AHMAD SHAHRIR NAZI

v.

NASHRUL HAZIMIE AB HALIM & ORS

High Court Malaya, Shah Alam
Wan Ahmad Farid Wan Salleh JC
[Suit No: 22NCVC-476-09-2015]
5 April 2016

Civil Procedure: *Judgments and orders — Judgment in default — Plaintiff seeking declaratory relief that 1st and 2nd defendants in breach of judgment in default obtained in another suit — Whether parties in present suit could be bound by judgment in default despite not being parties to other suit — Whether judgment in default regular*

Contract: *Sale and purchase of property — Sale and purchase agreement — Whether void for uncertainty — Contracts Act 1950, s 47 — Whether parties to be restored to status quo ante*

The plaintiff, before coming to this court in the instant case, had initiated almost similar proceedings against the 1st and 2nd defendants, and had managed to obtain a judgment in default in that suit ("Suit 111"). Instead of enforcing the said judgment in default, the plaintiff had instead opted to seek declaratory relief in this court that the 1st and 2nd defendants were in breach of the said judgment in default. This case concerned a piece of property ("the disputed property"), registered in the name of the 1st and 2nd defendants and subject to a legal charge by the 1st and 2nd defendants ("the original charge") in favour of Malayan Banking Berhad ("Maybank") as the registered chargee. It was charged in favour of Maybank as security for a housing loan extended to the 1st and 2nd defendants. The disputed property was also subject to the restriction in interest in that it could not be transferred, leased or charged unless with the consent of the state authority. The plaintiff entered into an agreement with the 1st and 2nd defendants to purchase the disputed property ("the first SPA"). As consideration, the plaintiff was to pay a cash payment of RM140,000.00 to the 1st and 2nd defendants (which the plaintiff did), and an unspecified amount to Maybank as full and final settlement of the housing loan and for the purpose of discharging the original charge. The 3rd defendant was a party to another agreement in respect of the disputed property with the 1st and the 2nd defendants, of which she was the purchaser ("the second SPA"). She applied for and received a housing loan from the 5th defendant and, in order to facilitate the transfer of the disputed property, paid the amount outstanding in respect of the 1st and 2nd defendants' housing loan to Maybank, thus discharging the original charge. The plaintiff, however, subsequently obtained an injunction restraining the transfer of the disputed property to the 3rd defendant.

The plaintiff came to this court seeking, *inter alia*, declaratory relief that the 1st and 2nd defendants were in breach of the judgment in default and that they

ought to pay the plaintiff in the form of exemplary damages for that breach. Over and above that, the plaintiff sought to declare that the second SPA was null and void and had no legal effect. As against the 4th defendant, the plaintiff sought an order for it to nullify the registration of the transfer of the disputed property in the name of the 3rd defendant, if any, and to henceforth register the disputed property in the name of the plaintiff. As against the 5th defendant, the plaintiff sought an order that the 5th defendant withdraw the private caveat it lodged in relation to the facilities granted to the 3rd defendant in respect of the 3rd defendant's housing loan. The 1st and 2nd defendants filed a counterclaim in the present suit, *inter alia*, for declaratory relief that the first SPA was null and void and could not be enforced against them, and a consequential order that the deposit of RM140,000.00 be forfeited. Since both Maybank and the 4th defendant were not parties to Suit 111, the questions that arose were: (i) whether they could be bound by the judgment in default; and (ii) whether the judgment in default was regular.

Held (dismissing the plaintiff's claim; partly allowing the 1st and 2nd defendants' counterclaim):

(1) The plaintiff was at all material times aware that Maybank was the registered chargee in respect of the disputed property. Yet he chose to ignore this fact at his own peril. As a registered chargee, and in the absence of fraud, Maybank must have an indefeasible interest in the disputed property because the original charge was created first, and, only then, came the first SPA. In fact, the first SPA even recognised the existence of the original charge. Maybank's consent must thus have first been obtained and there was, on the facts, no evidence that such consent was obtained. Had Maybank been made a party to the first suit, they could have consented to the plaintiff's claim. Alternatively, they could have objected and insisted on their right as the registered chargee to foreclose the disputed property as there was evidence of default on the part of the 1st and 2nd defendants. (paras 29 & 32)

(2) Clearly, as a registered chargee, Maybank had the right to be heard, which was not given by the plaintiff in Suit 111. Therefore, the plaintiff's blatant failure in making Maybank a party to Suit 111, knowing that the latter was the registered chargee, was bad in law and rendered the judgment in default irregular. The 4th defendant also could not be held to be bound by the judgment in default since they were never made a party to Suit 111. Furthermore, it was trite that land was a state matter. In fact, s 120 of the NLC empowered the state authority to impose such express conditions and restrictions in interest to any land alienated by the state. The court hence had no jurisdiction to give an order of transfer such as enunciated in the judgment in default without the prior consent of the state authority. To do that would tantamount to usurping the exclusive power and jurisdiction of the state authority. In the circumstances, the judgment in default was also bad in law for the reason of lack of jurisdiction. The judgment in default was thus non-existent (*Eu Finance Berhad v. Lim Yoke Foo (folld)*). (paras 33, 34, 35, 38 & 43)

(3) The first SPA, on the facts, was void for uncertainty due to its failure to address the pertinent issues of consent from the state authority, the time frame in respect of the application for consent, the position of the deposit paid in the event that consent were to be rejected and the time frame to obtain the redemption amount from Maybank. The plaintiff had failed to act within reasonable time in the spirit of s 47 of the Contracts Act 1950 in order to enforce his rights under the first SPA and since he had failed in asserting his rights much earlier, he could not come to the court of equity to seek relief. Under the circumstances, whether the plaintiff was a beneficial owner in respect of the disputed property after having paid the RM140,000.00 deposit was not relevant since the first SPA itself was void for uncertainty. It was for the same reason that this court could not make an order that the first SPA be specifically enforced subject to the "payment of the balance of the purchase price" and consent obtained from the state authority. Based on the pertinent evidence, the parties genuinely thought that they were signing a valid contract when they executed the first SPA, only to discover later the same was void. In the circumstances, and on the authority of *Leha Binte Jusoh v. Awang Johari Bin Hashim*, the parties were restored to *status quo ante*, ie before the contract was entered into. (paras 64-66)

[Order accordingly.]

Case(s) referred to:

Abdul Hai Masud Ahmad v. Kwang Yuet Song [1994] 3 MLRH 667 (refd)

Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmills (M) Sdn Bhd & Ors (No 2) [1996] 2 MLRA 519 (folld)

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 1 MLRA 183 (refd)

CIMB Investment Bank Berhad v. Metroplex Holdings Sdn Bhd [2015] 1 MLRA 517 (refd)

Dato' Capt Mohd Najib Abdullah v. Natarjaya Sdn Bhd & Ors [2016] 2 MLRH 12 (refd)

Director of Public Prosecutions v. Head [1959] AC 83 (refd)

Eu Finance Berhad v. Lim Yoke Foo [1982] 1 MLRA 507 (folld)

G Garden Development Sdn Bhd v. Pentadbir Tanah Daerah Kota Setar Kedah & Ors [2016] 3 MLRH 542 (refd)

Hew Hooi Chun v. KL Teksi Radio Bhd [2010] 1 MLRA 196 (refd)

Hiew Kat Kee v. Sading Aring; The State Government Of Sabah & Ors (Third Party) [2011] 7 MLRH 830 (refd)

Joseph Manikam v. Topwin Development Sdn Bhd & Ors [1987] 1 MLRH 211 (refd)

Leha Binte Jusoh v. Awang Johari Bin Hashim [1977] 1 MLRA 385 (folld)

Linggi Plantations Ltd v. Jagatheesan [1971] 1 MLRA 747 (refd)

Malayan Nurses Union v. Syarikat Perniagaan Cuepacs Bhd & Anor [2010] 3 MLRA 362 (refd)

Malaysia National Insurance Sdn Bhd v. Tan Kong Min [1996] 1 MLRH 914 (refd)
Matair Suhaili & Anor v. Rose Foo Chin Lan & Ors [2007] 2 MLRA 34 (refd)
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 1 MLRA 184 (refd)
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLRA 828 (distd)
Saw Siew Tuan v. Omicrast Manufacturers Sdn Bhd [2013] 5 MLRA 159 (refd)
Yap Moi v. Hong Leong Bank Bhd [2001] 1 MLRA 769 (refd)

Legislation referred to:
Contracts Act 1950, ss 30, 47, 66
Evidence Act 1950, ss 91, 92
National Land Code, s 120

Counsel:
For the plaintiff: Roshalizawati Muhamad (Noraizah Bahari with her); M/s Noraizah Bahari & Associates
For the 1st & 2nd defendants: Mohd Rifahmi Abdul Musikin; M/s AR Effande & Partners
For the 3rd defendant: Mohammad Hifdzi Hamzah; M/s Redzuan Hashim Hifdzi & Co
For the 4th defendant: Etty Eliany Tesno, SLO
For the 5th defendant: Arham Rahimy Hariri (Sharifah Alliana Idid with him); M/s Azim, Tunku Farik & Wong

JUDGMENT

Wan Ahmad Farid Wan Salleh JC:

Preamble

[1] This is a very peculiar case. Before coming to this court in the instant case, the plaintiff in this action had initiated almost similar proceedings against the 1st and 2nd defendants. The action was based on a stunningly similar set of facts and the plaintiff managed to obtain a judgment in default at that.

[2] The earlier suit, known as Writ Saman No: 22NCVC-111-03-2015, also in the Shah Alam High Court ("Suit 111"), was disposed of by my learned brother, Mohamad Zabidin Mohd Diah J, on 11 May 2015. I say that this case is peculiar because as opposed to enforcing the said judgment in default as one would normally do, the plaintiff had instead opted to seek a declaratory relief in this court that the 1st and 2nd defendants were in breach of the said judgment in default.

The Dispute

[3] The long and short of it is this. This is a dispute in respect of a piece of property known as No 41, Jalan AU2A/15, Taman Sri Keramat, 54200 Kuala

Lumpur situated on a land held under PM 4999 Lot 8578 Seksyen 2, Bandar Ulu Kelang, Daerah Gombak, Selangor ("the disputed property"). At all material times, the disputed property is registered in the name of the 1st and 2nd defendants. For the reasons to be explained later, the plaintiff claimed that he was the beneficial owner of the disputed property.

[4] It is also to be noted that the disputed property was at one time subject to a legal charge by the 1st and 2nd defendants ("the original charge") in favour of Malayan Banking Berhad ("Maybank") as the registered chargee. It was charged in favour of Maybank as security for a housing loan ("the housing loan") extended to the 1st and 2nd defendants.

[5] The disputed property is also subject to the restriction in interest in that it cannot be transferred, leased or charged unless with the consent of the state authority.

The Present Suit

[6] The plaintiff in this case is a party to an agreement dated 22 October 2012 between him of one part and the 1st and 2nd defendants of the other ("the first SPA" and marked as exh P-1).

[7] By the first SPA, the 1st and the 2nd defendants agreed to sell and the plaintiff agreed to purchase the disputed property for a consideration which can be summarised as follows:

(a) a cash payment of RM140,000.00; and

(b) an unspecified amount which the plaintiff had to pay to Maybank as full and final settlement of the housing loan and for the purpose of discharging the original charge.

[8] It was never disputed that the cash payment of RM140,000.00 was paid by the plaintiff to the 1st and 2nd defendants in different stages, which payments were duly acknowledged by the 1st and 2nd defendants.

[9] P-1 is so brief that, unlike any other standard sale and purchase agreements of land, it has only three clauses. It is not an exaggeration to note at this exordial stage that the plaintiff's case hinges of these three clauses. There was no mention of any time frame or any date of completion for the purpose of perfecting the discharge of the original charge and transfer.

[10] The 3rd defendant is a party to another sale and purchase agreement in respect of the same disputed property dated 4 November 2014 made between herself of one part and the 1st and the 2nd defendants of the other of which she was the purchaser ("the second SPA" and marked as "SD3-1") for a consideration of RM600,000.00.

[11] Unlike in Suit 111, in the instant case, the plaintiff finds it fit and desirable to include the Pendaftar and/or Pentadbir Tanah Daerah Gombak ("PTD Gombak") as the 4th defendant.

[12] In order to finance the purchase of the disputed property, the 3rd defendant had applied for a housing loan from CIMB Bank Berhad, the 5th defendant in the instant case, which application was approved by the latter vide their letter of offer dated 26 June 2015 (marked as exh SD3(3)) to the 3rd defendant. The loan ("the 3rd defendant's housing loan") approved by the 5th defendant was for a sum of RM420,000.00.

[13] In the meantime, in order to facilitate the transfer of the disputed property, the 3rd defendant, through the 5th defendant bank, had paid the amount outstanding in respect of the housing loan to Maybank. This was to enable the original charge on the disputed property to be discharged. The discharge was properly registered but the transfer to the 3rd defendant has yet to be perfected for the reason as follows.

[14] The plaintiff, in order to prevent the transfer to the 3rd defendant's name from being duly registered, had swiftly filed in an *ex parte* application for an injunction (encl 5) to restrain all of the defendants from taking all the necessary steps to transfer the disputed property into the name of the 3rd defendant. The *ex parte* application, which was supported by a certificate of urgency, was heard and eventually granted by my learned sister, Hanipah Farikullah J on 9 September 2015 (encl 8).

[15] The plaintiff then applied for the extension of the *ex parte* injunction which was heard *inter partes* by my learned sister, who on 19 October 2015 allowed the injunction ("the injunction") to remain enforced until the disposal of this suit.

[16] In the circumstances, the summary of the position is this:

(i) The disputed property remains in the name of the 1st and 2nd defendants;

(ii) The original charge in favour of Maybank had been duly discharged;

(iii) The transfer of the disputed property in the name of the 3rd defendant has been restrained due to the existence of the injunction;

(iv) The attendant consequent would be that no legal charge was registered in the name of the 5th defendant even though they had released a substantial amount of money to Maybank for the purpose of discharging the original charge.

[17] The plaintiff had come to this court seeking, *inter alia*, a declaratory relief that the 1st and 2nd defendants were in breach of the judgment in default and that they ought to pay the plaintiff, in the form of exemplary damages, for that breach. Over and above that, the plaintiff sought to declare that the second SPA was null and void and has no legal effect. As against the 4th defendant, the plaintiff sought an order for PTD Gombak to nullify the registration of the transfer of the disputed property in the name of the 3rd defendant, if any, and to henceforth register the disputed property in the name of the plaintiff.

As against the 5th defendant bank, the plaintiff sought for an order that the bank withdraw the Private Caveat Presentation No: 394/2015 duly registered on 5 February 2015 which was lodged by the 5th defendant bank in relation to the facilities granted to the 3rd defendant in respect of the 3rd defendant's housing loan.

[18] The 1st and 2nd defendants had filed in a counterclaim in the present suit, *inter alia*, for:

(i) a declaratory relief that the first SPA was null and void and could not be enforced against them; and

(ii) a consequential order that the deposit of RM140,000.00 be forfeited.

[19] At the trial, the plaintiff (SP1) gave evidence on his behalf and testified that he was ready, willing and able to perform his part of the obligation under the first SPA. He did testify that even if his application for loan to purchase the disputed property were to be rejected by any of the banks, he would still be able to pay the balance of the purchase price from his own resources. At one point, he indicated to the 2nd defendant (SD2) that he had no objection for the 2nd defendant to dispose of the disputed property to a third party, provided his prior consent was first obtained. Of course there was no mention about this prior consent in the first SPA and neither was it pleaded for in the statement of claim. I therefore exclude his evidence to vary the written agreement in the form of the first SPA. The plaintiff cannot adduce oral evidence to vary the first SPA as it falls foul of the provisions of ss 91 and 92 of the Evidence Act 1950; see *Abdul Hai Masud Ahmad v. Kwang Yuet Song* [1994] 3 MLRH 667 and *Yap Moi v. Hong Leong Bank Bhd* [2001] 1 MLRA 769.

[20] The other witnesses are the 2nd defendant (SD2) who gave evidence on her behalf and on behalf of the 1st defendant who is her son, the 3rd defendant (SD3), Mohd Naim bin Yusof (SD2-2) who was a solicitor acting for the 3rd defendant in respect of the second SPA and the 5th defendant in respect of the 3rd defendant's housing loan. The Disbursement Manager (SP5) of the 5th defendant bank gave evidence on behalf of the 5th defendant. The 4th defendant offered no witnesses.

Suit 111

[21] As I intimated earlier, the 1st and 2nd defendants were the only parties sued by the plaintiff in Suit 111.

[22] No memorandum of appearance was filed by either the 1st or the 2nd defendant. The plaintiff then proceeded with the filing of the certificate of non-appearance against both of the defendants on 8 April 2015. As aforesaid, a judgment in default of appearance was finally entered against both of the defendants on 11 May 2015 ("judgment in default").

Is The Judgment In Default In Respect Of The Suit 111 Regular?

[23] The judgment in default, *inter alia*, stated as follows:

(a) a declaration that the defendants were in breach of the first SPA;

(b) the plaintiff was to be given the rights under the first SPA and the rights to perfect the transfer of the same;

(c) that Maybank, as the registered chargee, was ordered to issue a redemption statement in respect of the charge of the disputed property to the plaintiff or otherwise to his solicitors;

(d) that PTD Gombak do register the discharge of charge in respect of the disputed property;

(e) that PTD Gombak do register the transfer the disputed property in the name of the plaintiff;

(f) and/or in the alternative, the defendants do pay to the plaintiff a sum of RM140,000.00 as a refund of the deposit in respect of the first SPA.

[24] I need to pause at this point in order to reiterate two issues. First, it is to be noted that Maybank and PTD Gombak were never made as parties in Suit 111. Secondly, it is a common ground that the disputed property is subject to a restriction in interest in that it cannot be transferred, leased or charged without the consent of the state authority.

[25] Since both Maybank and PTD Gombak were not made as parties in Suit 111, the questions that arise are: (i) could they be bound by the judgment in default; and (ii) is the judgment in default regular?

(i) Could Maybank Be Bound By The Judgment In Default?

[26] The counsel for the 3rd defendant in the instant case had submitted that not all of the affected parties were named as parties in the earlier suit. This, he argued, makes the judgment in default that followed to be defective. In particular, the counsel for the 3rd defendant argued that Maybank should have been made a party since the latter was the financier and above all a registered chargee. Any order by the court would have adversely affected Maybank as a registered chargee, and such order if given, would be defective and of no legal effect.

[27] The counsel then referred to the case of *Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmills (M) Sdn Bhd & Ors (No 2)* [1996] 2 MLRA 519. Mahadev Shankar JCA said in delivering the supporting judgment of the Court of Appeal:

> "The real question is whether these defendants were proper parties to the action. This claim was for specific performance of the contract for the transfer of the land to the purchaser. The bank had to be brought in because it was a chargee who had to be paid off and its consent was required for the sale."

[28] In reply, the counsel for the plaintiff submitted the 3rd and 5th defendants should have filed in an application to intervene in Suit 111. But then there was no evidence that the writ in Suit 111 was at least served on them, which gives rise to the question of how could they intervene? More importantly, the issue here is not solely about the 3rd and 5th defendants. Even at this stage, they (the 3rd and 5th defendants) have no registered interest under the National Land Code ("the NLC"). But the issue is as to the right of Maybank as a registered chargee under the NLC at the time of the filing of Suit 111.

[29] With respect, I agree with the submission by the counsel for the 3rd defendant. At all material times, the plaintiff was aware that Maybank was the registered chargee in respect of the disputed property. Yet he chose to ignore this fact, and I must add that he did so at his own peril. Obviously as a registered chargee, and in the absence of fraud, Maybank must have an indefeasible interest in the disputed property. This is so because the original charge was created first. Then came the first SPA. In fact, the first SPA even recognised the existence of the original charge. Maybank's consent, therefore, as expounded by Mahadev Shankar JCA in *Arah Cipta (supra)*, must have first been obtained. There was no evidence that such consent was obtained.

[30] If any authority is needed on this proposition of law, it can be found in the decision of Siti Norma Yaakob J (as she then was) in *Joseph Manikam v. Topwin Development Sdn Bhd & Ors* [1987] 1 MLRH 211 which reaffirmed the right of a registered chargee (the 3rd defendant in that case) when she said:

> "The facts of the case before me are in the reverse in that the charge was created first and then came the sale and purchase agreement. There is no denying the fact that the plaintiff had acquired a beneficial interest over his lot but this is however subject to the prior right of the 3rd defendant."

[31] In *Malayan Nurses Union v. Syarikat Perniagaan Cuepacs Bhd & Anor* [2010] 3 MLRA 362, the appellant had entered into a sale and purchase agreement ("the SPA") with the 1st respondent on 27 October 1981 to purchase the respondent's property situated in Cheras, Kuala Lumpur ("the property"). At the time of the sale, the property had been charged to Affin Bank Bhd ("the 2nd respondent"). On 3 October 1983, the appellant had paid the 1st respondent the full purchase price of the property but the latter had failed to transfer the property to the appellant. Thereafter, the appellant commenced action against the 1st respondent and obtained, *inter alia*, an order dated 2 September 1992 for specific performance of the SPA, for the property to be freed from all encumbrances and for it to be registered in favour of the appellant. Some eleven years later, the appellant sought to enforce the order dated 2 September 1992. The appellant's application for leave was heard together with the 2nd respondent bank's earlier application for leave to commence foreclosure proceedings on the charged property. The High Court refused to grant the appellant leave to enforce the judgment it had obtained against the 1st respondent, but granted the 2nd respondent bank leave to commence foreclosure proceedings. The Court of Appeal, in affirming the decision of the learned trial judge, held that

the latter was right to have refused the appellant leave to enforce the judgment that it obtained. The Court of Appeal further held that the learned judge was also right in granting the bank leave to commence foreclosure proceedings – for *ex facie* the bank is still the registered chargee.

[32] The Court of Appeal's decision in *Malayan Nurses (supra)* goes to show that the right of a registered chargee under the NLC is paramount and supercedes the right of a prospective purchaser in a sale and purchase transaction. Had Maybank been made a party to the first suit, they could have consented to the plaintiff's claim. Alternatively, they could have objected and insisted on their right as the registered chargee to foreclose the disputed property as there was evidence of default on the part of the 1st and 2nd defendants. However, in the absence of any evidence, I am not going to engage in surmise or conjecture as to these possibilities.

(ii) Is The Judgment In Default Regular?

[33] As I indicated earlier, clearly as a registered chargee, Maybank has the right to be heard which was not given by the plaintiff in Suit 111.

[34] For the reasons aforesaid, in my judgment, the plaintiff's blatant failure in making Maybank as a party in Suit 111, knowing that the latter was the registered chargee, is bad in law that would render the judgment in default irregular.

[35] It is also the finding of this court for the same reasons that PTD Gombak could not be held to be bound by the judgment in default since they were never made a party to Suit 111. This is even more so because the nature of the judgment in default was such that PTD Gombak was ordered to register the discharge of the original charge and thereafter to transfer the disputed property in the name of the plaintiff without any ancillary order for the amount outstanding under the original charge to be paid first to Maybank.

[36] For that to legally happen (in addition to Maybank and PTD Gombak being made parties to Suit 111), two conditions precedent must have been incorporated in the judgment in default. They are:

(i) there has to be a further order for the plaintiff to pay to Maybank whatever outstanding amount under the original charge; and

(ii) the transfer must be subject to the state authority giving consent to the same.

[37] It was obvious that the two conditions precedent were not incorporated in the judgment in default. Such an omission would render the judgment in default to be defective and irregular and therefore bad in law.

[38] Further, it is trite that land is a state matter. In fact, s 120 of the NLC empowers the state authority to impose such express conditions and restrictions in interest to any land alienated by the state. The court therefore

has no jurisdiction to give an order of transfer such as enunciated in the judgment in default without the prior consent of the state authority. To do that would tantamount to usurping the exclusive power and jurisdiction of the state authority; see *G Garden Development Sdn Bhd v. Pentadbir Tanah Daerah Kota Setar Kedah & Ors* [2016] 3 MLRH 542 and *Hiew Kat Kee v. Sading Aring; The State Government Of Sabah & Ors (Third Party)* [2011] 7 MLRH 830. In the circumstances, I have no hesitation whatsoever in concluding that the judgment in default was also bad in law for the reason of lack of jurisdiction.

[39] The counsel for the 5th defendant bank cited the Federal Court case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLRA 183 for the proposition of law that the final judgment of a High Court can be set aside by another High Court where the same can be proved to be null and void on the ground of illegality and lack of jurisdiction. With respect, I agree with this submission.

[40] What would a court of concurrent jurisdiction do when faced with a situation that a previous order of the same tribunal is bad and unlawful for want of jurisdiction? The counsel for the plaintiff in her submission insisted that the judgment in default stays and is enforceable for as long as it was not set aside. In fact, she even argued that this court is bound by that judgment in default. If that is so, why did the plaintiff not proceed with the enforcement? Why did the plaintiff come to this court? It is obvious that the judgment in default is incapable of being enforced.

[41] The general proposition of law is that if a judgment is irregular or bad for want of jurisdiction, it can be disregarded and impeached in collateral proceedings. This is referred to as collateral attack. To echo the words of Lord Denning in *Director of Public Prosecutions v. Head* [1959] AC 83, "if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado". Once want of jurisdiction has been established, which is my finding as regard to Suit 111, the said judgment in default is incurable and could simply be ignored in a collateral attack.

[42] I only need to refer to the judgment of Eusoffe Abdoolcader J (as he then was) in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 MLRA 507, wherein His Lordship said:

> "The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock (now a Law Lord) said (at p 736) that it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside."

[43] The principle laid down in *Eu Finance (supra)* was said to be the right proposition of law in many subsequent cases; see *Badiaddin (supra)*, *Hew Hooi Chun v. KL Teksi Radio Bhd* [2010] 1 MLRA 196 and *CIMB Investment Bank Berhad v. Metroplex Holdings Sdn Bhd* [2015] 1 MLRA 517. Based on the aforesaid established principle of law, this court has no choice but to make a finding that the judgment in default is of non-existence which I hereby do.

Is The Judgment In Default Enforceable?

[44] For the sake of completeness and since it has been raised by the parties, I will address on the issue of whether the judgment in default was capable of being enforced.

[45] Before me, the counsel for the 3rd defendant submitted that the judgment in default was not capable of being enforced anymore for the reason that the discharge of the original charge could not be executed (by PTD Gombak) since it had already been discharged by the payment made by the 3rd defendant to MBB through the 5th defendant bank.

[46] In reply, the counsel for the plaintiff argued that this court could always order the 5th defendant in the instant case to issue a statement of the amount outstanding in respect of the 3rd defendant's housing loan to enable the plaintiff to pay the 5th defendant off. With respect, this argument is without substance.

[47] To begin with, there was nothing in the statement of claim that sought an order of this kind. This court cannot go beyond the pleadings and reliefs sought for by the plaintiff in his statement of claim.There was nothing in the prayers in para 19 of the statement of claim that sought for such a relief. In *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 1 MLRA 184, the law was stated succinctly by Zakaria Yatim FCJ that "the court will not decide on any issue which is not pleaded and prayed for".

[48] In the circumstances, I therefore respectfully agree with the counsel for the 3rd defendant that Suit 111 is no longer enforceable or capable of being enforced anymore for the simple reason that the original charge had already been discharged.

Can The Plaintiff Enforce The First SPA In The Present Suit?

[49] Since I have made a ruling on the non-existence and hence the unenforceability of the judgment in default for being want of jurisdiction, I am now revisiting the legal implication of the first SPA in the present suit.

[50] The first question to be asked is whether the first SPA (P-1) is a valid contract. The terms and conditions of the first SPA are reproduced below, where the plaintiff is referred to as "pihak pertama" and the 1st and 2nd defendants are referred collectively as "pihak kedua".

"(1) Harga Jualan

Harga jualan adalah RM140,000.00 tunai dan besertakan penyelesaian baki pinjaman unit kediaman tersebut di Maybank yang akan dijelaskan oleh pihak pertama sebagaimana jumlah yang akan ditentukan oleh pihak Maybank. Proses pertukaran nama dan hakmilik akan dilakukan setelah keseluruhan harga jualan tersebut telah diselesaikan.

(2) Jangka Waktu Pembayaran

(1) Pihak pertama dan pihak kedua bersetuju bahawa pembayaran tunai untuk pembelian ini iaitu (RM140,000.00) akan diselesaikan oleh pihak pertama dalam jangkamasa 14 hari bekerja bermula dari tarikh perjanjian ini ditandatangani.

(3) Cara Pembayaran

(1) Kedua-dua pihak telah sepakat bahawa pembayaran untuk pembelian ini akan dibayar oleh pihak pertama secara tunai ke akaun yang ditentukan oleh pihak kedua.

(2) Setiap kali pembayaran dibuat oleh pihak pertama, rekod seperti di Lampiran 1 perlu dikemaskini oleh kedua-dua pihak."

[51] Before me, the counsel for the 1st and 2nd defendants argued that the first SPA was void *ab initio* for want of certainty. He cited s 30 of the Contracts Act 1950 which provides as follows:

"30. Agreements, the meaning of which is not certain or capable of being made certain are void."

For one, the counsel for the 1st and 2nd defendants argued that the consideration is not certain in that, except for the RM140,000.00 cash payment, the balance of the purchase price was not stated in the first SPA. Secondly, the learned counsel argued that the cash payment of RM140,000.00 (albeit in different stages) as the deposit for the disputed property was certainly more than 10% of the normal practice. He referred the court to the Privy Council case of *Linggi Plantations Ltd v. Jagatheesan* [1971] 1 MLRA 747 that the counsel said had given "judicial recognition" to the 10% deposit. Finally, the counsel for the 1st and 2nd defendants submitted that the plaintiff had not even paid the full amount of the purchase price and therefore is not even a beneficial owner. The counsel then cited the decision of the Court of Appeal in the case of *Dato' Capt Mohd Najib Abdullah v. Natarjaya Sdn Bhd & Ors* [2016] 2 MLRH 12 which is an authority that for a purchaser to be a beneficial owner, he must have paid the whole amount of the purchase price.

[52] I am going to analyse the points raised by the counsel for the 1st and 2nd defendants in the aforesaid paragraphs. Section 30 of the Contracts Act 1950 makes it clear that the contract has to be certain or capable of being made certain. Notwithstanding the fact the actual consideration of the first SPA was not specifically stated, it is to my mind capable of being computed. It is

therefore capable of being made certain within the meaning of s 30. The full consideration shall be the cash payment of RM140,000.00 and whatever the amount of the redemption of the original charge to be stipulated by Maybank. Secondly, on the deposit. In my judgment, for so long as parties are on a willing seller-willing buyer basis and that they entered into the contract without any coercion, it does not matter as to how much the deposit was. It could be 10%. It could even be more. The amount of the deposit paid by a purchaser does not in any way affect the legality and enforceability of a contract. With respect, I have been unable to find any authority which seems to suggest that a deposit of more than 10% in a sale and purchase transaction of land would render the contract void.

[53] The learned counsel for the plaintiff had urged this court to accept the plaintiff as the beneficial owner notwithstanding the fact that the purchase price was not paid in full. She cited the case of *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 MLRA 828 as an authority for the proposition of law that the plaintiff was indeed the beneficial owner, even if the full payment was not paid. In that case, the purchaser had paid a deposit of RM15,000.00 for the purchase of land, the consideration of which was for RM30,000.00.

[54] With respect, *Ong Chat Pang* is distinguishable. There was nothing in *Ong Chat Pang* that indicates that the land in question, unlike in the instant case, was subject to any restriction in interest. I will address on the issue of the beneficial ownership at the later part of this judgment.

[55] If there is anything that can be said about the uncertainty of P-1, it can be summarised thus:

(i) Since the transfer of the disputed property is subject to the restriction in interest in that it is subject to the consent of the state authority, whose obligation was it to obtain the said consent? Is it the plaintiff? Is it the 1st and 2nd defendants?

(ii) What is the time frame for the consent application from the date of the first SPA?

(iii) In the event where the application for consent were to be rejected by the state authority, what would happen to the agreement, in particular to the deposit of RM140,000.00?

(iv) What was the time frame for the plaintiff to pay off the balance of the purchase price to Maybank for the purpose of discharging the original charge?

Unfortunately, these were the issues that were not addressed nor incorporated as the terms and conditions of the first SPA. I therefore hold that the first SPA is void for the uncertainties itemised in (i) to (iv) herein before.

[56] In *Saw Siew Tuan v. Omicrast Manufacturers Sdn Bhd* [2013] 5 MLRA 159, Aziah Ali JCA (as she then was) in delivering the decision of the Court of Appeal said this:

> "… considering the fact that there was no certainty that the state authority would approve the appellant's application (*North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor* [2010] 3 MLRA 372), we agreed with learned counsel for the appellant that the completion of the sale and purchase transaction was uncertain and therefore the SPA was void for uncertainty (s 30 of the Contracts Act 1950)."

In *Saw Siew Tan*, the SPA provided that the balance of the purchase price was to be paid within two months "from the date of receipt by the vendor of the document of title in respect of the said property and the necessary approval for transfer (if any) in favour of the purchaser whichever is later". Thus completion of that contract, just like in the instant case, was predicated on the occurrence of certain events.

[57] In the instant case, there was no mention of the time frame for the contract to be completed. The absence of any time frame in any SPA is generally not fatal. Section 47 of the Contracts Act 1950 provides that "where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time" and that "what is a reasonable time is, in each particular case, a question of fact".

[58] What then, are the relevant facts in the instant case? The first SPA was executed on 20 October 2012. In order for the SPA to be perfected, two things must be fulfilled: (i) for the plaintiff to pay the balance of the purchase price to Maybank; and (ii) for the consent of the state authority to be obtained. In short, the first SPA is a contingent contract.

[59] The counsel for the plaintiff argued that if at all there was any delay, it was on the part of the 1st and 2nd defendants who consistently refused to give him: (i) the necessary documents to enable him to apply for consent; and (ii) the duly executed letter requesting for Maybank to issue the redemption amount in respect of the original charge. In the circumstances, the counsel further argued that the transfer could not be perfected and surely the plaintiff could not be faulted. I find this argument to be misplaced. If at all the 1st and 2nd defendants were to be at fault, what would be the option available to the plaintiff at that material time?

[60] The counsel for the plaintiff argued that the plaintiff was at all material times ready, willing and able to perfect the first SPA. However, the documentary evidence adduced before me shows the contrary. The plaintiff took his own sweet time. His action could only be considered as "leisurely paced". In my considered opinion, the plaintiff, knowing that his interest in the disputed property was at stake, should have been more vigilant in protecting the same. Since declaratory reliefs sought for in the instant case are

equitable in nature (see *Matair Suhaili & Anor v. Rose Foo Chin Lan & Ors* [2007] 2 MLRA 34), the relevant equitable maxim applicable would be *vigilantibus et non dormientibus lex succurrit* – equity aids the vigilant, not those who slumber on their rights (see *Malaysia National Insurance Sdn Bhd v. Tan Kong Min* [1996] 1 MLRH 914).

[61] From the evidence, it is clear that the plaintiff's action did not in any way reflect of his urgency to conclude and perfect the transaction. While the first SPA was executed on 22 October 2012, it was only stamped on 2 January 2014. In fact, the Stamp Duty Office had to impose a penalty on the duty for the delay. It was also on the same day, more than a year after the first SPA, that the plaintiff lodged a caveat on the disputed property. It was only on 22 September 2014, nearly two years after the first SPA, that the plaintiff through his solicitors sent a letter of demand to the 1st and 2nd defendants (marked as exh P3) demanding the latter to execute: (i) the memorandum of transfer in favour of the plaintiff; and (ii) the letter of "Surat Kebenaran kepada Pembiaya" addressed to Maybank for Maybank to issue a redemption sum in respect of the original charge. What is conspicuously missing in that letter of demand (P-3) was the application for consent from the state authority (which ought to be executed by the 1st and 2nd defendants) which is pertinent for the perfection of the transfer. It is my finding, therefore, that despite what has been vigorously submitted by his counsel, the plaintiff was not serious in enforcing his rights under the first SPA.

[62] It is trite that the law assists the vigilant and not the indolent. What the plaintiff should have done from the beginning was to file an action as soon as it become apparent that his right in the disputed property was at stake. He should have filed in an action for an order that the 1st and 2nd defendants do forthwith execute the relevant documents that include the:

(i) memorandum of transfer in respect of the disputed property;

(ii) consent letter addressed to Maybank for Maybank to release the redemption figure to the plaintiff or his solicitor; and

(iii) application for consent from the state authority.

[63] Upon obtaining the said order from the court, the plaintiff would have been in a better position to enforce his rights under the first SPA. That was the option open to the plaintiff – an option which he failed to exercise within reasonable time within the meaning of s 47 of the Contracts Act 1950. To have waited for about two years only to send an incomplete letter of demand is, in my considered opinion, not timeous at all.

Conclusion So Far

[64] For the reasons aforesaid, the conclusion of my findings so far would be thus:

a. Failure to mention the exact amount of consideration in the first SPA did not amount to uncertainty since the amount is capable of being made certain.

b. The amount of deposit to be paid in any sale and purchase agreement is irrelevant in determining whether such agreement is legally enforceable.

c. The first SPA is void for uncertainty by reasons of its failure to address the pertinent issues of consent from the state authority, the time frame in respect of the application for consent, the position of the deposit paid in the event that consent were to be rejected and the time frame to obtain the redemption amount from Maybank.

d. The plaintiff had failed to act within reasonable time in the spirit of s 47 of the Contracts Act 1950 in order to enforce his right under the first SPA and since he had failed in asserting his rights much earlier, he cannot come to the court of equity to seek relief.

[65] Under the circumstances, whether the plaintiff was a beneficial owner in respect of the disputed property after having paid the RM140,000.00 deposit is not relevant since I have decided that the first SPA itself is void for uncertainty. It is for the same reason that I cannot make an order, as urged by the counsel for the plaintiff, that the first SPA be specifically enforced subject to the "payment of the balance of the purchase price" and consent obtained from the state authority.

[66] Since the first SPA had become void, then s 66 of the Contracts Act 1950 will come into play. Section 66 provides that:

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Based on the evidence given by SP1 and SD2, it is my finding of fact that initially the parties genuinely thought that they were signing a valid contract when they executed the first SPA, only to discover later the same is void. Under the circumstances, and on the authority of *Leha Binte Jusoh v. Awang Johari Bin Hashim* [1977] 1 MLRA 385, parties are restored to *status quo ante*, ie before the contract was entered into.

On The Issue Of Rental Of The Disputed Property

[67] The 1st and 2nd defendants had raised the issue of rentals in respect of the disputed property (which was never referred to in the first SPA) in their statement of defence. It is my finding that the rentals collected by the plaintiff was a separate oral arrangement between the parties.

[68] Whatever the amount collected by the plaintiff in respect of the rental of the disputed property, if any, should be a matter of a separate cause of action and not for the determination in this proceedings. The 1st and 2nd defendants did not specifically pray for the same in their counterclaim anyway.

The Decision

[69] For the reasons expounded earlier in this judgment, my decision will be as follows:

(a) The plaintiff's claim in the instant case is dismissed.

(b) As a consequential order of the dismissal of the suit, the injunction is hereby discharged.

(c) I allow the counterclaim is so far as making a declaratory relief that the judgment in default was bad in law and is therefore set aside.

(d) Since the first SPA is declared void and applying s 66 of the Contracts Act 1950, I hereby make a consequential order that the deposit of RM140,000.00 be refunded by the 1st and 2nd defendants to the plaintiff within 14 days from the date of this judgment.

(e) The claim against the 4th defendant is hereby dismissed.

(f) Consequently, the claim against the 5th defendant is also dismissed.

(g) Since the first SPA is void, parties are at liberty to complete and perfect the second SPA provided that the balance of the purchase price is paid in full and that prior consent from the state authority is obtained for the transfer and charge of the disputed property.

(h) The 1st and 2nd defendants' counterclaim for the forfeiture of the deposit of RM140,000.00 be and is hereby dismissed with costs.

(i) The plaintiff is to pay costs to be taxed to all defendants herein.