ke atas tanah tersebut daripada Defendan Kesembilan."

[106] We agree with the learned High Court that R10 being a subsequent purchaser who had purchased the 2/3 portion of the land from R9 and R9 who had purchased the same 2/3 portion of the land from R4 had obtained an indefeasible title under the proviso to section 340(3) of the National Land Code as it has proven that they were a purchaser in good faith for valuable consideration.We also agree with findings of the learned High Court judge that the Appellant had failed to rebut the evidence that R10 had purchased the 2/3 portion of the land from R9 in good faith and for valuable consideration of RM8,200,000.00 without any notice of the Appellant's purported interest or rights in the 2/3 portion of the land. The findings are not perverse.

[107] We agree that the learned High Court judge did not erred in law and in fact in allowing R10's claims against the Appellant for the removal of private caveat entered by the Appellant and for the acts of trespass onto the 2/3 portion of the land that is registered under R10's as the proprietor.

Conclusion

[108] Quite clearly the outcome of this case turned primarily on findings of fact. In our view, based on the evidence led during the trial, it cannot be said that the learned trial judge's conclusion upon the evidence was plainly wrong. We need only refer to the reminder by the Federal Court in **Ng Hooi Kui & Anor v Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Kwang, Deceased& Ors** [2020] 12 MLJ 67 FC; [2010] 10 CLJ CA:

> "As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts."

[109] In light of all the above, we unanimously find that there is no appealable error to warrant any appellate interference in this case. We accordingly dismiss Appeal 39, Appeal 134 and Appeal 135 with costs of RM5,000 to Respondent 1, RM5,000 to Respondent 2, RM1,000 to Respondent 3, RM5,000 to Respondent 5, RM15,000 to Respondent 6, RM5,000 to Respondent 8, RM15,000 to Respondent 10 on Appeal 39, RM5,000 to Respondent 10 on Appeal 134, RM5,000 to Respondent 10 on Appeal 135, RM5,000 to Respondent 13 and RM5,000 to Respondent 14. All costs given be subject to allocator except on Respondent 1 and Respondent 8.

t.t

(YAACOB HAJI MD SAM)
Judge
Court of Appeal, Malaysia

Dated 01 November 2023

Counsels/Solicitors

For the Appellant:

Sharon Shakila Gabriel
Venkateswari a/p P. Alagendra
(Tetuan N. Saraswathy Devi)

For the Respondents:

First Respondent (R1):

Siti Hafiza Jaafar (Penang ALA)
(Pejabat Penasihat Undang-Undang Negeri Pulau Pinang)

Second Respondent (R2):

Datuk V.M. Ravindran
(Tetuan V. M. Ravi & Associates)

Third Respondent (R3):

(In person)

Fourth Respondent (R4):

(Not represented)

Fifth Respondent (R5):

Alan Chua Hock Kwang
Shreena Kaur Sidhu
(Tetuan Alan Chua & Co)

Sixth Respondent (R6):

Datin Jeyanthini
Sathya Kumardas
Sharon Kaur Jessy
(Tetuan Shearn Delamore & Co)

Seventh Repondent (R7):

(Not represented)

Eight Respondent:

Uma Devi a/p Balasubramaniam (SFC)
Hafizah Johor binti Arif Johor
(Jabatah Insolvensi Malaysia)

Nineth Respondent (R9):

(Not represented)

Tenth Respondent (R10):

Andrian Lee Yung Khin
Hanis Hazidi
(Tetuan Maxwell Kenion Cowdy & Jones)

Thirteenth Respondent (R13):

Chong Choon Choy
(Tetuan C.C. Chong & Associates)

Twelfth Respondent (R14):

Subath a/p Sathinathan
S. Vasanthi
(Tetuan Cheah Teh & Su)