

**Date and Time:** Thursday, 4 December 2025 3:02□pm +08

**Job Number:** 269757263

## Document (1)

1. [Jabar Khan @ Yasser Arafat bin Napi v Jebcon Sdn Bhd \[2021\] MLJU 532](#)

**Client/Matter:** -None-

**Search Terms:** "azzan"

**Search Type:** Natural Language

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**Jabar Khan @ Yasser Arafat bin Napi v Jebcon Sdn Bhd [2021] MLJU 532**

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

TEE GEOK HOCK JC

ORIGINATING SUMMONS NO BA-24NCVC-64-01 OF 2020

5 April 2021

*Nor Mohd Syazwan (**Azzan** with him) (Syazwan Hasim & Azeel Eskandar) for the plaintiffs.  
Syamsul Amar (The Chambers of Shamsul Anuar & Haziana) for the defendants.*

**Tee Geok Hock JC:**

**GROUND OF JUDGMENT**

**INTRODUCTION**

[1] The main issue in the present case relates to the developer's claims for service charges, said to be owed by the original purchaser, against the successful bidder of an auctioned apartment who took ownership by way of an assignment from the bank-assignee.

[2] The service charges which the developer (the Defendant herein) seeks to recover from the successful bidder (the Plaintiff therein) were in respect of the original purchaser's account for the period more than 6 years before the date of filing of this suit.

[3] After having paid the Joint Management Body the outstanding service charges claimed, the successful bidder did not want to pay the developer for the alleged unpaid service charges to the developer in respect of the period prior to the formation of the Joint Management Body. In response, the developer refused to execute the transfer of the strata title in favour of the successful bidder, and this led to the filing of the present suit by the successful bidder against the developer for a declaration that he is not under any obligation to pay the alleged service charges and for an order that the developer shall transfer the strata title of the apartment to him.

**FACTS**

[4] In 1998 the Defendant-developer sold an apartment unit in a strata development to the original purchaser. By Loan Agreement and Deed of Assignment, the original purchaser's rights and benefits to the said apartment were absolutely assigned to Alliance Bank's predecessor Bumiputra Merchant Bank Bhd (the bank-assignee) in consideration of a bank loan to finance the purchase: Exhibit "JKN1" to Plaintiff's Affidavit-in-Support.

[5] On 15.2.2000, the Joint Management Body for the strata development was formed.

[6] As a result of the original purchaser's defaults in repaying the loan, the bank-assignee sold the department by auction via Proclamation of Sale dated 7.4.2018: Exhibit "JKN1" to the Plaintiff's Affidavit-In- Support.

[7] The Plaintiff was the successful bidder at the auction sale.

[8] On 2.7.2018, the Plaintiff's solicitors sent the cheque of RM55,052.45 to the Joint Management Body as

payment for outstanding service charges as per the Joint Management Body's invoice and statement for years 2012 to 2017: Exhibit "JKN3" to the Plaintiff's Affidavit-In- Support.

[9] By letter dated 2.7.2018, the Plaintiff's solicitors also sent a cheque of RM10,057.30 being payment of assessment charges in favour of the relevant local authority: Exhibit "JKN3" to the Plaintiff's Affidavit-In- Support.

[10] On 25.8.2018, the balance price was paid by the Plaintiff to the bank's solicitors: Exhibit "JKN2" to the Plaintiff's Affidavit-In-Support.

[11] On 3.10.2018 the bank's solicitors sent the cheques for the bank's portion of assessment and service charges, being one cheque in favour of Majlis Perbandaran Ampang Jaya and another cheque in favour of the Joint Management Body: Exhibit "JKN4" to the Plaintiff's Affidavit-In-Support.

[12] By letter dated 11.3.2019 the Plaintiff's solicitors wrote to the Defendant-developer to inquire about the property and strata title status: Exhibit "JKN5" to the Plaintiff's Affidavit-In-Support.

[13] By letter dated 14.6.2019, CA Management Services Sdn Bhd on behalf of the Defendant-developer replied that the following amounts were allegedly outstanding:

- (a) Administrative fee payable to Jebcon Sdn Bhd RM 500.00 (developer)
- (b) service charges payable to CA Management Service Sdn Bhd for years 1999 to 2004 RM23,826.89

[14] On 22.6.2019, the Plaintiff's solicitors sent a letter instituted as "Request for Confirmation and Further Breakdown on the Interest" to CA Management Services Sdn Bhd in the following terms:

*"Please be informed that our Client is agreeable to settle the outstanding as per your letter dated above subject to your following confirmations:*

- 1) *Your confirmation as to whether the Strata Title is in your custody or Developer's custody;*
- 2) *Your confirmation to release to us the original Strata Title together with other relevant documents for our futher transfer purposes upon our full payment to your good office and to the Developer;*
- 3) *Your confirmation to execute the Memorandum of Transfer upon our full payment to your good office and to the Developer; and*
- 4) *The breakdown of the interest charges which is RM14,542.31. we take note that the amount might be adjusted in future. In the event, kindly forward us the breakdown for the said matter.*

*Please be informed that we shall forward you all the outstanding payment once we received the above confirmation."*

Exhibit "JKN7" to the Plaintiff's Affidavit-In-Support.

[15] By letter dated 10.10.2019 the Plaintiff's Solicitors informed CA Management Services Sdn Bhd that the Plaintiff was not agreeable to pay outstanding service charges of RM23,826.89 because the Plaintiff had paid RM55,052.45 to the Joint Management Body : Exhibit "JKN7" to the Plaintiff's Affidavit-In-Support.

[16] In the absence of any response from the Defendant, the Plaintiff by letter dated 5.12.2019 sent a notice of demand that the Defendant execute the Memorandum of Transfer of the strata title of the said apartment unit in favour of the Plaintiff: Exhibit "JKN8" to the Plaintiff's Affidavit-In-Support.

[17] As the Defendant still refused to execute the transfer the Plaintiff filed this Suit in January 2020.

#### **PARTIES' ARGUMENTS**

[18] In the Plaintiff's Written Submissions, the Plaintiff put forward the following arguments:

- (a) that the Plaintiff has no obligation or duty to pay the said amount of RM23,826.89, relying on the cases of *Resolution Alliance Sdn Bhd v. Binabaik Sdn Bhd* [2014] MLRAU 492; *Chung Khiaw Bank Ltd v. Penang Garden Sdn Bhd* [1990] 1 MLRH 495, *Malayan Banking Bhd v. Tonyin Fast Food Sdn Bhd* [2010] 6 MLRH 742;

- (b) that the claim for alleged outstanding service charges of RM23,826.89 was barred by Limitation Act 1953, relying on [section 6](#) of [Limitation Act](#), case of *Daud Arshad v. FELCRA Bhd* [2016] MLRHU 1689;
- (c) that the Defendant as bare trustee is under obligation to sign the Memorandum of Transfer in favour of the Plaintiff and then deliver the same together with the original strata title to the Plaintiff, relying on *Resolution Alliance Sdn Bhd v. Binabaik Sdn Bhd* [2014] MLRAU 492; *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* [2011] 1 MLRA 246.

[19] On the other hand, the Defendant in its Written Submissions argued as follows:

- (a) that the successful bidder is liable to pay all outstanding service charges based on the Proclamation of Sale and the Conditions of Sale, relying on *Serangoon Garden Estate Ltd v. Marian Chye* [1959] 25 MLJ 113, *Curtis v. Chemical Cleaning and Dyeing Co* [1951] 1 All ER 631; section 2(h), section 10 & 38 of Contracts Act, clauses of the Proclamation of Sale and Conditions of Sale.

## DECISION OF THIS COURT

[20] The facts of our present case are *in pari materia* with the material facts in *Resolution Alliance Sdn Bhd v. Binabaik Sdn Bhd & Anor* [2014] MLRAU 492.

[21] In *Resolution Alliance Sdn Bhd v. Binabaik Sdn Bhd* [2014] MLRAU 492 the Court of Appeal held as follows:

[31] *We have carefully examined the provisions of the assignment. Having done so, we hold that under the assignment the liability to pay any maintenance charges still remains with the second defendant. Section 3.01 of the assignment states that the second defendant as the purchaser cum assignor assigns to MBB "all the present and future right title and interest and benefit of the assignor in and to the property. "This means that what have been assigned to the plaintiff are only the 'right title interest and benefit' in respect of the property. **There has been no assignment of the liabilities in respect of the property to the plaintiff. This means that the liability to pay the maintenance charges is still that of the purchaser (that is, the second defendant).** Therefore, it is to the purchaser (the second defendant) that the demand for the payment of the outstanding maintenance charges should be made (but now subject to the appropriate legal procedure pertaining to bankruptcy). (emphasis added).*

.....

[34] *That only the rights of the assignor are transferred under an assignment and not the obligations and liabilities of the assignor was stressed by the High Court in Hong Leong Bank Berhad (which has taken over all assets and liabilities of Hong Leong Finance Bhd) v. Sum-Projects (Bros) Sdn Bhd* [2009] 4 MLRH 306;; [\[2010\] 7 MLJ 39](#); ; [2010] 7 CLJ 1010 where the Court held (at p 55 para 28):-

[28] *As adverted to above, the purchasers remain responsible and liable for the obligations under the SPA. What was assigned to the plaintiff under the deed of assignment is the benefit of the SPA, viz, the rights, titles and interest of the SPA and the property. The purchasers have undertaken to continue to discharge the burdens of it, viz, the conditions, covenants and stipulations of the SPA. The plaintiff, notwithstanding that it is not an original party to the SPA can take the benefits without the burden of the SPA. This intention is clearly reflected in [s. 7.01](#) of the deed of assignment between the purchasers as (assignors) and the plaintiff (as assignee) to which the consent of the defendant is endorsed therein".*

[35] *This legal position that in an assignment only rights and not liabilities are assigned was reiterated recently by the Court of Appeal in Hong Leong Bank Berhad v. Tan Siew Nam & Anor* [2015] 3 MLRA 681;; [\[2014\] 5 MLJ 34](#); ; [2014] 7 CLJ 293, para 55-56.

[40] *It is our judgment in the present case that, as submitted by learned counsel for the plaintiff, the first defendant is only a bare trustee of the property and no longer holds any beneficial interest in the property by reason of:-*

- (a) *the full purchase price of the property having been paid; and*
- (b) *the first defendant having delivered to the appellant the memorandum of transfer of the property duly executed.*

[41] *In Chua Hee Hung & Ors v. QBE Supreme Insurance Bhd* [1990] 1 MLRA 340;; [\[1990\] 1 MLJ 480](#); ; [1990] 1 CLJ (Rep) 49 at 51, the Supreme Court held


**In peninsular Malaysia the law is clear, viz the vendors after receipt of the full purchase price and surrender of possession of the lands to the purchasers are deemed to be bare trustees for the purchasers (see *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johor & Ors* [1974] 1 MLRA 163; [\[1974\] 2 MLJ 45](#)).**

[42] Therefore, it is the first defendant's obligation to deliver the strata title as requested by the plaintiff as ruled in *Director General of Inland Revenue v. Ooi Guan Hoe* [1985] 2 MLRH 645; [\[1986\] 2 MLJ 385](#) where Mohamed Dzaidin J (as he then was) at p 388 quoted *Halsbury's Law of England 4th edn Vol 48 para 641*:-



*A bare trustee is a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so.*


[43] In our judgment, based on the facts and the law, there is no excuse whatsoever for the first defendant to refuse to deliver up the strata title for the purposes of having the name of the successful bidder registered in the title. We reject the first defendant's argument that it has a lien over the property, as in our view the argument is devoid of any merit." (emphasis added).

[22] Liability cannot be transferred without the consent of all the parties to the contract. In *Chung Khiaw Bank Ltd v. Penang Garden Sdn Bhd* [1990] 1 MLRH 495 Mohamed Dzaidin J. (later CJ) held as follows:

**"First, in an assignment of a contract it is an accepted principle that the burden or liability cannot be transferred so as to discharge the original contractor without the consent of the party because no one is obliged without the consent of the other party because no one is obliged without his consent to accept the liability of a person other than him with whom he made his contract.** See *Chitty on Contract Vol. 1, 25th Edn.*, para 1309. In *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* [\[1902\] 1 Ch 146](#) , Vaughan Williams LJ held, citing the case of *Cox v. Bishop* [1857] 8 De G M & G 815 as authority, that it has never been the law that if a person receives the benefit which has resulted from a contract to which he is not a party, he has thereby taken upon himself the burden of the contract. (emphasis added).

[23] A developer who has received the full purchase price for a property unit becomes a bare trustee in respect of that property unit. In *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* [2011] 1 MLRA 246 (rujuk Tab F m/s 45-46 IOP) the Federal Court held as follows:

"[27] Based on the foregoing, I agree with the courts below that in the present case, constructive trust came into existence upon the execution of the deed of sale. This is in line with the common law principle that the deed of sale would entitle the plaintiff to specific performance and this in turn activates the equitable principle that equity looks upon as done that which ought to have been done (See *Walsh v. Lonsdale* [\[1882\] 21 Ch D 9](#) , *Attorney General for Hong Kong v. Reid* [\[1994\] 1 AC 324](#) .

**If I may add, by definition we may say that construction trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties.** (See *Edmund Davies LJ in Carl Zeiss Stiftung v. Herbert Smith & Co (No 2)* [\[1969\] 2 Ch 276](#)  at 301).

In *Beatty v. Guggenheim Exploration Co* 225 NY 380 at 389 (1919) it was observed that, " **A constructive trust is a formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.**" per *Cardozo J.* (emphasis added)

[24] It is trite law that by virtue of the doctrine of privity of contract, a person who is not privy to a sale contract is not entitled to claim any right or benefit under the terms of the contract.

[25] The Proclamation of Sale and Conditions of Sale being a sale contract made between the bank-assignee and the successful bidder, the developer who is not privy to the auction sale after the formation of the joint management body is not entitled to rely on a term of the sale contract to claim any alleged outstanding service charges against the successful bidder. Whatever *in personam* claim which the developer intends to make against the successful

bidder has to be premised upon the transfer of contractual liability from the original purchaser to the successful bidder.

[26] From the facts and circumstances of the present case, this Court has found and concluded as follows:

- (1) there was no transfer of the original purchaser's liability or obligation on service charges to the bank-assignee;
- (2) therefore, there was no transfer of the original purchaser's liability or obligation on service charges to the successful bidder through the auction sale;
- (3) the Proclamation of Sale (together with the Conditions of Sale) was a sale contract between the bank-assignee and the successful bidder, and the developer who is not privy thereto cannot claim any purported right or benefit under any term of the auction sale contract;
- (4) the developer is under a legal obligation to execute and effect the transfer of the strata title for the apartment in favour of the successful bidder; and
- (5) the developer has no lien over the strata title vis-à-vis the successful bidder who is the lawful owner of the strata property.

[27] In the course of the oral clarification on 2 September 2020, the Defendant's counsel clarified that the Defendant did not dispute its obligation to sign the Memorandum of Transfer and to deliver same together with the strata title to the Plaintiff, and the Defendant's position is that the outstanding service charges must be paid first before the signed Memorandum of Transfer together with the strata title is delivered to the Plaintiff. In essence, the Defendant's position is premised upon a lien over the strata title until the service charges are paid. Right of lien to strata title is a remedy *in rem*, while the right to recover service charges is a remedy *in personam*.

[28] From the provisions of the Strata Titles Act and as decided by the Court of Appeal in **Resolution Alliance Sdn Bhd v. Binabaik Sdn Bhd** (supra), after the formation of the joint management body a developer who has been paid the full purchase price has no lien over the strata title vis-à-vis assignee or successful bidder on account of any service charges said to be owed by the original purchaser.

[29] On the further or alternative argument of limitation period, this Court agrees with the Plaintiff's submission that the developer's claim for the alleged service charges for years 1999 to 2004 is time-barred.

[30] With the formation of the Joint Management Account on 15.2.2020, there was no longer any running account between the developer and the original purchaser as from 15.2.2000. As such, the developer's argument on alleged running account has no factual basis whatsoever in our present case.

[31] There is also a third reason which shows that on a point of law the developer's claim for alleged service charges against the successful bidder is unsustainable. This third reason is explained in the following paragraphs.

[32] The relevant sections of the Strata Management Act 2013 provides as follows:

***“Handing over by developer to the joint management body 15. (1) A developer shall, before the developer's management period expires –***

- (a) *transfer all balances of money in the maintenance account and the sinking fund account, after payment of all the expenditure which have been properly charged to the accounts, to the joint management body;*
- (b) *hand over to the joint management body –*
  - (i) *the administration office set up by the developer under paragraph 9(4)(a);*
  - (ii) *the audited accounts of the maintenance account and the sinking fund account or, if such accounts have not been audited, the unaudited accounts;*
  - (iii) *all the assets of the development area;*
  - (iv) *all records relating to and necessary for the maintenance and management of the buildings or lands intended for subdivision into parcels and the common property of the development area; and*
  - (v) *all invoices, receipts and payment vouchers in respect of the maintenance account and sinking fund account.*

**Balances not transferred shall vest in joint management body**

16. (1) *If any balance of moneys in the maintenance account and in the sinking fund account has not been transferred by the developer under paragraph 15(1)(a), the moneys shall vest in the joint management body on the date of the expiry of the developer's management period.*

(2) *Any right, power of remedy granted to the developer under this Part in respect of the Charges, contribution to the sinking fund, and any other assets of the maintenance account and the sinking fund account, shall vest in the joint management body on the date of the expiry of the developer's management period, and the joint management body shall have the same right, power or remedy as if it had at all times been a right, power or remedy of the joint management body including those rights in respect of any legal proceedings or applications to any authority by the developer pending immediately before the expiry of the developer's management period.*

(3) *Any judgment or award of any arbitral or other tribunal obtained by a developer in respect of the Charges, contribution to the sinking fund and any other assets of the maintenance account and the sinking fund account, and not fully satisfied before the expiry of the developer's management period shall be enforceable by the joint management body."*

**[33]** Under the Strata Management Act 2013, whatever monies or collectibles or chose in action which the developer had vis-à-vis the original purchasers would, upon the formation of the joint management body, forthwith be transferred to or vested in the joint management body. Our law of strata management does not countenance a situation where, after the joint management body's takeover of the management and maintenance of the strata development, a developer could still retain any money from service charges or sinking fund, collectibles or right to claim service charges against any purchaser or assignee or beneficial owner of any strata unit in the strata development. Such money or right in respect of service charges or sinking fund, if any, would become vested in the joint management body by operation of law.

**[34]** As the Plaintiff has fully settled his account of service charges vis-à-vis the Joint Management Body, it is not open to the developer to argue that there is still any outstanding service charges allegedly payable to the developer for the developer's own benefit.

**[35]** In any event, whatever account between the developer and the original purchaser in respect in respect of service charges for years 1999 to 2004 has been time-barred by virtue of section 6 of the Limitation Act.

**CONCLUSION**

**[36]** In conclusion, this Court decided on 2 September 2020 that the Plaintiff's claims in the present suit should be allowed with costs.

**[37]** Accordingly this Court on 2 September 2020 granted the following orders in favour of the Plaintiff:

- (a) A declaration that the Plaintiff, as the successful bidder in public auction dated 7.4.2018, does not have any obligation or responsibility to pay RM23,826.89 as outstanding service charges, maintenance, insurance, assessment charges, water charges and interests;
- (b) An order directing the Defendant to deliver to the Plaintiff the original strata title for the one unit of apartment in Hakmilik No. PM 491/M2/3/67, NO. LOT 28813, Mukim Ampang, Daerah Hulu Langat, Negeri Selangor Darul Ehsan with a floor area of 1033 square feet and bearing an address No. C5-2, Bella Vista Apartment, Jalan Cahaya 13, Taman Cahaya, 68000 Ampang, Selangor Darul Ehsan ("the said Property");
- (c) An order directing the Defendant to sign and execute a Memorandum of Transfer in Form 14A for the said Property in favour of the Plaintiff within 7 days from the date of this Order or, alternatively if the Defendant fails to do so, the Memorandum of Transfer shall be signed by the Registrar of the Court.

**[38]** After hearing the counsel for the respective parties on the quantum of costs of the suit, this Court assessed costs at RM5,000.00.