

**DALAM MAHKAMAH TINGGI DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
GUAMAN SIVIL NO.: WA-21NCVC-82-09/2016**

ANTARA

WAN NOOR KAMARIAH BINTI WAN JAAFAR

(No. K/P: 490203-03-6014)

...PLAINTIF

DAN

- 1. ARITAH REALTY SDN BHD
(NO. SYARIKAT : 71737-W)**
- 2. MUNIR & SONS SDN BHD
(NO. SYARIKAT : 718229-T)**
- 3. SMALL MEDIUM ENTERPRISE DEVELOPMENT BANK
MALAYSIA BERHAD (49572-H)**
- 4. PENGARAH TANAH DAN GALIAN, KUALA LUMPUR**
- 5. KETUA PENGARAH INSOLVENS, MALAYSIA**

...DEFENDAN-DEFENDAN

(Didengar bersama)

GUAMAN SIVIL NO.: WA-22NCVC-44-01/2017

ANTARA

- 1. AZHARI BIN ROSMAN
(NO. K/P: 580915-01-5619)**

2. **AZRIMAN BIN ROSMAN**
(NO. K/P: 600207-01-5349)
3. **AZMILLAH BINTI ROSMAN**
(NO. K/P: 610724-01-5960)
4. **AZMIN KASS BIN ROSMAN**
(NO. K/P: 621128-01-6311)
5. **MARIAM BINTI SULEIMAN**
(NO. K/P: 270228-01-5224)
6. **SYARIKAT MEEROS SDN BHD**
(NO. SYARIKAT: 102202-D)
7. **MELATI PERSPEKTIF SDN BHD**
(NO. SYARIKAT: 327352-P) **...PLAINTIF-PLAINTIF**

DAN

1. **ARITAH REALTY SDN BHD**
2. **MUNIR & SONS SDN BHD**
3. **PEMBANGUNAN BUKIT KUDA (M) SDN BHD**
(Dalam Likuidasi) **...DEFENDAN-DEFENDAN**

(Didengar bersama)

GUAMAN SIVIL NO.: WA-22NCVC-56-01/2017

ANTARA

1. **SEMANAT BIN ABU BAKAR**
(NO. K/P: 550823-11-5105)

2. **SITI MARINA BINTI SULAIMAN**
(NO. K/P: 610720-11-5534)
3. **MD FATHIL BIN HJ GZALI**
(NO. K/P: 3531506)
4. **WAN HASMAH BINTI WAN ALI**
(NO. K/P: 510413-03-5376)
5. **SURATMI BIN NGADI**
(NO. K/P: 570801-05-6448)
6. **ROKIAH BINTI IBRAHIM**
(NO. K/P: 430806-08-5016)
7. **HASHIM BIN RAZAK**
(NO. K/P: 560514-10-6271)
8. **LAILI BT YUSUF**
(NO. K/P: 690813-08-5672) ...PLAINTIF-PLAINTIF

DAN

1. **ARITAH REALTY SDN BHD**
2. **MUNIR & SONS SDN BHD**
3. **PEMBANGUNAN BUKIT KUDA (M) SDN BHD**
(Dalam Likuidasi) ...DEFENDAN-DEFENDAN

(Didengar bersama)

GUAMAN SIVIL NO.: WA-22NCVC-456-01/2017

ANTARA

CIMB BANK BERHAD

(NO. SYARIKAT:13491-P)

(dahulunya dikenali sebagai Bumiputra-Commerce Bank Berhad)

...PLAINTIF

DAN

1. ARITAH REALTY SDN BHD

(NO. SYARIKAT:71737-W)

2. MUNIR & SONS SDN BHD

(NO. SYARIKAT:718229-T)

3. SMALL MEDIUM ENTERPRISE DEVELOPMENT

BANK MALAYSIA BERHAD

(NO. SYARIKAT:49572-H)

4. AZMILLAH BINTI ROSMAN

(NO. K/P: 610724-01-5960)

5. AZMIN KASS BIN ROSMAN

(NO. K/P: 621128-01-6311)

6. MELATI PERSPEKTIF SDN BHD

(NO. SYARIKAT: 327352-P)

...DEFENDAN-DEFENDAN

JUDGMENT

[1] These five suits that were heard together concern claims by several parties, and in several capacities, in respect of a building known as Wisma Aritah.

[2] Wisma Aritah is a building situated in the heart of Kuala Lumpur City. It is a four and a half storey building erected on a piece of land held under Geran 76881, Lot 1404, Bandar Kuala Lumpur located along Jalan Raja Muda, Kampung Baru, Kuala Lumpur. Within Wisma Aritah are mixed residential and commercial units. There are a total of forty units constructed within Wisma Aritah. There are eight units of Shop Lots, eight units of Office Lots and twenty four units of what are referred to as “flat lots” (“Flats”). In the documents in evidence and the pleadings, various terminologies have been used to describe the Flats. To avoid confusion, the term Flats will be used since it is the term the developers of Wisma Aritah used in their sale and purchase agreements. For convenience, the Shop Lots, Office Lots and Flats in Wisma Aritah will also generally be referred to as “Units”.

[3] Wisma Aritah was the product of a joint venture between its original registered proprietor Aritah Realty Sdn Bhd (“Aritah Realty”) and a developer, which is a company known as Pembangunan Bukit Kuda (M) Sdn Bhd (“Developer”). The joint venture agreement between Aritah Realty and the Developer was dated 12th January 1983. The building of Wisma Aritah itself was completed sometime in the early 1980s. The Units in Wisma Aritah that were contracted for by purchasers were built and handed over and many, if not all, have been and are being occupied.

[4] It is common ground, and significant for the purposes of the Plaintiffs’ claims, that strata titles for the Units in Wisma Aritah were never issued. It is also common ground that neither the Developer nor Aritah Realty had completed applying for the issue of strata titles for the

Units in Wisma Aritah. In addition, the Developer has since been wound up. Therefore Wismah Aritah still sits on the single piece of title described above, without any strata titles issued for the Shop Lots, Office Lots and Flats within it.

The five suits

[5] There were altogether five different suits filed and these five suits were heard together. The five suits were Kuala Lumpur High Court Suits No: WA-21NCVC-82-09/2016 (“Suit 82”); No: WA-22NCVC-44-01/2017 (“Suit 44”); No: WA-22NCVC-55-01/2017 (“Suit 55”); No: WA-22NCVC-56-01/2017 (“Suit 56”) and No: WA-22NCVC-456-09/2017 (“Suit 456”). In these five suits, the claims that were brought against the Developer were discontinued. There were also third party proceedings initiated at the outset but they too were discontinued and not pursued.

[6] Pursuant to a Sale and Purchase agreement dated 20th September 2013, Wisma Aritah was sold by Aritah Realty to a company known as Munir & Sons (M) Sdn Bhd (“Munir & Sons”). Both Aritah Realty and Munir & Sons are parties to the five suits. The transfer of Wisma Aritah to Munir & Sons was effected, and title thereof was registered in the name of Munir & Sons, on 2nd July 2014. Having bought Wisma Aritah, Munir & Sons then rented Wisma Aritah to Aritah Realty pursuant to a Tenancy Agreement dated 26th of August 2014. However, Aritah Realty defaulted in paying the lease rental due to Munir & Sons.

[7] By reason of this default, Munir & Sons sought and obtained an order for the issue of a Writ of Distress against Aritah Realty from the Sessions Court in Kuala Lumpur on 9th Mei 2016. Some of the occupants who had purchased Units in Wisma Aritah sought and obtained an order from the Sessions Court on 15th June 2016, to stay the execution of the Writ of Distress. The order staying execution of the Writ of Distress was however set aside by the Sessions Court on the 27th of September 2016. There was no appeal against this order.

[8] It was the issue of the Writ of Distress that triggered some of the owners of Units in Wisma Aritah to investigate its basis that, in turn, led to the discovery of the sale of Wisma Aritah to Munir & Sons and the lease agreement between them. These five suits were therefore all related to the assertion of the parties' claimed respective interests in Wisma Aritah.

[9] The Plaintiffs in four of these five suits (Suit 82, Suit 44, Suit 56 and Suit 456) were permutations of purchasers who had contracted to buy various Units in Wisma Aritah. Some were purchasers from Aritah Realty and the Developer. Some were second tier purchasers who had contracted to buy Units from purchasers who had bought their Units from Aritah Realty and the Developer. Some had bought Units in public auctions. Some of these purchasers had obtained financing to purchase their Units in Wisma Aritah and they had assigned their rights in their respective sale and purchase agreements to their financiers.

[10] The Plaintiff in the fifth suit, Suit 55, was one of Aritah Realty's Directors, Abdul Munir Bin Ariffin ("Abdul Munir") and Aritah

Realty. Munir & Sons are also one of the Defendants in this suit. Abdul Munir is not to be confused with having any connections with Munir & Sons other than the similarity of his name “Munir”.

[11] In purchasing Wisma Aritah, Munir & Sons had to borrow from Small Medium Enterprise Development Bank Malaysia Berhad (“SME Bank”). As a consequence, Wisma Aritah was charged to SME Bank as security for Munir & Sons’ loan. Two charges were presented via presentation No. 24528/2014 and presentation No. 24529/2014 and they were both registered on 2nd July 2014.

[12] While there is a permutation of Plaintiffs in four of the five suits (i.e. excluding the Suit 55 brought by Abdul Munir and Aritah Realty), there was however a common thread that binds them. These Plaintiffs’ interests in their respective Units in Wisma Aritah are linked, and ultimately traceable, to contracts for the purchase of their respective Units from Aritah Realty and the Developer.

[13] Thus the parties interested in this action may be categorised as (a) Aritah Realty, the former registered proprietor of Wisma Aritah (b) Munir & Sons, the purchaser of Wisma Aritah (c) the purchasers of Units in Wisma Aritah and (d) the financiers of these purchasers and of Munir & Sons.

[14] To compound matters, Wisma Aritah and the land upon which it sits was, at the time the suits were filed, the subject of a compulsory acquisition for a rail transit line to be developed by Mass Rapid Transit Corporation Sdn Bhd.

[15] For the purposes of these suits, it is significant that their pleaded case and causes of action are carefully identified for reasons that will become apparent. It should also be noted that during the trial the interests of the various Plaintiffs, *qua* purchasers, and the financiers who are assignees of the rights and benefits of the purchasers under their respective sale and purchase agreements for their respective Units, were not disputed save for the interest of the Plaintiff in Suit 82.

Suit 82

[16] This suit was brought by the Plaintiff against Aritah Realty and Munir & Sons. The Plaintiff's claim was in respect of a Flat in Wisma Aritah described as Lot No. 2, Tingkat 2, in Wisma Aritah.

[17] The Plaintiff testified at the trial. The Plaintiff purchased the rights to this Flat in a public auction on 15th August 1992 for a sum of RM73,000.00, after its original purchaser had defaulted in loan payments. Documentation of the purchase from the auction was adduced in evidence. This auction was consequent upon an action by Malaysia Credit Finance Berhad against one Megat Aziz Bin Megat Noordin. Evidence of payment of the balance of the purchase price of RM65,700.00, after deducting the 10% deposit, was adduced in the form of a Banker's Cheque from Malayan Banking Berhad dated 22nd October 1992 and made payable to the Penolong Kanan Pendaftar Mahkamah Tinggi Kuala Lumpur. This payment was made under cover of the Plaintiff's letter dated 4th December 1992 and a receipt was issued for the payment.

[18] The Plaintiff was however vigorously cross-examined. The auction documentation states clearly that title had not been issued in respect of the Flat and that the rights of Megat Aziz Bin Megat Noordin were contained in a sale and purchase agreement with Aritah Realty dated 30th August 1983. What the Plaintiff was not able to establish, which was conceded by counsel for the Plaintiff at the trial, was that the rights and benefits of Megat Aziz Bin Megat Noordin in his contract with Aritah had been assigned to the Plaintiff either by Malaysia Credit Finance Berhad or Megat Aziz Bin Megat Noordin. As such, the Plaintiff was not able to establish that the Plaintiff had any right to maintain Suit 82 against Aritah Realty or Munir & Sons in respect of the Flat in question.

[19] The Plaintiff also contended that on the 10th of June 2016, Munir & Sons executed a Writ of Distress against the Plaintiff in Wisma Aritah. The Writ of Distress was predicated on a default by Aritah Realty to pay the rent for Wisma Aritah to Munir & Sons. The outstanding rent claimed was for a sum of RM840,000.00 for the year 2015. It was upon the execution of the Writ of Distress that the Plaintiff discovered that Wisma Aritah had been sold and transferred to Munir & Sons.

[20] In relation to the sale of Wisma Aritah to Munir & Sons, the Plaintiff's pleaded case was that the sale was illegal or fraudulent. The basis for this alleged illegality or fraud was because Aritah Realty had sold apartment Units in Wisma Aritah to the Plaintiff, and others, and the Plaintiff and the other purchasers, had acquired beneficial interests in the Units they purchased. It was also alluded to that the charges

created against Wisma Aritah in favour of SME Bank were also illegal for this reason.

[21] The relevant paragraphs of the Amended Statement of Claim relating to the validity of the sale of Wisma Aritah to Munir & Sons were as follows:

- ~~“24-18.~~ Plaintiff mengatakan bahawa Defendan Pertama tidak secara sah dan tidak sepatutnya menjual hartanah yang dikenali sebagai Wisma Aritah , termasuk hartanah tersebut kepada Defendan Kedua, sedangkan ianya sungguh nyata dan terang , bahawa hartanah tersebut telah dijual melalui lelongan awam oleh Mahkamah pada 15.8.1992 , lebih kurang dua puluh (20) tahun yang lalu.
- ~~22-19.~~ Dalam masa yang sama, Plaintiff telah dimaklumkan bahawa Defendan Kedua telah menggadaikan Hartanah berkenaan kepada Defendan ketiga untuk kemudahan pinjaman bernilai sebanyak RM8,000,000.00 yang kesemuanya dilakukan oleh Defendan Pertama dan Defendan Kedua secara frod tanpa mengambil-kira hak dan kepentingan Plaintiff atas hartanah tersebut.
- ~~23-20.~~ Pada masa-masa yang material tersebut, Plaintiff tidak pernah mempunyai pengetahuan berkenaan proses jualbeli dan gadaian yang dibuat oleh bagi Lot 1404 yang mengandungi hartanah tersebut yang direkodkan berlaku di antara Defendan Pertama, Defendan Kedua dan Ketiga tersebut.
- 24.21. Plaintiff adalah pemilik sah dan berkepentingan atas hartanah tersebut yang sepatutnya dan seadilnya dimaklumkan tentang transaksi yang berlaku di antara Defendan Pertama dan Defendan Kedua sebelum pendaftaran dilakukan oleh Defendan Keempat.

25.22. Oleh yang demikian, pendaftaran Lot 1404 termasuk hartanah tersebut kepada Defendan Kedua adalah tidak sah dan terbatal dengan satu taktik penipuan (frod) yang licik dengan tanpa memaklumkan dan melalui Plaintiff sebagai pemilik yang sah dan berkepentingan.

...

28.25. Defendan Kedua adalah pihak yang didaftar sebagai pemilik Lot 1404 dengan cara yang tidak sah dan terbatal dengan mengenyakan hak Plaintiff sebagai pemilik hartanah tersebut. Tindakan Defendan Kedua dengan memasuki transaksi dengan Defendan Pertama bagi jualbeli Lot 1404 yang mana kepentingan Plaintiff telah dinafikan adalah satu penipuan dan dengan itu adalah terbatal.”

[22] The remedies sought by the Plaintiff in the amended Statement of Claim in this suit were the following:

- “1. Satu deklarasi bahawa Plaintiff adalah pemilik sah dan berkepentingan bagi hartanah tersebut;
2. Satu Perintah bahawa tindakan Writ Distress melalui perlaksanaan no. WA-56-32-05/2016 adalah tidak sah dan seadilnya dibatalkan.
3. Satu deklarasi bahawa Perjanjian Jual Beli Wisma Aritah antara Defendan Pertama dan Defendan Kedua , adalah tidak sah dari awal “void ab initio: ;
4. Satu perisytiharaan bahawa pendaftaran pindahmilik Hartanah tersebut pada 2.7.2014 melalui penyerahan No . 24527/2014 dari Defendan Pertama kepada defendan Kedua adalah tidak sah serta menyalahi undang-undang ;
5. Satu deklarasi bahawa pendaftaran pemilikan ke atas nama Defendan Kedua adalah tidak sah , batal dan menyalahi undang-undang atau bertentangan dengan undang-undang ;
7. Defendan Pertama dan Defendan Kedua membayar ganti rugi teladan kepada Plaintiff yang akan ditaksirkan oleh Penolong Kanan Pendaftar atau Timbalan Pendaftar;

8. Defendan-Defendan membayar kos tindakan ini; dan
9. Plaintiff dibenarkan untuk memohon lain-lain perintah sampingan untuk memberi efek dan kesan untuk dengan adil melindungi haknya dalam tindakan ini.”

Suit 44

[23] This suit was brought by five Plaintiffs against Aritah Realty and Munir & Sons. In the course of the suit, CIMB Bank Berhad (“CIMB”) intervened and was added as the 4th Defendant with leave of the Court granted on 18th July 2017.

[24] The 1st, 2nd, 3rd and 4th Plaintiffs’ claim to be beneficial owners of a Shop Lot in Wisma Aritah confusingly described as Lot No.1, at Lot No. 17, Ground Floor. This Shop Lot was bought from Aritah Realty and the Developer pursuant to a Sale and Purchase Agreement dated 27th December 1993 for a consideration of RM115,000.00.

[25] The 5th Plaintiff claims to be the beneficial owner of a Flat known as No. 11-2 (Lot No 3), 1st Floor, in Wisma Aritah. Although pleaded otherwise, the evidence shows that this Flat was bought by the 5th Plaintiff from one Haji Mohd Hashim Bin Ismail pursuant to a Sale and Purchase Agreement dated 17th November 1995. Haji Mohd Hashim Bin Ismail had bought this Flat from the Developer and Aritah Realty pursuant to a Sale and Purchase Agreement dated 22nd July 1983.

[26] The 1st and 5th Plaintiffs' claim to be the beneficial owner of a Shop Lot confusingly described as Lot No. 7 and No. 6. To add further confusion, this Shop Lot is also referred to by the address No.3 and No. 5, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, 50300 Kuala Lumpur. This Shop Lot was bought by the 1st and 5th Plaintiffs from the Developer and Aritah Realty pursuant to a Sale and Purchase Agreement dated 12th September 1994.

[27] The 6th Plaintiff claims to be the beneficial owner of Office Lots described as Lots No. 17-1, 1-1, 7-3, 5-3, and 7 in Wisma Aritah. These Office Lots were bought by the 6th Plaintiff from the Developer and Aritah Realty pursuant to a Sale and Purchase Agreement dated 16th March 1995.

[28] The 7th Plaintiff claims to be the beneficial owner of four Office Lots described as Lots No. 15-1, 11-1, 9-1 and 7.1 in Wisma Aritah. These Office Lots were bought by the 7th Plaintiff from Aritah Realty pursuant to a Sale and Purchase Agreement dated 6th February 1995 for a consideration of RM340,000.00.

[29] The Plaintiffs claim that all payments payable under their respective Sale and Purchase Agreements have been paid. As with the Plaintiff in Suit 82, the Plaintiffs in this suit were also the subject of the same Writ of Distress issued by Munir & Sons.

[30] In this suit the Plaintiffs' pleaded case against the sale of Wisma Aritah to Munir & Sons were contained in the following paragraphs in the Statement of Claim:

- “32. Sepanjang pengetahuan Plaintiff-plaintif, hartanah yang dikenali sebagai Wisma Aritah yang didirikan di Hartanah lot 1404 yang mempunyai 8 unit lot kedai, 8 unit pejabat dan 24 unit rumah pangsa (yang kesemuanya 40 unit) telah dibeli oleh pembeli-pembeli terdahulu sekitar tahun 1985-1990an dan telah memasuki perjanjian jual beli dengan Defendan Pertama sahaja.
33. Plaintiff-plaintif mengatakan bahawa Defendan Pertama tidak secara sah dan tidak sepatutnya menjual hartanah yang dikenali sebagai Wisma Aritah, termasuk Hartanah-hartanah Plaintiff-plaintif di atas, sedangkan ianya sungguh nyata dan terang, bahawa hartanah tersebut telah dijual dan dimiliki oleh pembeli-pembeli/pemilik-pemilik lebih kurang dua puluh (20) tahun yang lalu.
34. Dalam masa yang sama, Plaintiff-plaintif juga telah dimaklumkan bahawa Defendan Kedua telah menggadaikan Hartanah tersebut kepada SME Bank (M) Berhad untuk kemudahan pinjaman bernilai sebanyak RM8,000,000.00 yang kesemuanya dilakukan oleh Defendan Pertama dan Defendan Kedua secara frod tanpa mengambil kira hak dan kepentingan Plaintiff-plaintif atas hartanah tersebut.
35. Pada masa-masa yang material tersebut, Plaintiff-plaintif tidak pernah mempunyai pengetahuan berkenaan proses jualbeli dan gadaian yang dibuat oleh Defendan Kedua bagi lot 1404, yang mengandungi Hartanah-hartanah tersebut di atas, yang direkodkan berlaku di antara Defendan Pertama dan Defendan Kedua tersebut.
36. Plaintiff-plaintif adalah pemilik yang sah dan berkepentingan atas hartanah tersebut yang sepatutnya dan seadilnya dimaklumkan tentang transaksi yang berlaku di antara Defendan Pertama dan Defendan Kedua.
37. Oleh yang demikian, pendaftaran Lot 1404 termasuk Hartanah tersebut kepada Defendan Kedua adalah tidak sah dan terbatal dengan satu taktik penipuan (frod) yang licik dengan

tanpa memaklumkan dan melalui Plaintiff-plaintif sebagai pemilik yang sah dan berkepentingan.

...

43. Defendan Kedua adalah pihak yang didaftarkan sebagai pemilik Lot 1404 dengan cara yang tidak sah dan terbatal dengan mengenepikan hak Plaintiff-Plaintif sebagai pemilik sah hartanah tersebut. Tindakan Defendan Kedua dengan memasuki transaksi dengan Defendan Pertama bagi jualbeli dan memindahmilik Lot 1404 melalui perserahan nombor: 24527/2014 pada 2.7.2014, yang mana kepentingan Plaintiff-plaintif telah dinafikan adalah satu transaksi yang tidak sah, salah nyata dan adalah terbatal.”

[31] The reliefs sought by the Plaintiffs in this suit were:

- “1. Satu perintah penggantungan prosiding menghalang Defendan Kedua daripada memulakan sebarang tindakan perlaksanaan di mahkamah sesyen ke atas hartanah, serta unit-unit rumah pangsa, unit-unit pejabat yang kesemuanya 40 unit di atas lot 1404, Kampong Baru, Kuala Lumpur;
2. Satu perintah injunksi interlokutori daripada Defendan Kedua memindahmilik tanah di bawah pegangan GRN Lot 1404, Kg Baru, Kuala Lumpur kepada mana-mana pihak ketiga sehingga keputusan penuh diputuskan oleh Mahkamah ini ;
3. Satu perintah bahawa tindakan Writ Distress melalui perlaksanaan no. WA-56-32-05/2016 adalah tidak sah dan seadilnya dibatalkan;
4. Satu deklarasi bahawa Perjanjian Jual Beli Lot 1404 antara Defendan Pertama dan Defendan Kedua adalah tidak sah dari awal “void ab initio”;
5. Satu deklarasi bahawa pendaftaran hakmilik hartanah tersebut, Lot 1404, pada 2.7.2014 melalui perserahan nombor 24527/2014 dari Defendan Pertama kepada Defendan Kedua adalah tidak sah serta menyalahi undang-undang;
6. Satu deklarasi bahawa pendaftaran pemilikan ke atas nama Defendan Kedua adalah tidak sah, batal dan menyalahi undang-undang atau bertentangan dengan undang-undang ;

7. Satu deklarasi bahawa gadaian melalui perserahan nombor:24528/2014 dan 24529/2019 yang didaftarkan ke atas lot 1404 oleh Defendan Ketiga adalah tidak sah dan terbatal dari mula (“void ab initio”) ;
8. Defendan Pertama dan Defendan Kedua membayar ganti rugi teladan kepada Plaintiff-plaintif yang akan ditaksirkan oleh Penolong Kanan Pendaftar atau Timbalan Pendaftar, Mahkamah ini;
9. Defendan Pertama dan Defendan Kedua membayar kos tindakan ini; dan
10. Plaintiff-plaintif dibenarkan untuk memohon lain-lain perintah sampingan untuk memberi efek dan kesan yang adil bagi melindungi kepentingan dan haknya di dalam tindakan ini.”

[32] CIMB, the 4th Defendant, is the absolute assignee of the interests of the 3rd, 4th and 7th Plaintiffs’ interests as security for loans granted to them. This is not disputed. CIMB claimed that Aritah had no right to sell and/or transfer Wisma Aritah to Munir & Sons. CIMB had also mounted a counterclaim for several declarations against 3rd, 4th and 7th Plaintiff. However, no defence to this counterclaim were ever filed by these three Plaintiffs.

[33] One Rabitah Binti A Razak, a bank officer with CIMB was called to testify on behalf of CIMB. Under cross-examination, it was established that CIMB did not consent to the 3rd, 4th and 7th Plaintiffs suing in respect of their rights which had been assigned to CIMB. Rather than CIMB’s consent, it is in fact the case that these Plaintiffs were not re-assigned the rights they had assigned to CIMB to enable them to maintain this suit. As such, the 3rd, 4th and 7th Plaintiffs had no right to maintain this suit.

[34] CIMB's counterclaim was for the following reliefs:

- "a) Suatu deklarasi bahawa **AZMILLAH BINTI ROSMAN**, Plaintiff Ketiga adalah Pemilik Benefisial Lot No. 11-3 dan 11-4 yang beralamat pos di No. 11-3 dan No. 11-4, Jalan Haji Hisham, Off Jalan Raja Muda Abdul Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur ("Hartanah-Hartanah Plaintiff Ketiga tersebut");
- b) Suatu deklarasi bahawa Defendan Keempat adalah Pemegang Serahhak (Absolute Assignee) keatas Lot No. 11-3 dan 11-4 yang beralamat pos di No. 11-3 dan No. 11-4, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur ("Hartanah-Hartanah Plaintiff Ketiga tersebut") dimana Perjanjian Pinjaman bertarikh 20/7/1998 dan Suratikatan Penyerahan hak ("Deed of Assignment") bertarikh 20/7/1998 yang telah disempurnakan di antara Defendan Keempat dengan Plaintiff Ketiga adalah sah dan berkuatkuasa;
- c) Suatu deklarasi bahawa **AZMIN KASS BIN ROSMAN**, Plaintiff Keempat adalah Pemilik Benefisial Lot No. 5-4 dan Lot No. 6-2 yang beralamat pos di No. 7-4 dan 5-2, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur ("Hartanah-Hartanah Plaintiff Keempat tersebut");
- d) Suatu deklarasi bahawa Defendan Keempat adalah Pemegang Serah hak (Absolute Assignee) keatas Lot No. 5-4 dan Lot No. 6-2 yang beralamat pos di No. 7-4 dan 5-2, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur ("Hartanah-Hartanah Plaintiff Keempat tersebut") dimana dimana Perjanjian Pinjaman bertarikh 20/7/1998 dan Suratikatan Penyerahan hak ("Deed of Assignment") bertarikh 20/7/1998 yang telah disempurnakan di antara Defendan Keempat dengan Plaintiff Keempat adalah sah dan berkuatkuasa;
- e) Suatu deklarasi bahawa **MELATI PERSPEKTIF SDN BHD**, Plaintiff Ketujuh adalah Pemilik Benefisial Lot No. 7-1, 9-1 dan 15-1 yang terletak di Tingkat Mezzanine, Wisma Aritah, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur ("Hartanah-Hartanah Plaintiff Ketujuh tersebut");

- f) Suatu deklarasi bahawa Defendan Keempat adalah Pemegang Serah hak (Absolute Assignee) keatas Lot No. 7-1, 11-1, dan 15-1 yang terletak di Tingkat Mezzanine, Wisma Aritah, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur (“Hartanah-Hartanah Plaintiff Ketujuh tersebut”) dimana Perjanjian Kemudahan bertarikh 16/6/1995 dan Suratikatan Penyerahan hak (“Deed of Assignment”) bertarikh 16/6/1995 yang telah disempurnakan di antara Defendan Keempat dengan Plaintiff Ketujuh adalah sah dan berkuatkuasa;
- g) Satu Perintah bahawa Hartanah-hartanah Plaintiff Ketiga, Keempat dan Plaintiff Ketujuh tersebut dikecualikan dari penjualan dan/atau pindahmilik Hakmilik GRN No. 76881, Lot 1404 Seksyen 41, (Dahulunya dikenali sebagai QTR 753, Lot 1404, Bandar Kampung Bharu) (“Hartanah tersebut”) oleh Defendan Pertama kepada Defendan Kedua.
- h) Satu Perintah bahawa Hartanah-hartanah Plaintiff Ketiga, Plaintiff Keempat dan Plaintiff Ketujuh tersebut dikecualikan dari cagaran dan/atau gadaian oleh Defendan Kedua yang memihak kepada pihak ketiga, SME Bank keatas Hakmilik GRN No. 76881, Lot 1404 Seksyen 41, (Dahulunya dikenali sebagai QTR 753, Lot 1404, Bandar Kampung Bharu) (“Hartanah tersebut”);
- i) Suatu Perintah bahawa Defendan Pertama melepaskan dan menyerahkan Hakmilik Strata Individu Hartanah-Hartanah Plaintiff Ketiga, Plaintiff Keempat dan Plaintiff Ketujuh tersebut bebas daripada sebarang bebanan kepada Defendan Keempat dan/atau kepada peguamcara Defendan Keempat dan juga menyerahkan Memorandum Pindahmilik Hartanah-Hartanah Plaintiff Ketiga, Plaintiff Keempat dan Plaintiff Ketujuh tersebut yang telah disempurnakan, yang sah dan boleh didaftarkan bersama dengan pembayaran yang berkenaan kepada Defendan Keempat dan/atau peguamcara Defendan dalam tempoh empat belas (14) hari bermula dari tarikh penghakiman;
- j) Secara alternatifnya, sekiranya Defendan Keempat tidak dapat mengambil kembali Hartanah-Hartanah Plaintiff Ketiga, Plaintiff Keempat dan Plaintiff Ketujuh tersebut daripada Defendan Kedua dan/atau Memorandum Pindahmilik Hartanah-Hartanah Plaintiff Ketiga, Plaintiff Keempat dan

Plaintif Ketujuh tersebut dan gadaian yang memihak kepada Defendan Keempat tidak dapat didaftarkan, maka Plaintif Ketiga, Plaintif Keempat dan Plaintif Ketujuh tersebut dan Defendan Pertama dan Defendan Kedua samada secara bersamaan dan/atau berasingan hendaklah membayar segala kerosakan dan kerugian yang dialami oleh Defendan Keempat dimana kerosakan dan kerugian tersebut hendaklah ditaksirkan oleh Pendaftar Mahkamah;

- k) Ganti rugi;
- l) Faedah pada kadar 5.00% atas jumlah Penghakiman bermula dari pemfailan writ ini sehingga tarikh pembayaran penuh;
- m) Kos; dan
- n) Perintah selanjutnya seperti dan/atau relif lain yang difikirkan sesuai dan adil oleh Mahkamah Yang Mulia ini.”

Suit 56

[35] There are eight Plaintiffs in this suit. The defendants are Aritah Realty and Munir & Sons.

[36] The 1st and 2nd Plaintiffs claim to be beneficial owners of Flat No. 1, with the address Lot No. 17-2, Tingkat 1, in Wisma Aritah. This Flat was purchased from an auction on 22nd February 1992 for a purchase price of RM57,200.00.

[37] The 3rd Plaintiff claims to be the beneficial owner of Shop Lot No. 15G, in Wisma Aritah. This Shop Lot was purchased from Aritah Realty for a sum of RM95,000.00 pursuant to a Sale and Purchase Agreement dated 18th March 1993.

[38] The 4th Plaintiff claims to be the beneficial owner of Flat No. 5-1, in Wisma Aritah. This Flat was purchased by the 4th Plaintiff from the Developer and Aritah Realty.

[39] The 5th Plaintiff claims to be the beneficial owner of Flat No. 15-2 in Wisma Aritah. This Flat was initially bought by one Yahya Bin Ahmad from Aritah Realty and the Developer. The 5th Plaintiff subsequently bought this Flat from Yahya Bin Ahmad pursuant to a Sale and Purchase Agreement dated 11th December 1995.

[40] The 6th Plaintiff claims to be the beneficial owner of Flat No. 9-2 in Wisma Aritah. This Flat was bought from the vendors Ahmad Rejal Arbee and Noraini Binti Ahmad Sharif under a Sale and Purchase Agreement dated 17th March 2006. The vendors had bought the Flat from the Developer and Aritah Realty pursuant to a Sale and Purchase Agreement dated 3rd January 1984.

[41] The 7th Plaintiff claims to be the beneficial owner of Flat No. 3-2, in Wisma Aritah. The 7th Plaintiff had inherited this Flat from his father who had purchased this Flat from the Developer and Aritah Realty pursuant to a Sale and Purchase Agreement dated 27th November 1984.

[42] The 8th Plaintiff claims to be the beneficial owner of Flat No. 1, Level 2 and, oddly, with the address at Lot No. 17-3, Level 2 in Wisma Aritah. This Flat was bought at a public auction on 12th of August 2005.

[43] As with the other Plaintiffs in the other suits, the Plaintiffs in Suit 56 were also the subject of the Writ of Distress referred to above.

[44] In this suit the Plaintiffs' pleaded case against the sale of Wisma Aritah to Munir & Sons were contained in the following paragraphs of the Statement of Claim:

- "42. Sepanjang pengetahuan Plaintiff-plaintif , hartanah yang dikenali sebagai Wisma Aritah yang didirikan di Hartanah lot 1404 yang mempunyai 8 unit lot kedai, 8 unit pejabat dan 24 unit rumah pangsa (yang kesemuanya 40 unit) telah dibeli oleh pembeli-pembeli terdahulu sekitar tahun 1985-1990an dan telah memasukkan perjanjian jual beli dengan Defendan Pertama sahaja.
43. Plaintiff-plaintif mengatakan bahawa Defendan Pertama tidak secara sah dan tidak sepatutnya menjual hartanah yang dikenali sebagai Wisma Aritah , termasuk Hartanah-hartanah Plaintiff-plaintif di atas, sedangkan ianya sungguh nyata dan terang , bahawa hartanah tersebut telah dijual dan dimiliki oleh pembeli-pembeli/pemilik-pemilik lebih kurang dua puluh (20) tahun yang lalu.
44. Dalam masa yang sama , Plaintiff-plaintif juga telah dimaklumkan bahawa Defendan Kedua telah menggadaikan Hartanah tersebut kepada SME Bank (M) Berhad untuk kemudahan pinjaman bernilai sebanyak RM8,000,000.00 yang kesemuanya dilakukan oleh Defendan Pertama dan Defendan Kedua secara frod tanpa mengambil kira hak dan kepentingan Plaintiff-plaintif atas hartanah tersebut.
45. Pada masa-masa yang material tersebut, Plaintiff-plaintif tidak pernah mempunyai pengetahuan berkenaan proses jualbeli dan gadaian yang dibuat oleh Defendan Kedua bagi lot 1404, yang mengandungi Hartanah-hartanah tersebut di atas, yang direkodkan berlaku di antara Defendan Pertama dan Defendan Kedua tersebut.

46. Plaintiff-plaintiff adalah pemilik yang sah dan berkepentingan atas hartanah tersebut yang sepatutnya dan seadilnya dimaklumkan tentang transaksi yang berlaku di antara Defendan Pertama dan Defendan Kedua.
47. Oleh yang demikian, pendaftaran Lot 1404 termasuk Hartanah tersebut kepada Defendan Kedua adalah tidak sah dan terbatal dengan satu taktik penipuan (frod) yang licik dengan tanpa memaklumkan dan melalui Plaintiff-plaintiff sebagai pemilik yang sah dan berkepentingan.
- ...
53. Defendan Kedua adalah pihak yang didaftarkan sebagai pemilik Lot 1404 dengan cara yang tidak sah dan terbatal dengan mengenepikan hak Plaintiff sebagai pemilik sah hartanah tersebut. Tindakan Defendan Kedua dengan memasuki transaksi dengan Defendan Pertama bagi jualbeli dan memindahmilik lot 1404 melalui perserahan nombor: 24527/2014 pada 2.7.2014, yang mana kepentingan Plaintiff-plaintiff telah dinafikan adalah satu transaksi yang tidak sah, salah nyata dan adalah terbatal.”

[45] The reliefs sought by the Plaintiffs were the following:

- “1. Satu perintah penggantungan prosiding menghalang Defendan Kedua daripada memulakan sebarang tindakan perlaksanaan di mahkamah sesyen ke atas hartanah , serta unit-unit rumah pangsa , unit-unit pejabat yang kesemuanya 40 unit di atas lot 1404 , Kampong Baru, Kuala Lumpur ;
2. Satu perintah injuksi interlokutori daripada Defendan Kedua memindahmilik tanah di bawah pegangan GRN Lot 1404 , Kg Baru , Kuala Lumpur kepada mana-mana pihak ketiga sehingga keputusan penuh diputuskan oleh Mahkamah ini ;
3. Satu perintah bahawa tindakan Writ Distress melalui perlaksanaan no. WA-56-32-05/2016 adalah tidak sah dan seadilnya dibatalkan ;
4. Satu deklarasi bahawa Perjanjian Jual Beli Lot 1404 antara Defendan Pertama dan Defendan Kedua adalah tidak sah dari awal “void ab initio” ;

5. Satu deklarasi bahawa pendaftaran hakmilik hartanah tersebut , Lot 1404 , pada 2.7.2014 melalui perserahan nombor 24527/2014 dari Defendan Pertama kepada Defendan Kedua adalah tidak sah serta menyalahi undang-undang ;
6. Satu deklarasi bahawa pendaftaran pemilikan ke atas nama Defendan Kedua adalah tidak sah , batal dan menyalahi undang-undang atau bertentangan dengan undang-undang ;
7. Satu deklarasi bahawa gadaian melalui perserahan nombor :24528/2014 dan 24529/2019 yang didaftarkan ke atas lot 1404 oleh Defendan Ketiga adalah tidak sah dan terbatal dari mula (“void ab initio”) ;
8. Defendan Pertama dan Defendan Kedua membayar ganti rugi teladan kepada Plaintiff-plaintiff yang akan ditaksirkan oleh Penolong Kanan Pendaftar atau Timbalan Pendaftar , Mahkamah ini ;
9. Defendan Pertama dan Defendan Kedua membayar kos tindakan ini ; dan
10. Plaintiff-plaintiff dibenarkan untuk memohon lain-lain perintah sampingan untuk memberi efek dan kesan yang adil bagi melindungi kepentingan dan haknya di dalam tindakan ini.”

Suit 456

[46] This suit was brought by CIMB against Aritah Realty as the 1st Defendant, Munir & Sons as the 2nd Defendant and SME Bank as the 3rd Defendant. The 4th, 5th and 6th Defendants in this suit are the same individuals as the 3rd, 4th and 7th Plaintiffs in Suit 44.

[47] The 4th Defendant had bought two Flats in Wisma Aritah namely Lot No. 11-3 and Lot No 11-4 pursuant to a Sale and Purchase Agreement dated 9th August 1997 from Aritah Realty for a price of RM200,000.00. For this purchase, CIMB had loaned the 4th Defendant a sum of RM180,000.00. In return and by way of security, the rights of

the 4th Defendant under the Sale and Purchase Agreement were assigned to CIMB pursuant to a Deed of Assignment dated 20th July 1998.

[48] The 5th Defendant bought two Flats in Wisma Aritah, Lot No. 5-4 and Lot No. 6-2, from Aritah Realty pursuant to a Sale and Purchase Agreement dated 9th August 1997 for a sum of RM200,000.00. For this purchase, CIMB loaned the 5th Defendant a sum of RM180,000.00. As security, the 5th Defendant assigned absolutely his rights and interest in the Sale and Purchase Agreement to CIMB by a Deed of Assignment dated 20th July 1998.

[49] The 6th Defendant bought four Office Lots in Wisma Aritah namely Lots No. 7-1, 9-1, 11-1 and 15-1, from Aritah Realty pursuant to a Sale and Purchase Agreement dated 6th February 1995 for a total sum of RM340,000.00. For this purchase, CIMB loaned the 6th Defendant a sum of RM300,000.00. As security, the 6th Defendant assigned absolutely his rights and interest in the Sale and Purchase Agreement to CIMB by a Deed of Assignment dated 16th June 1995.

[50] CIMB maintained that Aritah Realty had no right to sell Wisma Aritah to Munir & Sons because of the sale of the Units to the 4th, 5th and 6th Defendants and the assignment of the rights in their respective sale and purchase agreements to CIMB. CIMB also claimed that Munir & Sons had no right to create charges over Wisma Aritah in favour of SME Bank in view of the 4th, 5th and 6th Defendants' interest and the assignment of their interests to CIMB.

[51] As indicated above, the 4th, 5th and 6th Defendants' purchase of their respective Units, the loans granted to them by CIMB and the assignment of their rights in their respective sale and purchase agreements to CIMB were not disputed.

[52] In this suit the Plaintiffs' pleaded case against the sale of Wisma Aritah to Munir & Sons were contained in the following paragraphs in the Statement of Claim:

- “27. Defendan Pertama tidak berhak dalam apa jua hal keadaan sekalipun untuk menjualkan dan/atau memindahmilik Hartanah tersebut kepada Defendan Kedua kerana Hartanah tersebut adalah tertakluk kepada Hartanah-hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut yang pada setiap masa yang material telah diserahkan secara mutlak kepada Plaintiff.
28. Penjualan Hartanah tersebut dan/atau pindahmilik Hartanah tersebut telah dilakukan oleh Defendan Pertama kepada Defendan Kedua adalah tanpa kebenaran, pengetahuan, kuasa dan otoriti Plaintiff sebagai dan Pemberi Pinjam/Pemegang Serahkan yang sah keatas Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut.
29. Defendan Pertama juga mengabaikan kedudukan Plaintiff sebagai Pemberi Pinjaman/Pemegang Serah hak (Absolute Assignee) dan telah gagal bertindak secara bona fide dengan penjagaan yang betul dan usaha yang wajar berkenaan dengan urus niaga jual beli dan/atau urusan pindahmilik yang dilaksanakan oleh Defendan Pertama.
30. Defendan Kedua juga tidak berhak dalam apa jua hal keadaan sekalipun untuk mencagarkan dan/atau menggadaikan Hartanah tersebut kepada Defendan Ketiga kerana Hartanah tersebut adalah tertakluk kepada Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut yang pada setiap masa yang material telah diserahkan secara mutlak kepada Plaintiff.

31. Cagaran dan/atau Gadaian-Gadaian Hartanah tersebut telah dilakukan oleh Defendan Kedua melalui perserahan no.24528/2014 dan perserahan no. 24529/2014 yang masing-masing telah pada 2/7/2014 ("Gadaian-Gadaian tersebut") telah dilakukan oleh Defendan Kedua adalah tanpa kebenaran, pengetahuan, kuasa dan otoriti Plaintiff sebagai Pemberi Pinjam/Pemegang Serahhakan yang sah keatas Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut.
32. Defendan Kedua dan Defendan Ketiga juga mengabaikan kedudukan Plaintiff sebagai Pemberi Pinjaman/Pemegang Serah hak (Absolute Assignee) yang sah dan telah gagal bertindak secara bona fide dengan penjagaan yang betul dan usaha yang wajar berkenaan dengan urusan pendaftaran Gadaian-Gadaian tersebut atas Hartanah tersebut yang dilaksanakan oleh Defendan Kedua dan Defendan Ketiga.
33. Plaintiff menyatakan bahawa penjualan Hartanah tersebut dimana terletakanya Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam oleh Defendan Pertama kepada Defendan Kedua adalah:-
 - a) Ketiadaan (deprivation) Hartanah yang tidak sah; dan/atau
 - b) Pelaksanaan yang tidak betul dan menyalahi undang-undang; dan/atau
 - c) Penjualan dan/atau pindahmilik yang menyalahi undang-undang memandangkan Hartanah tersebut pada mulanya tidak dimiliki oleh Defendan Pertama; dan/atau
 - d) Pada setiap masa yang material, Defendan Pertama hanyalah bertindak sebagai "bare trustee" terhadap Defendan Keempat, Defendan Kelima dan Defendan Keenam."

[53] SME Bank had two charges registered in its favour on 2nd July 2014 against the title to Wisma Aritah. These charges were created by Munir & Sons as the registered proprietor of Wisma Aritah. SME Bank maintained that when the charges were created, there was no registered interest or encumbrance on the title to Wisma Aritah. As

such, SME Bank maintained that its charges are valid and enforceable. SME Bank also maintained that it had no knowledge of any irregularity or want of authority in respect of the sale of Wisma Aritah.

[54] The defence of the 4th, 5th and 6th Defendants, who are the customers of CIMB, were essentially to put CIMB to proof. Oddly enough, pleaded in their defence were also admissions to allegations by CIMB, yet said to be subject to CIMB proving these allegations.

[55] The reliefs sought by the CIMB were similar to those sought in its counterclaim in Suit 44 and they were the following:-

- “a) Suatu deklarasi bahawa **AZMILLAH BINTI ROSMAN**, Defendan Keempat adalah Pemilik Benefisial Lot No. 11-3 dan 11-4 yang beralamat pos di No. 11-3 dan No. 11-4, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur (“Hartanah-Hartanah Defendan Keempat tersebut”);
- b) Suatu deklarasi bahawa Plaintiff adalah Pemegang Serah hak (Absolute Assignee) keatas Lot No. 11-3 dan 11-4 yang beralamat pos di No. 11-3 dan No. 11-4, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur (“Hartanah-Hartanah Defendan Keempat tersebut”) dimana Perjanjian Pinjaman bertarikh 20/7/1998 dan Suratikatan Penyerahan hak (“Deed of Assignment”) bertarikh 20/7/1998 yang telah disempurnakan di antara Plaintiff dengan Defendan Keempat adalah sah dan berkuatkuasa;
- c) Suatu deklarasi bahawa **AZMIN KASS BIN ROSMAN**, Defendan Kelima adalah Pemilik Benefisial Lot No. 5-4 dan Lot 6-2 yang beralamat pos di No. 7-4 dan 5-2, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur (“Hartanah-Hartanah Defendan Kelima tersebut”);

- d) Suatu deklarasi bahawa Plaintiff adalah Pemegang Serah hak (Absolute Assignee) keatas Lot No. 5-4 dan Lot No. 6-2 yang beralamat pos di No.7-4 dan 5-2, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur (“Hartanah-Hartanah Defendan Kelima tersebut”) dimana Perjanjian Pinjaman bertarikh 20/7/1998 dan Suratikatan Penyerahan hak (“Deed of Assignment”) bertarikh 20/7/1998 yang telah disempurnakan di antara Plaintiff dengan Defendan Kelima adalah sah dan berkuatkuasa;
- e) Suatu deklarasi bahawa **MELATI PERSPEKTIF SDN BHD**, Defendan Keenam adalah Pemilik Benefisial Lot No. 7-1, 9-1, 11-1 dan 15-1 yang terletak di Tingkat Mezzanine, Wisma Aritah, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur (“Hartanah-Hartanah Defendan Keenam tersebut”);
- f) Suatu deklarasi bahawa Plaintiff adalah Pemegang Serah hak (Absolute Assignee) keatas Lot No. 7-1, 9-1, 11-1 dan 15-1 yang terletak di Tingkat Mezzanine, Wisma Aritah, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur (“Hartanah-Hartanah Defendan Keenam tersebut”) dimana Perjanjian Kemudahan bertarikh 16/6/1995 dan Suratikatan Penyerahan hak (“Deed of Assignment”) bertarikh 16/6/1995 yang telah disempurnakan di antara Plaintiff dengan Defendan Keenam adalah sah dan berkuatkuasa;
- g) Suatu deklarasi bahawa penjualan dan/atau pindahmilik Hakmilik GRN No. 76881, Lot 1404 Seksyen 41, (Dahulunya dikenali sebagai QTR 753, Lot 1404, Bandar Kampung Bharu) (“Hartanah tersebut”) yang tanpa mengecualikan Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam oleh Defendan Pertama kepada Defendan Kedua adalah terbatal dan tidak sah (viod ab initio);
- h) Suatu Perintah bahawa Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut dikecualikan dari cagaran dan/atau gadaian oleh Defendan Kedua yang memihak kepada Defendan Ketiga melalui perserahan no. 24529/2014 yang masing-masing telah didaftarkan pada 2/7/2014 (“Gadaian-Gadaian tersebut”) keatas Hakmilik GRN No. 76881, Lot 1404, Seksyen 41,

- (Dahulunya dikenali sebagai QTR 753, Lot 1404, Bandar Kampung Bharu) (“Hartanah tersebut”);
- i) Suatu Perintah bahawa Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga melepaskan dan menyerahkan Hakmilik Strata Individu Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut bebas daripada sebarang bebanan kepada Plaintiff dan/atau kepada peguamcara Plaintiff dan juga menyerahkan Memorandum Pindahmilik Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut yang telah disempurnakan, yang sah dan boleh didaftarkan bersama dengan pembayaran yang berkenaan kepada Plaintiff dan/atau peguamcara Plaintiff dalam tempoh empat belas (14) hari bermula dari tarikh penghakiman;
 - j) Secara alternatifnya, sekiranya Plaintiff tidak dapat mengambil kembali Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut daripada Defendan Kedua dan/atau Memorandum Pindahmilik Hartanah-Hartanah Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut dan gadaian yang memihak kepada Plaintiff tidak dapat didaftarkan, maka Defendan Pertama, Defendan Kedua, Defendan Ketiga, Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut dan gadaian yang memihak kepada Plaintiff tidak dapat didaftarkan, maka Defendan Pertama, Defendan Kedua, Defendan Ketiga, Defendan Keempat, Defendan Kelima dan Defendan Keenam tersebut samada secara bersamaan dan/atau berasingan hendaklah membayar segala kerosakan dan kerugian yang dialami oleh Plaintiff dimana kerosakan dan kerugian tersebut hendaklah ditaksirkan oleh Pendaftar Mahkamah;
 - k) Ganti rugi Am;
 - l) Faedah;
 - m) Kos tindakan; dan
 - n) Perintah selanjutnya seperti dan/atau relif lain yang difikirkan sesuai dan adil oleh Mahkamah Yang Mulia ini.”

Suit 55

[56] As mentioned, the Plaintiffs in this suit are Abdul Munir and Aritah Realty. The Defendants in this suit are the Personal Representatives of Zahar Bin Ariffin (deceased) (“Zahar”), Nurul Farahin Binti Md Ambia (“Nurul”) and Munir & Sons (M) Sdn Bhd.

[57] Zahar was a shareholder and director of Aritah Realty and he was also the brother of Abdul Munir. Nurul was the Company Secretary of Aritah Realty. There were other Defendants cited but they were removed as parties before the trial.

[58] In this suit, the Plaintiffs maintained that the sale of Wisma Aritah to Munir & Sons was without any lawful authority and the result of fraud on the part of the Defendants. Aritah Realty also averred that the Distress proceedings by Munir & Sons, predicated on an alleged tenancy agreement that was entered into between Munir & Sons as the landlord and Aritah Realty as the tenant, was void as it was entered into without the lawful authority of Aritah Realty.

[59] Abdul Munir testified that there were no shareholders’ and directors’ resolutions authorising the sale of Wisma Aritah. He also testified that a replacement title for Wisma Aritah was secured fraudulently by one Norazam Bin Tazli. Abdul Munir testified that what was said to be a statutory declaration signed by him in support of the application for the replacement title was in fact never signed by him. He also maintained that he did not sign a shareholders’ resolution and a directors’ resolution of Aritah Realty, both dated 12th September 2013,

authorising the sale of Wisma Aritah for a sum of RM11,000,000.00 and the entering into of a sale and purchase agreement with Munir & Sons respectively, both of which documents bore what appeared to be his signatures. However, when shown what appeared to be his signature in several other documents, he was less certain and said that he was not sure if they were indeed his signature. He did, however, admit that his signature was more or less inconsistent. Abdul Munir testified that Aritah Realty has now stopped carrying on business, has no income and does not even have an office.

[60] Thus it was Abdul Munir's allegation and testimony that the sale and transfer of Wisma Aritah was the product of fraud on the part of Zahar, Nurul and the individual by the name of Norazam Bin Tazli. On the 19th of June 2016, Abdul Munir lodged a police report stating that Zahar and Nurul had fraudulently transferred Wisma Aritah without his knowledge. On 4th of September 2017 Abdul Munir lodged a police report against Nurul for having among other things, fraudulently executed the transfer form for Wisma Aritah and having fraudulently produced a shareholders' and a directors' resolution of Aritah Realty. On 5th April 2018, Abdul Munir lodged a police report saying he did not receive the sum of RM1,900,000.00 or RM1,100,000.00 from Munir & Sons being the deposit and part of the consideration for the sale of Wisma Aritah. At the trial, Abdul Munir denied signing a letter dated 5th November 2013, under the letterhead of Aritah Realty and addressed to the solicitors Messrs Rommel & A Nagarajan, acknowledging receipt of the said sums of RM1,900,000.00 and RM1,100,000.00. This letter bore what appeared to be the signatures of Zahar and Abdul Munir. There was also in evidence a police report lodged by Abdul Munir against his

brother, Zahar, for having transferred some of Abdul Munir's shares in Aritah Realty to himself. This police report was dated 18th October 2007, i.e. several years before the sale of Wisma Aritah.

[61] There was no resolution by Aritah Realty's board of directors or shareholders authorising the tenancy agreement. The identity of the person who signed on behalf of Aritah Realty was not disclosed and the signature was unidentifiable. As for the alleged tenancy agreement between Aritah Realty and Munir & Sons, Abdul Munir testified that there was no resolution authorising this tenancy agreement. Even the name of the witness was not disclosed in the tenancy agreement.

[62] Puan Harnini Binti Bahari, Penolong Pengarah Pejabat Tanah dan Galian, was subpoenaed to testify. She testified that a replacement grant was applied for by Abdul Munir and Zahar. This was based on the application which was supported by 2 separate statutory declarations – one by Zahar and the other by Abdul Munir. This was the statutory declaration that Abdul Munir denied signing. She testified that upon the application, an investigation was conducted on the 27th of March 2014 at 9.14 a.m. and Zahar and Norazam Bin Tazli attended to assist in the investigations. The replacement grant was issued on 16th of April 2014.

[63] Nur Muhammad Bin Zahar was also called to testify for the Plaintiffs. He was Zahar's son. He testified that Zahar passed away on the 19th of November 2015 and when he passed away, he did not have much money. Nur Muhammad testified that Zahar only had several tens of Ringgit when he died. He also testified that Zahar was seriously ill in

2013 and 2014, before he passed away, and that Zahar was not capable of walking or ambulating on his own without assistance. Zahar was also senile and had dementia. Nur Muhammad also testified that Zahar never wanted to sell Wisma Aritah, knowing that Units in Wisma Aritah had been sold.

[64] However, in mid-trial, Aritah Realty and Munir & Sons resolved their differences and Suit 55 was withdrawn by Aritah Realty. Consequently, on 6th July 2018, Suit 55 was struck out without liberty to file afresh and with no order as to costs. The trial continued with the other suits.

[65] With the withdrawal of Suit 55 there remained Aritah Realty and Munir & Sons' defences to the remaining suits.

Aritah Realty's Defences

[66] Aritah Realty's defences filed in respect of the suits, other than Suit 55, were fundamentally the same as the basis pleaded for its claim in Suit 55. The crux of its defence was that the sale and the transfer of Wisma Aritah to Munir & Sons was occasioned by fraud and/or effected without lawful authority.

Munir & Sons' Defences

[67] Munir & Sons' defences to all the suits were essentially that it was a bona fide purchaser for value of the legal interest in Wisma Aritah, having purchased it for a total consideration of RM11 million. Munir &

Sons contended that its purchase of Wisma Aritah was without notice of any fraudulent conduct or lack of authority and the title it obtained from Aritah Realty was indefeasible by reason of section 340 of the National Land Code. It further contended that, on the other hand, the Plaintiffs in all the suits did not register any interest that they might have had in Wisma Aritah.

[68] Munir & Sons led evidence that its purchase of Wisma Aritah was through the introduction of an agent. Having found that Wisma Aritah was free from encumbrances, it entered into a sale and purchase agreement dated 20th September 2013 and purchased Wisma Aritah for a sum of RM11 million. A deposit of RM1.1 million was paid under the sale and purchase agreement. For the purchase of Wisma Aritah, Munir & Sons obtained a loan of RM8,400,000.00 from SME Bank.

[69] The solicitor who represented Munir & Sons in its purchase of Wisma Aritah, Mohamad Illiayas Bin Seyed Ibrahim ("Mohamad Illiayas") testified at the trial. He testified that the firm of solicitors Messrs Rommel & A Nagarajan represented Aritah Realty. Mohamad Illiayas' law firm prepared the sale and purchase agreement for Wisma Aritah. His legal firm also conducted a search at the registry and found that the title to Wisma Aritah was free from encumbrances. He referred to the fact that there were the shareholders' and directors' resolutions of 12th September 2013, authorising the sale of Wisma Aritah and that the memorandum of transfer, Form 14A, was executed under the respective parties' company seal.

[70] Mohamad Illiayas also testified that Munir & Sons borrowed the balance of the purchase price of RM8,400,000.00, less the initial deposit and part payment made, from SME Bank. Mohamad Illiayas' legal firm represented SME Bank in respect of the loan facility given to Munir & Sons. Mohamad Illiayas testified that the balance of the purchase price of RM8,400,000.00 was released by SME Bank to Aritah Realty's said solicitors, Messrs Rommel & A Nagarajan. He testified that the presentation of the transfer and SME Bank's charges were rejected on two prior occasions. The first was because the Memorandum and Articles of Munir & Sons did not state that it was a Malay entity and that the transfer of its shares were restricted to Malays and Malay companies. The second rejection was because the NRIC number of SME Bank's attorney was incorrectly stated. These issues were addressed and the transfer of Wisma Aritah to Munir & Sons and the registration of SME Bank's charges on the title were then effected.

[71] One Iqbal Bin Mohd Ayub ("Iqbal") also testified on behalf of Munir & Sons. He was one of the two directors and shareholders of Munir & Sons. His testimony was in respect of the overall purchase of Wisma Aritah. The introduction to the property was by an agent whose name he could not remember. The witness referred to the document in the non-agreed bundle of documents and confirmed that it was a copy of the sale and purchase agreement for Wisma Aritah entered into between Aritah Realty and Munir & Sons and that the signature on the last page of the document was his. According to Iqbal a 10% deposit amounting to RM1,100,000.00 and part of the purchase price amounting to RM1.9 million was paid by him to Zahar in cash. The receipt of these payments was acknowledged by a letter from Aritah Realty dated 5th November

2013, which was identified and pointed out by Iqbal Bin Mohd Ayub in the non-agreed bundle of documents. This letter was signed by Zahar and Abdul Munir and addressed to Messrs Rommel & A Nagarajan. In this letter, receipt of both the sums of RM1,900,000.00 and RM1,100,000.00 were acknowledged.

[72] Iqbal also testified that after the purchase of Wisma Aritah, it was rented to Aritah Realty for a rental of RM70,000.00 a month. He identified the Tenancy Agreement dated 26th of August 2014 which was in the non-agreed bundle of documents. He also testified that he signed the Tenancy Agreement on behalf of Munir & Sons and the signature appearing on the Tenancy Agreement was his.

[73] Iqbal testified that he visited Wisma Aritah with the agent before it was purchased. He was accompanied by Zahar and one of its directors. He said he was told that Wisma Aritah was tenanted. Iqbal said he spoke to someone in one of the Shop Lots and was told by the occupier that he was a tenant. Iqbal also visited the 2nd or 3rd floor and found that the rooms there were occupied by Bangladeshi workers who said they were tenants. Zahar informed him that they were tenants of Aritah Realty.

The Plaintiffs' claims in Suit 82, Suit 44, Suit 56, Suit 456

[74] With the discontinuation of Suit 55, the allegations of fraud and illegality in the sale of Wisma Aritah were also discontinued. As for the evidence tendered, it was agreed among all parties that since the

cases were heard together, to avoid repetition, the evidence and the testimonies given were to remain.

[75] However, the fraud and illegality alleged in Suit 55 were not the pleaded case of the Plaintiffs in the other suits. As set out above, their pleaded case was predicated on an assertion that by reason of the purchase of their respective Units they each had acquired beneficial interests in Wisma Aritah or part of it and therefore the sale of Wisma Aritah to Munir & Sons was somehow illegal and void.

[76] Although the word “fraud” appears in some of the statements of claim in the remaining suits, the allegation was predicated only on the sale of Wisma Aritah in light of the beneficial interests claimed by the Plaintiffs. No other particulars of fraud were pleaded. In this regard, it is important to be reminded of the decision of the Federal Court in *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799. In that case Jeffrey Tan FCJ delivering the judgment of the Court made it quite clear:

“[24] ... In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see O 18 r 12(1)(a) of the Rules of the High Court 1980, now Rules of Court 2012). 'When fraud is alleged it must be specifically pleaded. The mere allegation of fraud without showing facts to support it is not a matter to which the court will pay serious attention (*Wallingford v Mutual Society and Official Liquidator* (1880) 5 App Cas 685 at p 697. The party need not use the word 'fraud' if he pleads, in unambiguous language, acts which amount in law to fraud (*Myddleton v Lord Kenyon* (1794) 2 Ves 391 at p 412). Whenever fraud or misrepresentation is alleged in a pleading, or any affidavit, full particulars of the alleged fraud or

misrepresentation must be given' (*Spenser Bower, Turner and Handley, Actionable Misrepresentation*, (4th Ed), at pp 384–385).

[25] In *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672, Gopal Sri Ram JCA, as he then was, summarised the law as follows: The defendant alleged that the transfer to the plaintiffs by their father was by way of fraud, but no particulars were pleaded in the statement of defence or the counterclaim, it is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. In the High Court case of *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715; [1994] 4 CLJ 558 it was held by the High Court that it is established law that the expression fraud cannot be generally or vaguely pleaded. In *Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193; [1988] 1 CLJ 619; [1988] 1 CLJ (Rep) 717 the High Court held that a general allegation of fraud is insufficient event to amount to averment of fraud. There is good reason why fraud must be specifically pleaded and required in O 18 r 8(1) of the RHC. It is not to take the other party by surprise. In fact Lord Denning MR in *Associated Leisure Ltd (Phonographic Equipment Co Ltd) And Others v Associated Newspapers Ltd*; [1970] 2 QB 450 at p 677 said that 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.'

[77] Thus the “fraud” pleaded was narrow and limited in context. It is trite that parties are bound and confined by their pleadings (see *Saiman bin Umar v Lembaga Pertubuhan Peladang and anor appeal* [2015] 6 MLJ 492, FC). Given the circumstances, the observation of James Foong FCJ in the Federal Court in *RHB Bank Bhd (Substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 at p 202, is pertinent:

“[35] On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they

want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.”

Therefore the Court has to decide the remaining suits upon the parameters set by the pleadings. I would emphasise that the determination of the remaining suits is premised entirely on the very narrow bases of their pleadings. In this regard, it should also be pointed out that there was no attempt to prove any damages suffered by the Plaintiffs and no evidence was led in that respect.

[78] Thus the issue that needs ultimately to be considered is whether the Plaintiffs in the remaining suits have made out the case that they pleaded, which is, that they have beneficial interest in the Units they bought and the transfer of Wisma Aritah to Munir & Sons was therefore illegal or void.

[79] It is important to take cognisance of, and to reiterate, the fact that strata titles to the Units in Wisma Aritah were never issued. This is not a disputed fact. It is also not disputed that the strata titles were never even applied for. Under the sale and purchase agreements between Aritah Realty and the Developer and some of the Plaintiffs, the provision relating to the strata title states as follows:

“9. STRATA TITLE AND TRANSFER

- 9.1 the Vendor and/or Developer shall at its/their own costs and expenses take all reasonable steps and use its/their best endeavours to obtain approval for the subdivision of the said Building under the provisions of the Strata Title Act, 1985 as to

lead to the issue of a separate Strata Title to the said Flat-Lot and all costs and expenses in or about the subdivision of the said Building and the issue of a separate Strata Title to the said Flat-Lot shall be borne and paid by the Vendor and Developer.

- 9.2 The Vendor shall within twenty-one (21) days upon the issue of the Strata Title to the said Flat-Lot execute a valid and registrable Memorandum of Transfer of the said Flat-Lot in favour of the Purchaser, its nominee(s), successor(s)-in-title or lawful assign(s), as the case may be, free from encumbrances.”

Clearly therefore both Aritah Realty and the Developer had defaulted and breached their obligation under the sale and purchase agreements to apply for and to secure strata titles for the Units, at their own cost and expense.

[80] As strata titles were never issued for the Units in Wisma Aritah, subsequent purchasers of Units in Wisma Aritah had to have assigned to them the rights and benefits under the original purchasers' sale and purchase agreements with Aritah Realty and the Developer. It is only by such assignments would the chain of title to the contractual rights and benefits pass and the subsequent purchasers become successors in title or the lawful assigns of the original purchasers. Only then, would the subsequent purchasers be able to compel Aritah Realty and the Developer to apply for and to secure strata titles for their respective Units in Wisma Aritah. As stated above the sale and purchase agreements of the Plaintiffs in Suit 44, Suit 56 and Suit 456 and the assignments to CIMB were not disputed.

[81] However, in Suit 44, there was only one paragraph in the Statement of Claim relating to the failure to secure the strata titles and that was only against the Developer, which is under liquidation. There was no such pleaded claim against Aritah Realty but there is a prayer for exemplary damages against Aritah Realty and the Developer. As mentioned above, the action against the Developer was discontinued and not pursued.

[82] In Suit 56, it was pleaded that the Developer had failed to attend to the perfection of the Plaintiffs' titles in the Units but the Developer was removed as a party to the suit. Damages were sought against Aritah Realty and Munir & Sons but there was no pleaded cause of action for breach of contract against Aritah Realty in respect of its failure to secure or apply for strata titles for the Plaintiffs' Units.

[83] In Suit 456, there was no pleaded claim against either Aritah Realty or the Developer for breach of contract in not applying for or securing strata titles for the Units in Wisma Aritah purchased by the 4th, 5th and 6th Defendants. However, there was a prayer for damages against Aritah Realty and Munir & Sons.

[84] In Suit 82, the Developer was not cited and there was no pleaded claim for breach of contract against Aritah Realty. However there was a prayer for damages against Aritah Realty and Munir & Sons. There was no prayer for either specific performance or damages for breach of contract.

[85] Therefore based on the pleadings and in the final analysis, the Plaintiffs' pleaded cases were predicated merely on the contention that as purchasers and assignees of the rights of purchasers, they had beneficial interest in the Units they purchased. The contention continues on the basis that by reason of their beneficial interest, the subsequent sale and transfer of Wisma Aritah to Munir & Sons was unlawful, illegal and even fraudulent and void. In consequence, it was then maintained that SME Bank's charges in respect of its loan to Munir & Sons ought also to be set aside.

The purchasers' alleged beneficial interests

[86] Where a contract concerns purchase of land that is alienated, it is said to be trite law that pending transfer and registration of the land purchased, the purchaser will acquire a beneficial interest in the land if full payment of the purchase price had been made (see *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 and *Karrupiah Chettiar v Subramaniam* [1971] 2 MLJ 116). However, does the same principle apply if the contract is for the purchase of an apartment in a building, in respect of which strata title was to be acquired but has not, as yet, been issued?

[87] Was there any property in existence that the Plaintiffs in the remaining suits could claim they are beneficial owners of? In this regard, as a starting point, the decision of the Federal Court in *Tan Ong Ban v Teoh Kim Heng* [2016] 3 CLJ 193 is of significance.

[88] In *Tan Ong Ban* one of the questions of law posed to the Federal Court was “Whether section 340(1) of the National Land Code 1965 applied to immovable strata property in respect of which no register document of title has been issued by the appropriate authority”. This question of law was regarded by the Federal Court as Question No. 2. To this question of law, Arifin Zakaria CJ, delivering the judgment of the Court, held as follows:

“Our Finding To Question No. 2

[21] We entirely agree with the plaintiff's submission, as rightly conceded by learned counsel for the first defendant, the proviso to s. 340(3) of the NLC does not apply to the present case as the strata title is yet to be issued at the material date. This is premised on the fact that s. 340(1) of the NLC only speaks of registered title or interest. It is common ground that at the material date no strata title in respect of the property has been issued by the authority.”

Thus the concept of indefeasibility of title and interest under the National Land Code 1965 has no applicability when there is no title issued – whether in the form of a strata title or otherwise.

[89] Quite apart from whether the doctrine of indefeasibility applies or not, can any property rights, either in law or in equity, be acquired in respect of “property” that has yet to come into existence? Without the issuance of strata titles, what the Plaintiffs have are rights *ex contractu* and they are in the form of choses in action. The Plaintiffs’ rights are in respect of what they had contracted for and embodied in their respective sales and purchase agreements. Until the strata titles to the Units they had contracted to buy are issued, the Plaintiffs’ rights remain *in personam* as against Aritah Realty and the Developer, who

had undertaken to apply for and secure strata titles for the Units in Wisma Aritah. For those Plaintiffs who had contracted to purchase their Units in Aritah Realty from purchasers who had contracted for them with Aritah Realty and the Developer, they should have been assigned the rights under those contracts with Aritah Realty and the Developer. Without an assignment of rights and benefits in the contracts with Aritah Realty and the Developer, the right to the benefit of Aritah Realty's and the Developer's obligations thereunder would not have passed down to these Plaintiffs. These Plaintiffs/purchasers cannot even claim to have any right *in rem* because what they had contracted for, i.e. property with strata title, had not come into existence. They also cannot claim to have any rights *ad rem* (see *Tan Ong Ban and Bachan Singh v. Mahinder Kaur & Ors* [1956] MLJ 97) because without any strata titles issued, there cannot exist any rights *to* any existing property. All that exists, without strata titles being issued, are rights in contract.

[90] Does the fact that the physical space that was contracted for exists make any difference? I do not think so. Individuals may have occupational rights or rights of possession in respect of physical spaces without title. However, this is not the same as having any beneficial or legal interest in the space *qua* "property". Like rooms in a house, the Units that exist physically are not capable of separate ownership in law. They too have no separate title of their own. The physical space that exists, again like a room in a house, is capable of being rented or leased. Right of occupation in the form of a licence may also be granted. However these rights are again rights *in personam*. They exist by virtue of the contract or instrument that created them. There is only

one legal title that exists and that is the title in the land upon which Wisma Aritah sits.

[91] It is also for the very reasons above that the security given for loans in respect of property, the title for which has yet to come into being, is in the nature of an assignment and not a charge, as in this case. What are assigned by the purchasers, that passes to the financiers and taken as security, are the rights and benefits in contract. Because they are rights and benefits that arise from contract, and thus a chose in action, they can only be passed by means of an assignment, unlike title to land which, under our Torrens system, lies in registration. The rights, benefits and obligations in a contract may also pass by way of a novation, but they nevertheless remain rights, benefits and obligations *in contract enforceable in personam*.

[92] In regard to beneficial interests over landed property that may be acquired pursuant to a sale and purchase agreement, the authorities offered by the Plaintiffs are concerned with the sale and purchase of land in respect of which title exists or have come into existence. The only property to which title exists, in this case, is the title to Wisma Aritah. However, it cannot be that the purchasers are to be regarded as beneficial owners of Wisma Aritah. They did not contract to buy Wisma Aritah or the land upon which it sits. What the purchasers contracted for were ownership of Units in Wisma Aritah and ownership of such Units may only be achieved when title, i.e. strata titles, are issued for them. It also follows, having regard to the decision of the Federal Court in *Tan Ong Ban*, that without any title to the Units

purchased, the Plaintiffs have no registrable interest under the National Land Code.

[93] In the recent decision of the Court of Appeal in *Ooi Siew Eng @ Ooi Siw Eng (F) & Ors v Link Ventures Sdn Bhd (in liquidation) and another appeal* [2018] MLJU 76, Mary Lim JCA, delivering the judgment of the Court, stated of the bare trustee concept and beneficial ownership in relation to the decision of the Federal Court in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, in the following terms:

“[32] ... This then brought the Court to the position following Jessel MR’s dicta in *Lysaght v Edwards* (1875-76) 2 Ch D 499, that where there is “a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.” Mindful that *Lysaght v Edwards* was a case concerning a conveyance under a will and not a dispute between vendor and purchaser, the Supreme Court expressed the view that applying Jessel MR’s dicta in unqualified terms “would be misplaced.” The Supreme Court accepted that it was, however, “too late now to question the applicability of the concept of the bare trust in a vendor/purchaser situation in Malaysia” ; but stressed that the concept will have “to be applied in a modified form.”

[33] After examining some earlier decisions of *Peninsula Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149, *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45; *Ong Chat Pang & Anor v Valiappa Chettiar* [1971] 1 MLJ 224 and *Karrupiah Chettiar v Subramaniam* [1971] 2 MLJ 116; and the commentary by Judith Sihombing in her book *National Land Code: A Commentary* (2nd Ed,

1992) (at page 801); the Supreme Court accepted that the concept of the bare trust in a vendor/purchaser situation applies. However, against the Torrens system, that relationship does not arise from the time a contract of sale and purchase of land is concluded. The vendor is a trustee for the purchaser only *“when the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.”*

Thus the concept of bare trustee and the acquisition of beneficial interest can only arise if there is in existence a registrable title capable of being transferred - consistent with the principle that equity looks upon that as done, which ought to be done. It arises when, in equity, the purchaser is entitled to seek specific performance of the contract.

[94] The Plaintiffs' remedy therefore lies in the enforcement of the rights and benefits in their respective contracts. They could have proceeded for specific performance against Aritah Realty or the Developer but they did not, despite the many years that have lapsed since Aritah Realty and the Developer sold the Units in Wisma Aritah. They could have terminated their respective sales and purchase agreements with Aritah Realty and the Developer (either as assignees or original contracting parties) for their breach in not applying for and securing strata titles to the Units they purchased, but they did not. Even in these suits that have been brought, there is no claim against Aritah Realty for breach of contract or any attempt to terminate their respective contracts and to sue for damages. The Plaintiffs have sat on their rights and did nothing to enforce their rights.

[95] Unfortunately, since then, the Developer has been wound up. The Developer was wound up pursuant to a petition filed by American Home Assurance Company Limited and an order for winding up made on the 1st of December 1994. As for Aritah Realty, there is no claim based on its breach of contract. Equally unfortunate is the fact that Wisma Aritah has now been compulsorily acquired.

Conclusion

[96] For the reasons given above the orders that the Court may make, and makes, in regard to the remaining suits are:

Suit 82

- (i) The Plaintiffs action is dismissed.

Suit 44

- (i) The Plaintiffs' action is dismissed.
- (ii) The 4th Defendant, CIMB Bank Berhad's counterclaim against the 1st, 2nd, 5th and 6th Plaintiffs is dismissed.
- (iii) The 4th Defendant's, CIMB Bank Berhad's, counterclaim against the 3rd, 4th and 7th Plaintiffs for the declarations sought in paragraphs b), d) and f) of the prayers to the counterclaim is allowed, namely:
 - (a) in respect of the 3rd Plaintiff, a declaration that the 4th Defendant is the absolute assignee of the rights to Lots No. 11-3 and 11-4 bearing postal address at No. 11-3 and No.

11-4, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur and the Loan Agreement dated 20th July 1998 and the Deed of Assignment dated 20th July 1998 executed between the 4th Defendant and the 3rd Plaintiff are valid and enforceable;

- (b) in respect of the 4th Plaintiff, a declaration that the 4th Defendant is the absolute assignee of the rights to Lots No. 5-4 and 6-2 bearing postal address at No. 7-4 and No. 5-2, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur and the Loan Agreement dated 20th July 1998 and the Deed of Assignment dated 20th July 1998 executed between the 4th Defendant and the 4th Plaintiff are valid and enforceable and
- (c) in respect of the 7th Plaintiff, a declaration that the 4th Defendant is the absolute assignee of the rights to Lots No. 7-1, 9-1, 11-1 and 15-1, Mezzanine Floor, Wisma Aritah Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur and the Loan Agreement dated 16th June 1995 and the Deed of Assignment dated 16th June 1995 executed between the 4th Defendant and the 7th Plaintiff are valid and enforceable.

Suit 56

- (i) The Plaintiffs action is dismissed.

Suit 456

- (i) The Plaintiff's action against the 1st, 2nd and 3rd Defendants is dismissed.
- (ii) The declarations sought by the Plaintiff against the 4th, 5th and 6th Defendants in prayers b), d) and f) of the prayers to the Plaintiff's Statement of Claim are allowed, namely:
 - (a) in respect of the 4th Defendant, a declaration that the Plaintiff is the absolute assignee of the rights to Lots No. 11-3 and 11-4 bearing postal address at No. 11-3 and No. 11-4, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur and the Loan Agreement dated 20th July 1998 and the Deed of Assignment dated 20th July 1998 executed between the Plaintiff and the 4th Defendant are valid and enforceable;
 - (b) in respect of the 5th Defendant, a declaration that the Plaintiff is the absolute assignee of the rights to Lots No. 5-4 and 6-2 bearing postal address at No. 7-4 and No. 5-2, Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur and the Loan Agreement dated 20th July 1998 and the Deed of Assignment dated 20th July 1998 executed between the Plaintiff and the 5th Defendant are valid and enforceable and
 - (c) in respect of the 6th Defendant, a declaration that the Plaintiff is the absolute assignee of the rights to Lots No. 7-1, 9-1, 11-1 and 15-1, Mezzanine Floor, Wisma Aritah Jalan Haji Hashim, Off Jalan Raja Muda Abdul Aziz, Kampung Baru, 50300 Kuala Lumpur and the Loan Agreement dated

16th June 1995 and the Deed of Assignment dated 16th June 1995 executed between the Plaintiff and the 6th Defendant are valid and enforceable.

After hearing counsel for the respective parties and given the circumstances and outcome, I make no order as to costs in respect of all the remaining four suits.

Dated this 18th Day of October 2018

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(DARRYL GOON SIEW CHYE)

Judicial Commissioner

High Court of Malaya

Kuala Lumpur

(Civil NCvC 2)

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