Ng Bee Ken Kenny (an advocate and solicitor practicing under the name and style of Messrs Azri, Lee Swee Seng & Co) v Tan Yee Shen & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02-(NCVC/W)-1259–06 OF 2018, W-02(NCVC)(W)-2580–12 OF 2018 AND W-02(NCVC)(W)-2603–12 OF 2018
ABDUL KARIM, NANTHA BALAN AND SUPANG LIAN JJCA
15 DECEMBER 2020

Civil Procedure — Limitation — Action against advocate for negligence — Whether trial judge had erred in analysis of the issue of limitation — Whether claim was time barred — Whether cause of action arose from earliest time action could be brought — Limitation Act 1953 s 6(1)(a)

Legal Profession — Duty of care — Professional negligence — Whether appellant was negligent in conveyancing transaction — Whether there was proof of breach of duty of care — Whether expert evidence must be tendered to determine standard of care — Whether appellant liable personally — Whether appellant failed to exercise due diligence in supervising SPA transaction — Whether appellant failed to perform duties in accordance with standard of a reasonably competent and prudent conveyancing practitioner — Whether loss was caused by appellant's actions or omissions — Whether appellant was responsible for intervening events

This was the appellant's appeal ('Appeal 1259') against the High Court's finding of negligence, appellant's appeal ('Appeal 2603') against quantum and respondents appeal ('Appeal 2580') against quantum. The appellant was an advocate and solicitor and a partner in the legal firm of Messrs Azri, Lee Swee Seng & Co ('the firm'). According to the respondents, they intended to purchase a parcel of commercial property in Kuala Lumpur and had engaged the appellant to handle the relevant sale and purchase transaction. The appellant's position was that the respondents had engaged the firm and it was the firm which handled the conveyancing transaction and was responsible/liable for any purported shortcomings/negligence. The respondents had entered into a sales and purchase agreement ('the SPA') dated 25 October 2000 with Jurumurni Sdn Bhd ('the vendor') to purchase a parcel of land with a 1 1/2 storey factory erected thereon ('the property'). Subsequently, an individual title was issued for the property and it was thereafter held under title PN 31499 Lot 38698 Mukim Petaling Daerah Kuala Lumpur. The developer of the property was the Datuk Bandar Kuala Lumpur ('DBKL'). The vendor purchased the property from DBKL whilst the property

was still under a master title. The SPA was conditional in that the completion of the SPA was subject to the approvals from DBKL and the Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur ('the state authority'). The vendor had previously taken banking facilities from Southern Finance Bhd (formerly known as United Merchant Finance Bhd). The vendor created a legal charge over the property. Thus, in order for the SPA to be completed, the charge had to be discharged and this could only happen when the chargee bank provided the redemption statement and the redemption sum was fully settled. In so far as consents were concerned, the appellant maintained that the firm assisted the vendor to obtain the DBKL and the state authority consent as the vendor was unrepresented. However, despite the repeated extensions of the consent by DBKL and the state authority, the SPA was not completed as the redemption sum which stood at RM411,773.76 as at 10 May 2002, had not been paid to the chargee bank. The redemption sum was more than 80% of the respondents' loan value of RM354,000, which was procured by the respondents from Public Bank Bhd to enable the respondents to complete the purchase of the property. The firm acted for the respondents in respect of the loan from Public Bank Bhd. At any rate, the property was not redeemed right up to the date where it was sold at the public auction on 16 February 2006. At the beginning stage of the transaction, the firm conducted a winding up search on the vendor at the Jabatan Pemegang Harta. The result was that the vendor had not been wound up. However, the vendor was subsequently wound up on 24 July 2001. The appellant and the firm were not aware that the vendor had been wound up. The chargee bank enforced the charge over the property. The property was initially scheduled to be sold via public auction on 3 June 2004. That auction was called off as parties were attempting to settle the redemption sum. The property was eventually sold via public auction on 16 February 2006. The reserve price was RM530,000. The respondents put in a bid at the auction. Their bid was RM690,000. However, the successful bidder was AEIOU Studio Sdn Bhd ('AEIOU'). On 26 June 2008, the respondents lodged a complaint with the advocates and solicitors disciplinary board ('ASDB') wherein it was alleged that the appellant had committed misconduct and that he should be subject to disciplinary action. This was more than two years after the property had been sold via public auction. As for the respondents' complaint to the ASDB, by an order dated 21 May 2010, the ASDB ordered that the appellant be reprimanded and that he was to refund a sum of RM29,700 to the first respondent. On 9 August 2012, the respondents filed Suit 943 against the appellant on the grounds that the appellant was negligent and had caused the respondents to lose the opportunity to purchase the property. On 31 May 2018 the respondents' claim (on liability) was allowed by the learned judge of the High Court ('the judge') following the conclusion of a full trial. On appeal, the counsel for the appellant submitted that the judge had erred in allowing the respondents claim as: (a) the claim was time barred; and (b) there was no proof of breach of duty of care.

Held, allowing the appellant's appeal ('Appeal 1259') with costs:

(1) In so far as the duties of a solicitor for the purchaser under the SPA are concerned, the court agreed that the appellant had a duty of care towards his client, the respondents. However, the court did not particularly agree with the judge's finding that the respondents had engaged the appellant personally, as opposed to the firm, to handle the SPA transaction. Indeed, it was obvious enough from the various contemporaneous documents that it was the firm that was handling the SPA transaction. In the court's view, even if it was the appellant who was engaged to take charge of the SPA and had bungled or mishandled the transaction, ultimately, it was the partnership ie the firm, which would be liable and not the appellant personally (see paras 71–72).

(2) The court had examined the evidence ie the documents, the witness statements and notes of evidence and did not think that the defendant had completely blundered or was hopelessly incompetent in the way the SPA was handled. The judge made a finding that the appellant's assertion that it was DW3 who handled the file was a bare assertion. In the court's view, that finding was plainly unsustainable, particularly in light of DW3's extensive evidence as to what he did in terms of, inter alia, the consents and the redemption statement. The judge's finding with respect to DW3's role in the implementation of the SPA flew in the face of the evidence. As such, it was obvious that there was a lack of appreciation of the evidence in favour of the appellant that was tendered at the trial. Having read the evidence in totality, it was quite clear that the appellant was not 'hands-on' in respect of the SPA. Rather, it was DW3 who was really handling the file under the appellant's supervision (see paras 76–77).

(3) In so far as the allegation of breach of duty of care was concerned, looking at the evidence as a whole, the court found no basis for the suggestion that the appellant had breached his duty of care as a conveyancing solicitor. The respondents had not even called an expert to testify that there was a departure from any particular standard of conveyancing practice. Even if the court accepted the respondents' assertion that the appellant was negligent, it was clear that the respondents had not proven that any loss that they had suffered, was caused by the appellant's actions or omissions. Plainly, the respondents had not satisfied the 'but for' test (see para 87).

(4) It was clear that 16 February 2006 was the earliest point in time that the respondents could have commenced an action in negligence as the cause of action commenced on that date. The damage occurred on that date because thereafter it was legally impossible to complete the SPA. The six years limitation period for an action in tort per s 6(1)(a) of the Limitation Act 1953 would therefore have ended on 15 February 2012. However, the present suit was only filed on 9 August 2012. On that analysis,

Suit 943 was plainly time barred. Lastly, the court noted that the judge had made a finding that the action was not time barred because the respondents' claim was premised on events that occurred prior to the respondents' loss of the property which crystallized on 16 February 2006. If that be the case, then the issue of time bar was even more compelling as anything that happened prior to 16 February 2006 would make the issue of time bar even more egregious. The judge had therefore erred in her analysis of the issue of limitation (see paras 104 & 108).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('rayuan 1259') terhadap dapatan kecuaian Mahkamah Tinggi, rayuan perayu ('rayuan 2603') terhadap kuantum dan rayuan responden ('rayuan 2580') terhadap kuantum. Perayu adalah seorang peguambela dan peguamcara dan rakan kongsi firma guaman Tetuan Azri, Lee Swee Seng & Co ('firma tersebut'). Menurut responden, mereka berniat untuk membeli sebuah hartanah komersial di Kuala Lumpur dan telah melantik perayu untuk mengendalikan transaksi jual beli yang berkaitan. Pandangan perayu adalah bahawa responden telah melantik firma tersebut dan ia adalah firma yang mengendalikan transaksi jual beli dan bertanggungjawab/bertanggungan terhadap sebarang kekurangan/kecuaian yang didakwa. Responden telah memasuki perjanjian jual beli ('SPA') bertarikh 25 Oktober 2000 dengan Jurumurni Sdn Bhd ('penjual') untuk membeli sekeping tanah dengan 1 1/2 tingkat kilang didirikan di atasnya ('hartanah tersebut'). Lanjutan itu, hakmilik individu telah dikeluarkan untuk hartanah tersebut dan ia kemudiannya dipegang di bawah hakmilik PN 31499 Lot 38698 Mukim Petaling Daerah Kuala Lumpur. Pemaju hartanah tersebut adalah Datuk Bandar Kuala Lumpur ('DBKL'). Penjual membeli hartanah tersebut daripada DBKL sementara hartanah tersebut masih di bawah hak milik induk. SPA adalah bersyarat kerana muktamadnya SPA tertakluk kepada kelulusan DBKL dan Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur ('pihak berkuasa negeri'). Penjual sebelum ini telah mengambil kemudahan perbankan daripada Southern Finance Bhd (dahulunya dikenali sebagai United Merchant Finance Bhd). Penjual membuat gadaian undang-undang ke atas hartanah tersebut. Oleh itu, untuk SPA dimuktamadkan, gadaian perlu dilepaskan dan ini hanya boleh berlaku apabila bank pemegang gadaian menyediakan penyata penebusan dan jumlah penebusan telah dijelaskan sepenuhnya. Setakatmana terhadap kebenaran, perayu menegaskan bahawa firma tersebut membantu penjual mendapatkan kebenaran DBKL dan pihak berkuasa negeri kerana penjual tidak diwakili. Walaubagaimanapun, di sebalik pelanjutan kebenaran berulang kali oleh DBKL dan pihak berkuasa negeri, SPA tidak dimuktamadkan kerana jumlah penebusan berjumlah RM411,773.76 pada 10 Mei 2002, belum dibayar kepada bank pemegang gadaian. Jumlah penebusan adalah lebih daripada 80% daripada nilai pinjaman responden sebanyak RM354,000, yang diperoleh oleh responden daripada Public Bank Bhd untuk membolehkan responden

memuktamadkan pembelian hartanah tersebut. Firma tersebut bertindak untuk responden berkenaan dengan pinjaman daripada Public Bank Bhd. Bagaimanapun, hartanah tersebut tidak ditebus sehingga tarikh ia dijual di lelongan awam pada 16 Februari 2006. Pada peringkat permulaan transaksi, firma tersebut menjalankan carian penggulungan ke atas penjual di Jabatan Pemegang Harta. Hasilnya adalah penjual tidak digulung. Bagaimanapun, penjual tersebut kemudiannya telah digulung pada 24 Julai 2001. Perayu dan firma tidak menyedari bahawa penjual telah digulung. Bank pemegang gadaian menguatkuasakan gadaian ke atas harta tersebut. Hartanah tersebut pada mulanya dijadualkan untuk dijual melalui lelongan awam pada 3 Jun 2004. Lelongan tersebut dibatalkan kerana pihak-pihak cuba menyelesaikan jumlah penebusan. Hartanah tersebut akhirnya dijual melalui lelongan awam pada 16 Februari 2006. Harga rizab adalah RM530,000. Responden membuat bidaan semasa lelongan. Bidaan mereka adalah RM690,000. Bagaimanapun, pembida yang berjaya adalah AEIOU Studio Sdn Bhd ('AEIOU'). Pada 26 Jun 2008, responden telah membuat aduan kepada lembaga tatatertib peguambela dan peguamcara ('ASDB') di mana perayu telah didakwa melakukan salah laku dan bahawa beliau harus dikenakan tindakan tatatertib. Ini adalah lebih daripada dua tahun selepas hartanah tersebut dijual melalui lelongan awam. Bagi aduan responden kepada ASDB, melalui perintah bertarikh 21 Mei 2010, ASDB memerintahkan supaya perayu ditegur dan beliau perlu membayar balik sejumlah RM29,700 kepada responden pertama. Pada 9 Ogos 2012, responden memfailkan saman 943 terhadap perayu atas alasan bahawa perayu cuai dan telah menyebabkan responden kehilangan peluang untuk membeli hartanah tersebut. Pada 31 Mei 2018 tuntutan responden (atas liabiliti) telah dibenarkan oleh hakim Mahkamah Tinggi yang bijaksana ('hakim') selepas tamatnya perbicaraan penuh. Semasa rayuan, peguam perayu berhujah bahawa hakim telah terkhilaf dalam membenarkan tuntutan responden kerana: (a) tuntutan tersebut telah dihalang oleh had masa; dan (b) tiada bukti pelanggaran kewajipan berjaga-jaga.

Diputuskan, membenarkan rayuan perayu ('rayuan 1259') dengan kos:

(1) Setakat kewajipan peguamcara bagi pembeli di bawah SPA berkenaan, mahkamah bersetuju bahawa perayu mempunyai kewajipan berjaga-jaga terhadap anak guamnya, responden. Bagaimanapun, mahkamah tidak begitu bersetuju dengan keputusan hakim bahawa responden telah melantik perayu secara peribadi, berbanding firma, untuk mengendalikan transaksi SPA. Sememangnya, sudah cukup jelas daripada pelbagai dokumen kontemporari bahawa firma tersebut yang mengendalikan transaksi SPA. Pada pandangan mahkamah, walaupun perayu yang telah dilantik untuk mengendalikan SPA dan telah semberono atau salah urus urus transaksi tersebut, akhirnya, perkongsian iaitu firma, yang akan bertanggungjawab dan bukan perayu secara peribadi (lihat perenggan 71–72).

(2) Mahkamah telah meneliti keterangan iaitu dokumen, penyata saksi dan nota keterangan dan tidak berpendapat bahawa defendan telah melakukan kesilapan sama sekali atau tidak cekap dalam cara SPA dikendalikan. Hakim membuat dapatan bahawa penegasan perayu bahawa DW3 yang mengendalikan fail tersebut adalah penegasan kosong. Pada pandangan mahkamah, dapatan tersebut jelas tidak dapat dikekalkan, terutamanya berdasarkan keterangan DW3 yang meluas tentang apa yang beliau lakukan dari segi, antara lain, kebenaran dan pernyataan penebusan. Dapatan hakim berkenaan dengan peranan DW3 dalam pelaksanaan SPA meleset terhadap keterangan. Oleh itu, adalah jelas bahawa terdapat kekurangan penghayatan terhadap keterangan yang memihak kepada perayu yang dikemukakan pada perbicaraan. Setelah membaca keterangan secara keseluruhan, adalah jelas bahawa perayu tidak 'hands-on' berkenaan dengan SPA. Sebaliknya, DW3 yang benar-benar mengendalikan fail di bawah pengawasan perayu (lihat perenggan 76–77).

(3) Setakat mana dakwaan pelanggaran kewajipan berjaga-jaga, melihat kepada keterangan secara keseluruhan, mahkamah mendapati tiada asas bagi cadangan bahawa perayu telah melanggar kewajipan jagaannya sebagai peguamcara jual beli. Responden tidak pernah memanggil pakar untuk memberi keterangan bahawa terdapat penyimpangan daripada mana-mana standard amalan jual beli. Walaupun mahkamah menerima penegasan responden bahawa perayu cuai, adalah jelas bahawa responden tidak membuktikan bahawa apa-apa kerugian yang mereka alami, adalah disebabkan oleh tindakan atau peninggalan perayu. Jelas sekali, responden tidak memenuhi ujian 'but for' (lihat perenggan 87).

(4) Ia adalah jelas bahawa 16 Februari 2006 adalah masa paling awal responden boleh memulakan tindakan secara cuai kerana punca tindakan dimulakan pada tarikh tersebut. Kerugian berlaku pada tarikh tersebut kerana selepas itu adalah mustahil untuk menyiapkan SPA. Oleh itu, tempoh had enam tahun untuk tindakan tort mengikut s 6(1)(a) Akta Had Masa 1953 akan berakhir pada 15 Februari 2012. Bagaimanapun, Tindakan semasa hanya difailkan pada 9 Ogos 2012. Mengenai analisis tersebut, Saman 943 telah dihalang oleh had masa. Akhir sekali, mahkamah menyatakan bahawa hakim telah membuat keputusan bahawa tindakan tersebut tidak disekat oleh had masa kerana tuntutan responden adalah berdasarkan peristiwa yang berlaku sebelum kehilangan harta benda responden yang menjadi nyata pada 16 Februari 2006. Jika ia adalah benar, maka isu had masa adalah lebih menarik kerana apa-apa yang berlaku sebelum 16 Februari 2006 akan menjadikan isu had masa lebih teruk. Oleh itu, hakim telah terkhilaf dalam analisisnya tentang isu had masa (lihat perenggan 104 & 108).]

Cases referred to

AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784; [2010] 7 CLJ 663; [2009] 1 LNS 1479, CA (folld)

Buana Perdana Sdn Bhd v Chan Siew Cheong & Ors [2012] 8 MLJ 367; [2012] 1 AMR 560, HC (refd)

Dato' Ahmad Johari bin Tun Abdul Razak v A Santamil Selvi a/p Alau Malay @ Anna Malay (administratix for the estate of Balasubramaniam a/l Perumal, deceased) & Ors and other appeals [2020] 6 MLJ 133; [2020] 7 CLJ 588, CA (refd)

Hemp v Garland (1843) 4 QB 519 (refd)

KE Hilborne v Tan Tiang Quee; KS Chung v Tan Tiang Quee [1972] 2 MLJ 94, CA (refd)

Lim Goh Huat v Saw Keng See [1998] 6 MLJ 600, HC (refd)

Mohd Sari bin Datuk Okk Hj Nuar & Ors v Asia General Equipment and Supplies Sdn Bhd & Ors [2010] 5 MLJ 766, CA (refd)

Ngan Siong Hing v RHB Bank Bhd [2014] 2 MLJ 449; [2014] 3 CLJ 984; [2014] 1 AMCR 829, CA (refd)

Shearn Delamore & Co v Sadacharamani a/l Govindasamy [2017] 1 MLJ 486; [2017] 2 CLJ 665; [2016] 6 AMR 797, CA (refd)

Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor [2017] 4 MLJ 207; [2017] 6 CLJ 368, CA (refd)

Legislation referred to

Rules of Court 2012

Limitation Act 1953 s 6(1)(a)

Appeal from: Civil Suit No 22NCVC-943–08 of 2012 (High Court, Kuala Lumpur)

Lim Kian Leong (Joyce Goh Min Yen with him) (Lim Kian Leong & Co) for the appellant.

David Gurupatham (Venothani Raja with him) (Gopal, David Gurupatham & Koay) for the respondents.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant is an advocate and solicitor. He is a partner in the legal firm of Messrs Azri, Lee Swee Seng & Co ('the firm'). On 9 August 2012, the respondents filed Kuala Lumpur High Court Suit No 22 NCVC-943–08 of 2012 ('Suit 943') and naming the appellant as the sole defendant. According to the respondents, they intended to purchase a parcel of commercial property in Kuala Lumpur and had engaged the appellant to handle the relevant sale and purchase transaction. The appellant's position is that the respondents had

engaged the firm and it was the firm which handled the conveyancing transaction and was responsible/liable for any purported shortcomings/negligence.

[2] Leaving aside the question as to whether the respondents had engaged the appellant or the firm, what is indisputable is that ultimately the sale and purchase transaction did not go through. Indeed, it could not go through. For now, it is important to mention that the intervening events are, first, the winding up of the vendor and secondly, the enforcement of a legal charge over the land, and lastly, the sale of the subject land to a third party at a public auction. The appellant says that he had no control over these events. The respondents disagree. We will come back to this issue in the later part of this judgment. The respondents tried to salvage the transaction by putting in a bid at the auction. However, their bid during the auction was unsuccessful and ultimately they were not able to purchase the land. As such, they claim that they suffered loss and damage. The respondents attribute the loss and damage to the appellant's alleged negligence and mishandling of the conveyancing transaction.

[3] During cross-examination, the first respondent said (rather crudely) in reference to the appellant's handling of the sale and purchase transaction that, 'He actually screwed up the whole transaction'. The respondents therefore sued the appellant for his alleged negligence in respect of the conveyancing transaction.

SUIT 943 — THE OUTCOME

[4] In so far as Suit 943 is concerned, on 31 May 2018 the respondents' claim (on liability) was allowed by the learned judge of the High Court ('the judge') following the conclusion of a full trial. Thereafter, after undertaking an assessment of damages, the judge granted damages pursuant to an order dated 23 November 2018.

[5] The judge allowed damages in the sum of RM300,000 being renovation costs and cost of relocation of the respondents' business to a new location. The judge also awarded interest on the damages at the rate of 5%pa from the date of the filing of the action until full and final settlement, and costs of RM30,000 (subject to allocator).

THE APPEALS

[6] The appellant was not happy with the outcome on liability and quantum. For their part, the respondents were also not happy with the

outcome as the amount that was awarded by the judge was far less than what they had sought as damages per the reamended statement of claim.

[7] The appellant appealed via Civil Appeal No W-02(NCVC)(W)-1259–06 of 2018 ('Appeal No 1259') against the finding of negligence. The respondents appealed via Civil Appeal No W-02(NCVC)(W)-2580–12 of 2018 ('Appeal No 2580') as to the inadequacy of quantum. The appellant appealed via Civil Appeal No W-02(NCVC)(W)-2603–12 of 2018 ('Appeal No 2603') against the quantum which was awarded.

[8] On 15 December 2020, we allowed Appeal No 1259 (on liability). Consequently, Appeal No 2580 and Appeal No 2603 were rendered academic and were accordingly dismissed. This judgment explains why we allowed Appeal No 1259. For the sake of convenience and brevity, we shall refer to the parties as per their titles in the High Court. Hence, we shall refer to the appellant as 'the defendant' and the respondents as the 'plaintiffs'.

BACKGROUND FACTS

[9] The first plaintiff is Mr Tan Yee Shen. He shall be referred to in the singular as 'P1'. P1 is also known as 'Eason' The reference to Eason in the documents or notes of evidence is to be taken as a reference to P1. The second plaintiff is Mr Tan Khiang Nam. He shall be referred to in the singular as 'P2'. P2 is P1's father. The plaintiffs carried on business as partners of a partnership known as Kient Win Enterprise (business registration No 001082771-K) ('KWE').

[10] During the trial it was established that as at the date of filing of Suit 943, the business registration of KWE had been 'cancelled'. Counsel for the defendant argued before the High Court that Suit 943 was a nullity as the plaintiffs lacked the requisite standing to sue as partners of KWE. The point was not seriously pressed in the appeal before us.

[11] As such, this judgment shall proceed on the footing that the plaintiffs had the requisite locus standi to sue. In any event, the issue of the plaintiffs' standing to sue is irrelevant as we had allowed Appeal 1259 on the basis that Suit 943 was time-barred and that the plaintiffs had not established their case in negligence against the defendant.

[12] We turn now to the conveyancing transaction. The starting point is that the plaintiffs entered into a sales and purchase agreement ('the SPA') dated 25 October 2000 with Jurumurni Sdn Bhd ('the vendor') to purchase a parcel

of land with a 1 1/2 storey factory erected thereon with an address at No 45, Taman Desa Tasik, Sungei Besi, Kuala Lumpur.

[13] The subject property is more specifically described in the First Schedule to the SPA, as 'All that 1 1/2 storey factory known as Lot 45, Type 4B measuring approximately 2,971.90 sqft in area bearing postal address 45, Taman Desa Tasik, Sungei Besi, Kuala Lumpur and held under Master Title(s), Pajakan Negeri (WP) No Hakmilik 23485, Lot 36068, Mukim Petaling, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan KL (formerly held under HSD 76917, PT No 4727, Mukim of Petaling, Daerah and Negeri Wilayah Persekutuan)' ('the property'). Subsequently, an individual title was issued for the property and it was thereafter held under title PN 31499 Lot 38698 Mukim Petaling Daerah Kuala Lumpur.

[14] The developer of the property was the Datuk Bandar Kuala Lumpur ('DBKL'). The vendor purchased the property from DBKL whilst the property was still under a Master Title.

[15] The vendor was wound up on 24 July 2001. Neither the firm, the defendant nor the plaintiffs were aware of this fact. They came to know of the vendor's wound up status very much later. All along the firm dealt with Dato' Lim Thean Seng ('Dato' Lim') who was a director of the vendor. Dato' Lim did not alert the defendant, the firm or the plaintiffs that the vendor had been wound up.

[16] It is relevant to mention at this juncture that the vendor was previously a client of the firm in respect of matters which are not connected to the SPA or the conveyancing transaction. Dato' Lim was known to the defendant. And due to the previous solicitor/client relationship between the firm and the vendor, the respondents alleged that the defendant was in a conflict of interest position. P1 actually made an allegation that the defendant's actions were designed to benefit the vendor. But during cross-examination, P1 recanted and withdrew the allegation.

[17] In so far as the SPA and the conveyancing transaction are concerned, the vendor was unrepresented. Indeed, the SPA specifically states that all reference to vendor's solicitors shall be a reference to the firm (see: Third Schedule to the SPA).

[18] The SPA was conditional in that the completion of the SPA was subject to the approvals from DBKL and the Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur ('the state authority'). In this regard, cl 7.1 of the SPA reads as follows:

> 7.1 ... this Agreement is subject to the Consents which shall be obtained by the vendor within Three (3) calendar months in the case of the Developer und SIX (6) Calendar months in the case of the State Authority (if any) from the date of the Agreement, falling which the vendor shall be entitled to the option of extending the waiting period for a maximum period of Three (3) calendar months from the expiry of the respective period stipulated herein for the Consents to be obtained and in the event of the vendor not exercising the option of the Consents not being obtained after the extension period mentioned, this Agreement shall be automatically terminated and the vendor shall refund to the Purchaser all sums free of interest paid by the Purchaser pursuant to cl 2 herein on or before the expiry of Fourteen (14) days from the date of the rejection letter from the Developer and/or the State Authority failing which interest at the rate of Ten percentage (10%) per annum calculated on daily basis shall be paid by the vendor on such sums remain outstanding and, in addition, all costs and expenses incurred by the Purchaser in connection therewith shall be borne by the vendor on a full indemnity basis whereupon to Purchaser shall return any documents belonging to the vendor in exchange of the refund and forthwith this Agreement shall be terminated and shall be null und void and of no further effect and neither of the parties hereto shall have any claim against the other under or in respect of this Agreement save and except for any antecedent breach of this Agreement.

[19] Further, cll 7.2 and 7.3 of the SPA provide as follows:

> 7.2 Upon the vendor obtaining the Consents as aforesaid and having fully settled with the Developer the administrative charges and all charges still owing in the Developer, this Agreement shall become unconditional.
>
> 7.3 The vendor hereby agrees that the vendor shall at their own cost and expense obtain the approval of the Developer.

[20] The vendor had previously taken banking facilities from Southern Finance Bhd (formerly known as United Merchant Finance Bhd). The vendor created a legal charge over the property. We shall refer to Southern Finance Bhd as 'the chargee bank'. Thus, in order for the SPA to be completed, the charge had to be discharged and this could only happen when the chargee bank provides the redemption statement and the redemption sum is fully settled.

[21] In this regard, cl 2.1 of the SPA imposed an obligation on the vendor or their solicitors to obtain the redemption statement and/or relevant documents and to deliver them within 14 days of receipt of request for the redemption sum or relevant documents which affects the discharge of the property. In the event of any default in this regard, then the completion date will be extended as per cl 2.1 of the SPA.

[22] In so far as consents are concerned, the defendant maintained that the firm assisted the vendor to obtain the DBKL and the state authority consent as

the vendor was unrepresented. Thus, the firm applied on behalf of the vendor for the consent from DBKL and the state authority respectively on 27 October 2000 and 18 April 2001.

[23] The consents from DBKL and the State Authority were extended several times and were finally extended to 24 and 3 April 2003 respectively. The details in regard to the various applications for consent etc. may be gathered from the evidence of Chan Chee Choong ('DW3') a former legal assistant of the firm who gave evidence on behalf of the defendant.

[24] However, despite the repeated extensions of the consent by DBKL and the state authority, the SPA was not completed as the redemption sum which stood at RM411,773.76 as at 10 May 2002, had not been paid to the chargee bank. The redemption sum was more than 80% of the plaintiffs' loan value of RM354,000, which was procured by the plaintiffs from Public Bank Bhd to enable the plaintiffs to complete the purchase of the property. The firm acted for the respondents in respect of the loan from Public Bank Bhd. At any rate, the property was not redeemed right up to the date where it was sold at the public auction on 16 February 2006.

[25] At the beginning stage of the transaction, the firm conducted a winding up search on the vendor. This was done on or around 13 November 2000. The search was conducted at the Jabatan Pemegang Harta. The result was that the vendor had not been wound up. However, the vendor was subsequently wound up on 24 July 2001.

[26] As stated earlier, the defendant and the firm were not aware that the vendor had been wound up. The chargee bank enforced the charge over the property. The property was initially scheduled to be sold via public auction on 3 June 2004. That auction was called off as parties were attempting to settle the redemption sum. Dato' Lim was in discussions with the chargee bank. He tried to procure a 'hair-cut'. In any event, nothing came out of the discussions and the property was eventually sold via public auction on 16 February 2006. The reserve price was RM530,000. It was stated in the proclamation of sale that bumiputera purchasers will be given priority. The plaintiffs put in a bid at the auction. Their bid was RM690,000. However, the successful bidder was AEIOU Studio Sdn Bhd ('AEIOU'). The property was sold to AEIOU for RM695,000. The property was transferred to AEIOU on 29 August 2009 via No Perserahan 26734/2009.

[27] In the meanwhile, by around early January 2006, the plaintiffs appear to have engaged new solicitors, namely, Messrs Roy Joseph Loh & Gary Teh ('RJLGT') to advise on the SPA and salvage the conveyancing transaction.

Thus, the defendant and/or the firm were no longer in the picture. RJLGT liaised with the chargee bank's solicitors and the official receiver ('the OR').

[28] The OR was in favour of the auction being postponed. RJLGT tried to get the auction which was scheduled to be held on 16 February 2006, to be called off. RJLGT wrote to the chargee bank's solicitors and requested for the auction to be postponed to give the plaintiffs a window of opportunity to try and resolve the problem pertaining to the redemption sum. However, the chargee bank refused to postpone the auction. On 16 February 2006, the property was sold to AEIOU.

[29] On 26 June 2008, the plaintiffs lodged a complaint with the Advocates and Solicitors Disciplinary Board ('ASDB') wherein it was alleged that the defendant had committed misconduct and that he should be subject to disciplinary action. This was more than two years after the property had been sold via public auction. The significance of the date of the plaintiffs' complaint to ASDB is relevant to the issue of time-bar which is discussed in the later part of this judgment. As for the plaintiffs' complaint to the ASDB, there was indeed an outcome in that by an order dated 21 May 2010, the ASDB ordered that the defendant be reprimanded and that he is to forthwith refund a sum of RM29,700 to P1.

[30] In our view, the ASDB's order against the defendant is irrelevant in so far as the issue of liability for negligence in Suit 943 is concerned. The question of negligence has to be independently determined by the court and the findings of the ASDB should not influence the court's findings one way or the other. As mentioned earlier, the reference to the plaintiffs' complaint to the ASDB was made solely for purposes of the issue of time-bar.

[31] It is also relevant to mention that by 2007, the plaintiffs had engaged yet another set of solicitors, namely, Messrs David Gurupatham & Koay ('DGK') who took over conduct. DGK issued letters on behalf of the plaintiffs (see for instance DGK's letter dated 14 August 2007 to AEIOU's solicitors, Messrs Azmi Mustapa & Associates).

[32] At any rate, on 9 August 2012, the plaintiffs (through DGK) filed Suit 943 against the defendant on the grounds that the defendant was negligent and had caused the plaintiffs to lose the opportunity to purchase the property.

[33] It is also relevant and material to mention that although this was a conveyancing transaction wherein the plaintiffs and the vendor had entered into the SPA to enable the plaintiff to purchase the property, they had in fact taken possession of the property, albeit that the balance of the purchase price

had not been paid and neither had the redemption sum been settled. Indeed, under cl 6.1 of the SPA, the plaintiffs are to be given vacant possession only upon full payment of the purchase price. Clause 6.1 reads as follows:

> 6. DELIVERY OF VACANT POSSESSION
>
> 6.1 Vacant possession of the Property shall be delivered by the vendor to the Purchaser together with the complete set of keys upon full payment of the Balance Purchase Price together with all the money due, if any, to the vendor's Solicitors.

[34] Apparently, the plaintiffs had a prior arrangement with the vendor and were using the property to store their goods. However, these are all matters which are outside the four corners of the SPA. Indeed, prior to the execution of the SPA, there was a tenancy in place between the vendor (as landlord) and an entity known as Macro Neon Manufacturer.

[35] The latter entity was owned by P1. The tenancy was from 1 November 1998 until 31 October 2000. Despite the expiry of the tenancy, the plaintiffs through KWE, occupied the property, pending completion of the SPA.

[36] There is no evidence that the plaintiffs paid any rentals to the vendor, but the plaintiffs appear to have paid the annual quit rent and assessment (RM1,640pa). This was because the vendor was having financial difficulties and could not meet these payments. According to P1, all payments that were made towards quit rent/assessment and rentals to be paid, were to be calculated and discussed at the conclusion of the conveyancing transaction, when a set off and adjustment would be done. During the proceedings before the ASDB, Dato' Lim appears to have confirmed that there was some sort of arrangement (the details of which were sketchy) between the vendor and the plaintiffs.

[37] After AEIOU purchased the property in the auction, they filed a civil suit to evict the plaintiffs who had continued to occupy the property. The plaintiffs had to pay RM100,000 to AEIOU to settle the legal suit. Thereafter plaintiffs sought reimbursement from the defendant for the sums that were paid to AEIOU. The plaintiffs' pleaded case on the issue of payment to AEIOU was as follows:

> 11. Selanjutnya, AEIOU telah memfailkan satu saman bernombor S1- 13460-07 di Mahkamah Sesyen Kuala Lumpur bertarikh 14-05-2007 terhadap Plaintif-plaintif untuk gantirugi sewaan yang tidak dapat diperoleh oleh AEIOU semasa Plaintif-plaintif mendiami Hartanah Tersebut sebagai Penyewa, iaitu semasa Plaintif masih lagi berusaha untuk terus membeli Hartanah Tersebut. Pada 12-02-2010 Mahkamah Tinggi Kuala Lumpur telah memasukkan satu penghakiman terhadap Plaintif sebanyak RM86,072.84 dan faedah sebanyak 4% atas RM86,072.84 dari tarikh 21-12-2006 sehingga penyelesaian penuh.
>
> 12. Plaintif telah membayar sejumlah RM100,000.00 kepada AEIOU pada 23-12-2011 sebagai jumlah penyelesaian bagi jumlah yang dituntut oleh AEIOU.

[38] According to the plaintiffs, as a result of defendant's negligence which encompassed various lapses and omissions to do all things which are necessary to ensure completion of the SPA, they lost the opportunity to purchase the property and had to move out and look for another property to store their goods. The particulars of negligence which were pleaded against the defendant are as follows:

BUTIR-BUTIR KECUAIAN

i) Kegagalan dan/atau kecuaian Defendan sebagai peguamcara bagi Plaintif-plaintif untuk melaksanakan Perjanjian Jualan dan Pembelian bertarikh 25.10.2000 yang tepat dan betul, dan telah mengakibatkan kegagalan untuk memindah Hartanah Tersebut kepada Plaintif-plaintif.

ii) Kegagalan dan/atau kecuaian Defendan untuk menjalankan kewajipan peguamcara-pelanggan ('solicitor-client') dan kewajipan fidusiari (seterusnya dirujuk sebagai 'Hubungan tersebut') yang wujud setelah Plaintif-plaintif mengarah ('instruct') Defendan untuk menyediakan dan melaksanakan Perjanjian Jualan dan Pembelian tersebut, dan menerima bil daripada Defendan bertarikh 1.11.2000.

iii) Kegagalan dan/atau kecuaian Defendan untuk menjalankan, melaksanakan, menyelia permohonan dan kemajuan/progress [sic], menyelia peguam-peguam bantuannya, dan/atau memindah Hartnah [sic] Tersebut sepertimana yang dihuraikan dalam retainer dan/atau bil Defendan bertarikh 1.11.2000.

iv) Kegagalan dan/atau kecuaian Defendan sebagai rakankongsi firma ('partner') yang lebih berpengalaman untuk menyelia peguamcara pembantunya.

v) Kegagalan dan/atau kecuaian Defendan untuk menjawab kesemua keraguan dan soalan Plaintif-plaintif, di mana Plaintif-plaintif membuat pertanyaan yang tertakluk kepada siasatan dan/atau pertanyaan untuk kemajuan/progress [sic] dalam permohonan dan keadaan kewangan Penjual dalam Perjanjian Jualan dan Pembelian tersebut.

vi) Kegagalan dan/atau kecuaian Defendan untuk memastikan Penjual dalam Perjanjian Jualan dan Pembeli tersebut boleh menyerahkan pemilikan kosong ('vacant possession') dan mempunyai keadaan kewangan yang stabil dan boleh menebus kesemua jumlah perbezaan antara jumlah penebusan dan jumlah pinjaman Plaintif- plaintif.

vii) Kegagalan dan/atau kecuaian Defendan untuk memberitahu Plaintif-plaintif bahawa Penjual mempunyai masalah kewangan dan tidak dapat menebus kesemua jumlah perbezaan antara jumlah penebusan dan jumlah pinjaman Plaintif-plaintif.

viii) Kegagalan dan/atau kecuaian Defendan untuk memberitahu Plaintif-plaintif bahawa jumlah penebusan yang dikenakan faedah telah bertambah dengan banyaknya.

ix) Kegagalan dan/atau kecuaian Defendan untuk membuat dengan sendirinya atau menyelia peguamcana pembantunya untuk membuat suatu carian rasmi syarikat dan/atau menyiasat tentang keadaan kewangan Penjual, atas sebab Defendan berpengetahuan dan/atau syak yang munasabah bahawa faedah yang dikenakan atas jumlah penebusan telah bertambah dengan banyaknya.

x) Kegagalan dan/atau kecuaian Defendan untuk memastikan hak-hak Plaintif-plaintif sebagai Pembeli dalam transaksi Perjanjian Jualan dan Pembelian tersebut dilindung.

xi) Kegagalan dan/atau kecuaian Defendan untuk menyemak lot hartanah untuk Hananah Tersebut secara teliti dan juga gagal dan/atau cuai dua kali untuk memasukkan kaveat lot hartanah yang betul di Pejabat Tanah dan Galian WP Kuala Lumpur. Defendan telah gagal dan/atau cuai untuk menyelia peguam bantuannya dalam semakan lot hartanah untuk Hartanah Tersebut secara teliti dan juga kemasukkan kaveat lot hartanah yang betul oleh peguam bantuannya di Pejabat Tanah dan Galian WP Kuala Lumpur.

xii) Kegagalan dan/atau kecuaian Defendan untuk memastikan tiada wujudnya konflik kepentingan ('conflict of interest') antara Penjual dan Defendan. Defendan telah gagal, cuai dan/atau abai untuk mendedahkan dan/atau menerangkan butir-butir konflik kepentingan ini kepada Plaintif-plaintif. Defendan tidak menafikan bahawa beliau pernah mewakili Penjual dalam perkara dan/atau urusan yang lain.

xiii) Kegagalan dan/atau kecuaian Defendan untuk menolak perwakilan untuk Plaintif-plaintif, walaupun Defendan mempunyai dokumen-dokumen dan/atau maklumat-maklumat sulit mengenai Penjual sebagai pelanggannya dalam perkara dan/atau urusan yang lain.

xiv) Kegagalan dan/atau kecuaian Defendan untuk memberitahu Plaintif-plaintif bahawa Penjual mempunyai masalah kewangan sejak awal lagi dan juga bahawa Penjual telah digulungkan pada 24.07.2001 atau selepas itu, tetapi maklumat ini tidak dilanjutkan kepada Plaintif-plaintif. Defendan telah gagal, cuai dan/atau abai untuk menjelaskan kepada Plaintif-plaintif bahawa lelongan awam untuk 3.06.2004 adalah disebabkan oleh penggulungan syarikat Penjual.

xv) Secara alternatif, Hubungan tersebut juga wujud secara tersirat dan hubungan peguamcara-pelanggan adalah suatu perjanjian tersirat kontraktual antara Defendan dan Plaintif-plaintif. Oleh itu, Defendan bertanggungjawab ('liable') atas kesemua obligasi- obligasi tersirat, iaitu untuk melindungi hak-hak dan tidak berprasangka terhadap Plaintif-plaintif semasa pemindahmilikkan berdasarkan Perjanjian Jualan dan Belian tersebut.

THE PLAINTIFFS' CASE AGAINST THE DEFENDANT

[39] In summary, the plaintiffs' case against the defendant is that:

(a) the plaintiffs entered into the SPA to purchase the property for the consideration sum of RM443,000;

(b) the plaintiffs appointed the defendant to manage and complete the conveyancing transaction. The defendant ought to obtain the consent/approval, from DBKL for the purposes of the transfer. The said consent/approval ought to be obtained within the period of three months from the date of the SPA failing which a one month grace period shall be granted without interest;

(c) the defendant had failed to obtain the said consent/approval within the designated period and/or a reasonable period, thereby causing the said consent/approval to be obtained from DBKL on 6 May 2002 and the defendant had to apply for extension of time on two occasions. DBKL had given an extension of time of a one month on 8 April 2002 and thereafter another extension of two months on 24 April 2003. The delays were due to the defendant's negligence as he did not understand the procedure and the manner of applying for the said consent from DBKL;

(d) due to the delay caused by the defendant, they only made the request to the vendor for the redemption sum via letter on 25 April 2003. The defendant had further failed to apply and/or obtain the redemption sum letter within the designated period and/or a reasonable period, and this had caused the redemption sum to increase significantly from RM350,362.76 as at 8 September 2000, to RM411,773.76 as at 7 June 2002. The redemption sum had even become higher than the balance of the purchase price payable by the plaintiffs pursuant to the SPA;

(e) due to the delay caused by the defendant, the SPA could not be completed as the vendor was wound up on 24 July 2001. The defendant had the duty and obligation as the purchaser's solicitor to inform the plaintiffs regarding the winding up of the vendor. But he failed to do so;

(f) the defendant had requested the plaintiffs to pay an additional sum of RM60,000 to redeem the property from Southern Finance Bhd. At that material time, the plaintiffs had obtained a loan to pay for the purchase price of the property. However, due to the redemption sum which had became significantly higher, the property could not be redeemed;

(g) the SPA could not be completed and the defendant as the conveyancing solicitor, had failed to ensure that the SPA was completed and that the property was transferred to the plaintiffs;

(h) the defendant had failed and/or neglected to fulfil his solicitor-client duties and to act in accordance with the fiduciary duty owed to the

plaintiffs in the preparation and execution of the SPA. The defendant had failed to protect the plaintiffs' rights in the transaction and/or the SPA;

(i) the defendant had failed and/or neglected to execute, carry-out, supervise the application for consent and the progress of the SPA. The defendant had further failed to answer queries by the plaintiffs in relation to the application and progress of the SPA, as well as the financial status of the vendor. The defendant had failed and/or neglected to inform the plaintiffs regarding the financial status of the vendor and/or any progress of the application;

(j) the defendant had failed and/or neglected to enter the caveat over the right property;

(k) the defendant had failed and/or neglected to disclose the conflict of interest when it acted for the plaintiffs, as it had other transactions and/or legal dealings with the vendor. The defendant had failed and/or neglected to inform the plaintiffs that the vendor was in financial difficulties and had failed and/or neglected to do due diligence to find out whether or not the vendor had been wound up;

(l) due to the defendant's negligence, the plaintiffs had lost the opportunity to purchase the property at the original price and had suffered significant loss due to the loss of opportunity. Finally, the property could not be redeemed from Southern Finance Bhd and the property was auctioned through a public auction on 16 February 2006 and where AEIOU was the successful bidder;

(m) thereafter, AEIOU had filed a suit against the plaintiffs for rent which could not be obtained by AEIOU during the period the plaintiffs were occupying the property. During this period, the plaintiffs were still attempting to purchase the property. On 12 February 2010, a judgment was entered against the plaintiffs for the sum of RM86,072.84 with interest of 4% on RM86,072.84 from the date 21 December 2006 till full settlement. The plaintiffs had paid a sum of RM100,000 to AEIOU on 23 December 2011 as full and final settlement of the sums claimed by AEIOU;

(n) the plaintiffs filed a complaint to the ASDB on the 26 June 2008. The ASDB reprimanded the defendant and ordered that a sum of RM29,700 with interest (being the stakeholding sum held by the defendant on behalf of the plaintiffs) be refunded to the plaintiffs; and

(o) due to the failure, omission and/or negligence of the defendant, the plaintiffs had suffered severely and had to bear monetary losses. P1 claims that he suffered mental and emotional distress. The plaintiffs had to search for another premises which was suitable to store their goods.

THE RELIEFS SOUGHT IN SUIT 943

[40] In para 15 of reamended statement of claim, the plaintiffs prayed for the following reliefs:

(a) a sum of RM100,000 as payment made by the plaintiffs to AEIOU Studio Sdn Bhd;

(b) interest on the above sum at the rate of 8% from 23 December 2011 until full and final settlement;

(c) RM4m for loss of income due to the plaintiffs' failure to purchase the property or such other amount which the court deems reasonable;

(d) interest on the above sum at the rate of 8% from the date of filing the writ until full and final settlement;

(e) RM400,000 as damages for renovation, racking, fittings and workmanship at the new place of business or such other amount which the court deems reasonable;

(f) interest on the above sum at the rate of 8% from the date of filing the writ until full and final settlement;

(g) RM800,000 as damages for the future appreciated value of the property from 2000 to 2012 or such other amount which the court deems reasonable;

(h) interest on the above sum at the rate of 8% from the date of filing the writ until full and final settlement;

(i) costs; and

(j) further and other reliefs as deemed necessary.

THE DEFENCE

[41] At the outset, it is important to note that the defendant had pleaded per para 8 of the amended defence that the plaintiffs' claim was time-barred:

> 8. Seterusnya dan/atau secara alternatif Defendan mengatakan bahawa tuntutan Plaintif-plaintif di sini adalah dihalang oleh had masa.

[42] In so far as the issue of limitation is concerned, it was argued that the plaintiffs' loss (if any) would have crystallized on 16 February 2006. According to the defendant, that was the earliest date when the plaintiffs could have filed an action. In the present case, Suit 943 was only filed on 9 August 2012. As such, the action was time barred.

[43] It is also the defendant's position that the plaintiffs had appointed the firm and not the defendant personally. It is further the defendant's case that the plaintiffs had the knowledge that the defendant did not personally handle the conveyancing file nor the SPA.

[44] As for the defendant's purported failure to obtain the DBKL's approval within the stipulated time, the defendant contended that it was not the defendant's obligation to obtain the aforesaid approvals which was beyond the defendant's control.

[45] The defendant contended that the firm was only required to file the necessary applications to DBKL and not to obtain the aforesaid approvals. The SPA was a conditional agreement subject to the granting of the approvals within the stipulated time. The defendant contended that the plaintiffs never objected nor complained of the defendant's purported delay in obtaining the approvals at any point in time.

[46] Subsequent to submitting the necessary applications for the approval, the defendant had written for the redemption letter for the property. The defendant later discovered that the plaintiffs had taken over the responsibility of the vendor to fully redeem the property from the bank.

[47] However the plaintiffs subsequently failed to redeem the property from the financier. It is the defendant's contention that at all material times the plaintiffs knew of the financial hardship of the vendor. The defendant's failure to notify the plaintiffs of the vendor's winding up was irrelevant as the SPA could still be completed by obtaining the relevant sanction from the OR.

[48] As for the plaintiffs' complaint of conflict of interest between the defendant and the vendor, there were clearly no particulars pleaded to that effect in the reamended statement of claim as to the reason for such conflict arising from the defendant's previous solicitors/client relationship with the vendor. At any rate, there was in fact no conflict as the defendant was not doing any work for the vendor at the material time. And further, the plaintiffs or at least P1, was aware through the introduction by Dato' Lim, that the defendant had previously done work for the vendor.

DECISION OF HIGH COURT

[49] In summary, learned judge found the defendant was negligent and held that:

(a) the defence of limitation did not apply, since the claim was premised on events that occurred prior to the plaintiffs' loss of the property which occurred on 16 February 2006;

(b) the defendant had failed to advise the plaintiffs to either proceed, terminate or transfer an agreement [sic] in the event that consent from the authorities were not obtained or rejected (see: Part A para [1.7] of the grounds of judgment);

(c) the defendant had failed to inform the plaintiffs of the vendor's liquidation status; and

(d) the defendant had put himself in a position of conflict of interest.

[50] The judge's grounds of judgment (on liability) reads as follows:

GROUNDS OF JUDGMENT

1 PART A

1.1 Defendant was engaged by the plaintiffs to execute the SPA for the transfer of the subject property into the plaintiff's name. For his professional services, the defendant and the defendant's firm had impose a fee as supported by the documentary evidence namely, defendant's invoices dated 18 November 2001 and 23rd May 2001.

1.2 The defendant's firm issued plaintiffs a receipt dated 23rd February 2001 which confirmed plaintiffs' payment for the professional services rendered by the defendant. As such, plaintiffs' undisputed payment to the defendant for the professional services constitute a retainer which impose a duty of care on the part of the services provider, the defendant.

1.3 Defendant had challenged plaintiffs' claim on the ground that the plaintiffs had wrongly sued the defendant as a party to the suit pursuant on s 12 and s 14 of the Partnership Act 1961. Section 12 had clearly impose liability of a partner acting in the cause of the firm's business, or with the co-partner's authority on the firm, to the extent as the partner who was acting or omitting to act.

1.4 Section 14 further provides for each partner to be jointly liable with it's co-partners and, also severally for other matter in respect of which the firm whilst he is a partner therein becomes liable under the aforesaid sections. Plaintiffs' suit against the defendant was thus not wrong as pursuant to these provisions, there was no requirement to sue the defendant's firm. Further, all correspondences by the Defendant in respect of plaintiffs' SPA and, all files relating to the SPA bore clear evidence of defendant's initials, ('KN').

1.5 Defendant's averment that plaintiffs file was handled by a Mr Chan Chee Choong, was mere bare averment, legally untenable as defendant was clearly in control of the plaintiffs' file on the SPA. Thus, it is evident to the court that a duty of care was owed by defendant to the plaintiffs' in respect of the plaintiffs' SPA of the subject property.

1.6 As a professional, practicing conveyancing advocate, defendant was under a duty of care towards his client in the discharge of works assigned by his client, the plaintiffs. The duty of care expected of the defendant was undoubtedly, higher than that of another ordinary service provider

1.7 According to DW2, ex-chair and member of the Bar Council's Conveyancing Practice Committee, conveyancing advocates were required to advise clients either to proceed, terminate or transfer an agreement in the event that consent from the relevant authority were not obtained or, rejected.

1.8 There was no advice from the defendant or his firm to the plaintiffs as to the possibility of termination of the SPA. The expert witness, Dato' Low Beng Choo have in her testimony in court stated that, it is prudent for conveyancing advocates to maintain records of client's request. In this regard, no such request was found to be recorded by the defendant or his firm.

1.9 The Defendant in his evidence in court confirmed of the defendant or defendant's firm's non maintenance of any record of plaintiffs' request for an extension of time and, vendor's refusal letter for the redemption payment. Despite their knowledge it is clear that, neither the defendant nor his firm had informed plaintiffs of the vendor's liquidation status.

1.10 Defendant's failure and, breach of duty towards the client plaintiffs were evident in the resulting non completion of the SPA between plaintiffs and the vendor. As a conveyancing advocate appointed by a client, in a situation where the defendant ended in a situation of a 'conflict of interest' and, possess the knowledge that he would be in the aforesaid situation, the advocate should not proceed to act for that client.

1.11 Defendant was thus found by the court to be a willing party to act for another conflicting party namely the plaintiffs, the vendor and, the vendor's financier. The proximity of the defendant, vendor and financier was evident in the handling of the vendor's matter. Despite defendant's apparent close relationship with the vendor for a period of 20 years supported plaintiffs' averment of defendant's conflicting of interest and, clear breach of duty towards the plaintiffs.

1.12 The court found undisputed evidence of defendant's breach of duty of care in the discharge of his duty as a conveyancing advocate. The test case in determining the negligence of a professional, is the *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 which held —

> A situation which involves the use of some special skill or competence, then the test whether there has been negligence or is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professional to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

1.13 Defendant's failure and breach of duty was evident in defendant's wrongful lodgment [sic] of two private caveats on two different properties unrelated to the subject property in the plaintiffs' SPA. Defendant's further failure to promptly alert

the plaintiffs of the vendor's liquidation status, which Defendant had only made after the SPA, was a clear breach of his duty of care.

1.14 As the process of winding up of a company require a period of one to two years, defendant ought to be minded of the need to insert a cl on vendor's winding up in the parties SPA. Had that been done, plaintiffs would have adequate time to be sufficiently alerted of the liquidation status of the vendor, which would assist the plaintiffs to take the required action. As such, plaintiffs' loss and damages were the direct cause of the defendant's breach in the discharge of his conveyancing duties towards the plaintiffs.

1.15 As a professional who professed special skill and knowledge in conveyancing, the defendant undoubtedly owe a duty of care to his client the plaintiffs who relied and depended wholly on his special skill. Defendant, as the professional advocate should have foreseen the financial consequences to his client consequent to any aborted execution of the SPA or, it's non completion.

1.16 In concluding that the defendant's negligence was sufficiently supported by the court's foregoing grounds of judgment, the court firstly considered the defendant's issues to the plaintiffs' averment of defendant's negligence. Defendant had challenged the plaintiffs' action on the ground of time barred, that the action was wrongly filed against the defendant, absence of locus on the part of plaintiffs to file suit against the defendant and, absence of merit in the plaintiffs' action were after due deliberation largely found by the court to be without merit and, untenable.

1.17 Defendant had stated that plaintiffs' claim was time barred was misconceived, as it was premised on events that occurred prior to plaintiffs' loss of the subject property which occurred on 16th February 2006. Defendant further stated that plaintiffs' averment of defendant's delay in obtaining the authorities' consent was misconceived as the consent was only obtained on 24 April 2003

1.18 Defendant further averred that plaintiffs had filed action not against the defendant's firm but instead had wrongly sued the defendant, on the ground that, the SPA stated that plaintiffs had engaged the firm and not the defendant. Defendant further stated that at all material time, Defendant's firm had liased [sic] with all parties on the authorities' consent and, issues arising from the redemption statement.

1.19 Defendant's further challenge was that plaintiffs have no locus standi to institute action against the defendant, as plaintiffs ceased to be a partner of the Kient Win Enterprise partnership, wound up on 4 May 2010. Plaintiffs' averment of defendant's negligence and, defendant's professional misconduct was thus challenged by the defendant to be without merit and, vexatious as the plaintiffs had failed to produce any expert, professional witness to support it's claim of defendant's professional negligence.

2. CONCLUSION (PART A)

2.1 Thus, based on the court's foregoing grounds, the court concluded that, defendant failed to successfully disprove plaintiffs' clear case of defendant's negligence and breach of duty of care. Plaintiffs clearly, have on a balance of probabilities succeeded to prove it's case of defendant's negligence in the discharge of defendant's duties as a conveyancing advocate. The court thus allowed plaintiffs' claim against the defendant subject to the court's assessment of quantum.

SUBMISSIONS ON LIABILITY

[51] Before us, counsel for the defendant submitted that the judge had erred in allowing the plaintiffs' claim as the claim was time barred. It was argued that for a cause of action based on a claim in negligence, *time starts to start run when the damage occurs*.

[52] It was argued for the defendant that if time started to run from 16 February 2006 (when the property was auctioned and purchased by AEIOU), then the claim is time barred because that is the date when the damage occurred, if at all (see *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663; [2009] 1 LNS 1479 (CA)).

[53] Hence, it was argued on behalf of the defendant that the plaintiffs' action (per Suit 943) was clearly filed out of time as the writ was filed on 9 August 2012 whereas the last date for filing of any action for negligence would be 15 February 2012. Counsel said that this is fatal and nothing can be done to salvage it. According to the defendant, the plaintiffs had ample opportunity to bring a claim before the action was time-barred, but they had elected not to do so.

[54] In amplification, it was highlighted that:

(a) by early January 2006 the plaintiffs had appointed RJLGT to specifically advise on the SPA and this was even before the date of the public auction (which was well within the limitation period), and therefore they could have sought legal advice and brought an action within the six year limitation period; and

(b) the plaintiffs (through P1) had filed a complaint to the ASDB on 26 June 2008 and raised the issue of the defendant's alleged negligence. This was well within the limitation period, and they could have easily filed a civil action at that point of time.

[55] By the time the complaint was made to the ASDB, the plaintiffs had already formed the view that the defendant was negligent. The complaint (in verbatim) to the ASDB was as follows:

> (a) The above legal firm acted on my behalf in the Sale and Purchases (S&P) Agreement between Jurumumurni [sic] Sdn Bhd (Seller) And me (Purchaser). With a reason for helping the seller to save cost, I had been advised to engage Lee Swee Seng as the S&P Lawyer for this transaction for both of us, and legal fees are born by me. (Because Jurumurni Sdn Bhd (Seller) is a current client & friend of Ng Bee Ken Kenny — the lawyer from Lee Swee Seng).

(b) *Due to the negligence* and miss calculation of stakeholder amount of the above legal firm, had cause me a lot of unnecessary trouble, delay, and they miss the transfer approved period of the said property, with arrive of lot of unnecessary circumstances to redeem the said property. The attach document shown that they had working on the wrong property with difference title number, they even twice caveated the wrong property belonging to others.

(c) I had been treated unfair to make payment for all the quit rent and assessment fees that due by the seller I was advised this was to keep the procession of transfer smoother. They had not noticed that, Jurumurni Sdn. Bhd. (Seller) had been wound up on 24/07/2001, until 15/02/2206 the seller's banker told me. The above legal firm asking me to pay extra +/-RM 60,000.00 to redeem the property from the (illegible) after the first auction date, and I refused to do so (As it was not my fault).

(d) To date, the property had been sold in a auctioned by the Bank. We had been chased out by force by the new owner with a summons. The above legal firm had refused to give me back my files and the full record of this S&P. I had been refused to the stakeholding amount of RM30,000.00+ due to the above legal firm insist me to sign on some documents with some terms & conditions agreeing to forgo [sic] any claim against them. By right it is my money and they should just remit it to me. Till to date I have not been given a complete breakdown of fees.

(e) I suspect a conflict of interest with unfair treatment had made by the above legal firm. This clearly shows that, the above legal firm had done things very unprofessional, unfair and not responsible as an Advocate & Solicitor for S&P. *Due to their negligence* and unethical conduct *I had suffered pecuniary loss, emotional stress, loss of business, loss of times of cost, cost of relocate all my belonging goods & products and now also suffering from loss of the said property despite our investment*.

(f) A further breach of the firm is their refusal to release my file and documents to me, I had gone to see the lawyer many times but they refused to give me the documents. The lawyer Kenny said that if I want the file I have to sign a letter of case close and releasing them of any liability. I refuse and so until today they are withholding the file.

(g) I believe there is a clear cut breach of the legal Profession Act and the Solicitors Account Rules. Rules 31, 16 and 55. (Emphasis added.)

[56] In any event, it was submitted that there was no proof of breach of duty of care. Elaborating on the issue of duty of care, counsel for the defendant said conveyancing is a specialized area of legal practice and in professional negligence cases involving specialized areas of legal practice, the plaintiffs are required to tender expert evidence to determine the standard of care and whether there has been a breach in the sense of a departure from the standard of care.

[57] It was submitted that for a claim in professional negligence the plaintiffs are required to prove the standard of care as expected from a reasonable practitioner in the area of practice in conveyancing and that there had been a breach of the standard. Here, the plaintiffs did not provide any expert evidence to establish their claim for professional negligence against the defendant or even to contradict the defendant's expert evidence throughout the entire trial.

[58] Thus, it was submitted that a client who sues their former solicitors for professional negligence have the burden proving that the solicitor's conduct had fallen short of the standard of care of a reasonably competent solicitor and that this is to be done by calling an advocate and solicitor to satisfy the element of breach of the standard of care.

[59] It was contended that in the present case, the plaintiffs failed to adduce any evidence of the standard of care or that the defendant failed to act in accordance with that standard (which was not proven in any event) (see *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207; [2017] 6 CLJ 368 (CA) ('Tetuan Theselim'), *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486; [2017] 2 CLJ 665; [2016] 6 AMR 797 (CA) ('Shearn Delamore'), *Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449 ; [2014] 3 CLJ 984; [2014] 1 AMCR 829 (CA)).

[60] According to the defendant, the evidence especially through the testimony of Dato' Low Beng Choo ('DW2') and DW3, showed that the defendant acted in accordance with normal professional standards of conveyancing practice. Counsel submitted that in the absence of any expert evidence by the plaintiffs, the action should have been dismissed *in limine*.

[61] Counsel for the defendant also relied heavily on the expert evidence provided by DW2 who was the defendant's expert witness. DW2 was a senior legal practitioner and was a member of the Bar Council Conveyancing Practice Committee ('the committee') for about 18 years. DW2 had served as Chair and Deputy Chair of the Committee. Briefly, DW2's evidence was that:

(a) a purchaser's solicitor has no duty of care nor obligation to investigate into the vendor's financial situation as such investigation is not within a solicitors' purview or scope;

(b) the fact that a lawyer had acted for the vendor, in other previous matters or transactions not related to the SPA is not by itself and does not give rise to a conflict of interest situation per se;

(c) in practice, it is not mandatory for a private caveat to be lodged on behalf of the purchaser in every SPA transaction;

(d) in all cases where the SPA transaction is by way of a deed of assignment and the private caveat is lodged on the master title, and the auction sale of the property is by way of rights and remedies conferred under the deed of assignment, the private caveat would not be reflected in the auction sale notice and would not be able to prevent the auction sale of the property in any event; and

(e) in any event the defendant acted in accordance with normal professional conveyancing standards and the problems caused were not due to any failure by the defendant.

[62] We may turn now to the plaintiffs' submission. For the plaintiffs, it was argued that the judge had applied the law correctly upon considering the evidence and upon hearing the testimonies of the witnesses at trial and in deciding that the defendant was in fact negligent and was in breach of duty of care towards the plaintiffs.

[63] As for the primary issue of time-bar, it was argued that the judge was right in law and fact in deciding that the defendant's challenge on the grounds of 'time-bar' was misconceived as it was premised on events that occurred prior to the plaintiffs' loss of the property which occurred on 16 February 2006.

[64] Counsel for the plaintiffs submitted that the issue of limitation was never specifically pleaded as required by the provisions of the Rules of Court 2012. Further, it is alleged that the defendant has failed to provide necessary particulars in raising the defence of limitation and as such is precluded from doing so now.

[65] Counsel referred to the case of *Lim Goh Huat v Saw Keng See* [1998] 6 MLJ 600 (HC) where it was held by Abdul Kadir Sulaiman J (as he was then) that the defendant's failure to include and state in clear terms the commencement date for the accrual of the cause of action precluded the defendant from pleading the defence of limitation. As such, it was submitted for the plaintiffs that on the facts, the claim was not time barred.

[66] Counsel referred to para 14(xv) of the reamended statement of claim dated 24 January 2014 and said that, the defendant's breach of fiduciary duty includes failing to follow the plaintiffs' instructions to release the file to the plaintiffs to enable them to have access to the documents in order to obtain a second opinion, to take legal action or to even injunct the vendor.

[67] As such, the plaintiffs' claim was within the six year limitation period imposed by s 6(1)(a) Limitation Act 1953.

[68] Counsel for the plaintiffs referred to the Court of Appeal decision in the case of *Shearn Delamore* where it was stated that the standard of care expected is that of a reasonable practitioner in that profession and not merely that of an ordinary reasonable man. In the present case, it is contended that the defendant had fallen below the standard of care expected of him as a conveyancing solicitor.

OUR DECISION

[69] Essentially, the plaintiffs' claim is predicated on the allegation that the defendant was negligent in terms of handling the SPA transaction. Quite apart from the multitude of allegations that were levelled against the defendant, it is undeniable that the plaintiffs could not complete the purchase of the property because of intervening events, namely, the vendor had defaulted on the banking facility in respect of which the property was put up as 'security', the vendor was wound up, the chargee bank had commenced proceedings to enforce the charge. And finally, the sale of the property via public auction on 16 February 2006.

[70] P1 was aware that the property was scheduled to be sold via public auction on 3 June 2004 as the relevant auction papers were sent to the property. P1 liaised with Dato' Lim in an effort to salvage the property from being sold via public auction. Indeed, DW3 (who was handling the SPA transaction) had the impression that Dato' Lim and P1 were in discussions with the chargee bank. The first auction was called off. But there was no settlement with the chargee bank. Thereafter the property was put up for sale via public auction on 16 February 2006. Prior to the second public auction, the plaintiffs had engaged RJLGT to act for them. The defendant and the firm were no longer in the picture. RJLGT were not able to persuade the chargee bank to postpone the auction. The plaintiffs put in a bid at the auction (RM690,000) but it fell short of the amount for which the property was eventually sold to AEIOU (RM695,000).

[71] In so far as the duties of a solicitor for the purchaser under the SPA are concerned, we agree that the defendant had a duty of care towards his client, the plaintiffs. However, we do not particularly agree with the judge's finding that the plaintiffs had engaged the defendant personally, as opposed to the firm, to handle the SPA transaction.

[72] Indeed, it is obvious enough from the various contemporaneous documents that it was the firm that was handling the SPA transaction. In our view, even if it was the defendant who was engaged to take charge of the SPA and had bungled or mishandled the transaction, ultimately, it is the partnership ie the firm, which will be liable and not the defendant personally.

[73] In this regard, it is pertinent to refer to the case of *Buana Perdana Sdn Bhd v Chan Siew Cheong & Ors* [2012] 8 MLJ 367; [2012] 1 AMR 560 at [37] where Mary Lim J (as Her Ladyship then was) discussed the liability of partnership and held:

> ... The partnership remains an association of individuals who, by reason of their art and skills necessarily offer that expertise personally instead of through the establishment of a corporate sole. And, that is how a legal practice is operated in this country, just as much as anywhere else in the world. Insofar as the client is concerned, his dealings are with the firm and not a particular partner. He may, however, request for the services of a particular partner or counsel due to some peculiar reason or purpose and be charged the fees appropriate to that partner or counsel. But that does not alter the primary principles of partnership. The settlement of any dues by a client is always to the firm and not to any individual partner. That is also why the Legal Profession Act 1976 (Act 166) mandates the cover of insurance to protect clients, the firm and the practice.

[74] However, we do not think that it is necessary to discuss this point any more than what we have already stated in the earlier paragraphs. On the issue of liability, the main question is whether the defendant had breached that duty of care.

[75] The answer to that question is to be resolved by asking whether the defendant had failed to exercise due diligence in supervising the SPA transaction and performed his duties in accordance with the standard of a reasonably competent and prudent conveyancing practitioner.

[76] In this regard, we have examined the evidence ie the documents, the witness statements and notes of evidence. We do not think that the defendant had completely blundered or was hopelessly incompetent in the way the SPA was handled. The judge made a finding that the defendant's assertion that it was DW3 who handled the file was a bare assertion. In our view, that finding is plainly unsustainable, particularly in light of DW3's extensive evidence as to what he did in terms of, inter alia, the consents and the redemption statement.

[77] The judge's finding with respect to DW3's role in the implementation of the SPA flies in the face of the evidence. As such, it is obvious that there was a lack of appreciation of the evidence in favour of the defendant that was tendered at the trial. Having read the evidence in totality, it is quite clear that the defendant was not 'hands-on' in respect of the SPA. Rather, it was DW3 who was really handling the file under the defendant's supervision.

[78] It is pertinent in our view to reproduce DW3's evidence to demonstrate the content of the actions that were taken to implement the SPA. DW3's

evidence shows that the topic of termination of the SPA, topping-up of the balance of purchase price were all discussed with P1. DW3's evidence so far as they are material, reads as:

Q: During the whole process for approval/consent, please explain how the vendor, Jurumurni and the plaintiffs were involved?

A: Both the vendor, Jurumumni and the plaintiffs as Purchasers were involved and indeed many steps taken required action on their own part, including fulfilling conditions of DBKL's approval/consent (see above).

Furthermore as it was vendor, Jurumurni's obligation to obtain approval/consent, vendor, Jurumurni themselves had on several occasions attended at DBKL on their own and in fact followed up on the submission for approval/consent which we had assisted them to file: See IDB Bahagian B Jilid 1 page 24. DBKL also wrote direct to Jurumurni : See IDB Bahagian B Jilid 2 page 31 and IDB Bahagian B Jilid 1 page 27 to 30 and 38. In fact, we corresponded only when necessary and the vendor, Jurumurni knew there problem getting the approval/consent from the DBKL, Dato' Lim from vendor, Jurumurni had informed me that they were working on it and that vendor, Jurumurni was dealing directly with the DBKL to resolve the matter and to secure approval/consent.

Apart from the various forms which both the vendor, Jurumurni and the Plaintiffs had to fill in, detailed above, the Plaintiffs also effected payment of Quit Rent which was essential and without payment which parties could not proceed: See IDB Bahagian B Jilid 1 page 18, 51, 52 and 53.

Q: Why did Messrs Lee Swee Seng & Co write to vendor, Jurumurni and not to the bank?

A: I wrote to the vendor, Jurumurni was because Dato Lim had told me earlier that he was trying to negotiate a haircut from the Bank. He had taken a copy of the Redemption Statement dated 16.8.2001 from us and informed me that he would obtained a new/revised redemption statement and give it to us.

Q: Prior and leading up to April 2003 did you have any communication with the Plaintiffs or Jurumurni?

A: Yes as explained above, apart from both their continuous involvement in the approvals process, Dato' Lim had already mentioned he wanted to get a haircut for redemption sum.

With regard to the Plaintiffs, Eason would call me and I would verbally inform him of the status. Various letters were also copied to the plaintiffs.

Also, both Eason and Dato' Lim were also in direct communication in light of redemption sum issue.

Q: What happened to the approval/consent from the State Authority?

A: It had lapsed in May 2002. We re-applied in March 2003: see IDB Bahagian B Jilid 1 page 54 after DBKL's extension of time: See IBD Bahagian B Jilid 1 page 40.

Q: Messrs Lee Swee Seng & Co had to apply for several extension and/or 're-apply' for approval/consent both from the DBKL and State Authority. Why was this so?

A: The timing of the issuance of approval/consent from these respective bodies was an issue and a problem. We did not receive the approval/consents at the same time, as one or the other would lapse or was near expiry by the time we secured the other approval/consent. Without both approval/consents, we were not able to proceed. There were various outstanding issues which vendor, Jurumumi and/or Plaintiffs had to deal with which also delayed the process.

For example, by 2003, the Quit Rent for 2003 was due and we were waiting for payment from Eason Tan. He had not given to us any payment, so I took steps to ascertain whether Quit Rent on the Master Title for year 2003, had been paid or not. I wanted to use this receipt as an alternative. I received the Quit Rent Notice on 17.3.2003 but found that it was still not paid. See IDBT Bahagian B dan C Jilid 1 page 10.

So to support the application to the State Authority and to avoid further delay, I attached the year 2002 Master Title's Quit Rent receipt for whatever it is worth hoping that State Authority in their discretion will still approve and grant its approval/consent based on the duly paid Quit Rent of 2002 — IDBT Bahagian B & C (Jilid 1) page 9. See IDB Bahagian B Jilid 1 page 54 — I wrote by letter 17.3.2003 for extension of time and see our letter to DBKL at IDB Bahagian B Jilid 1 page 51 for request for the Master Title's 2002 Quit Rent receipt. DBKL's approval/consent had expired at this time and we also had to apply for extension of time (see my explanation above).

Q: Were the approval/consents given?

A: Yes. DBKL gave the extension on 24.4.2003: see IDB Bahagian B Jilid 1 page 40 for 2 months. State Authority gave approval/consent on 3.4.2003: see IDB Bahagian B Jilid 1 page 56 for 12 months.

Q: Did you inform the first plaintiff of this?

A: I remember I called up Eason to tell him that we had all the approval/consents; and as noted above, we wrote to vendor, Jurumurni to ask for the redemption statement.

Q: During this time did Dato' Lim ever mention that Jurumurni was wound up?

A: No he never did. He gave me the impression that everything was proceeding as normal.

Q: Was Dato' Lim and the plaintiffs in communication?

A: So far as I know yes, in fact the plaintiffs told me they were tenants and doing business at the property in question.

Further the redemption sum was an issue they both told me they were discussing amongst themselves and were sorting out with the Bank. We were not involved in this at all.

Q: When did you discover that the property was going to be force sold by Public Auction?

A: It was Eason who told me the property was going to be auctioned.

He informed me that he had received a letter informing that the property was being auctioned.

Q: Did he show you the letter?

A: It was not a letter but I was given a copy of a Proclamation of Sale for the auction of the Property: see IDB Bahagian B Jilid 3 page 344.

Q: What was the first plaintiff's reaction?

A: He asked what was he to do now. I was surprised as I was always given to understand that Dato' Lim, and Eason were in discussion with the Bank.

We were instructed to write to Solicitors for the Bank to hold on to the auction: see IDB Bahagian B Jilid 1 page 67–68.

Since they had been discussing amongst themselves, I told Eason that he should contact Dato' Lim on the matter.

Subsequently I called up Dato' Lim and he said he intend to meet with the Bank Officer to reduce payment of redemption sum and settlement. I then wrote a letter as per Dato' Lim's representation to us that the auction would be postponed: see IDB Bahagian B Jilid 1 page 69, letter from the Firm dated 31.5.2004.

Q: Was the redemption sum ever discussed?

A: Yes. Several times. Eason had asked before in 2001, when we received the redemption statement from Southern Finance: See IDB Bahagian B Jilid 1 page 61, on why he should pay additional sum and I explained it is to settle the outstanding loan and will enable him to get property if he still wanted it. This was particularly so since he was aware the property price had gone up. He also was contemplating whether to just move to other premises.

But he never came back to me on it and his response was he would talk to Dato' Lim. At that time, Dato' Lim was also informed of this and he said he would negotiate a haircut.

We never received any instructions to terminate the transactions.

In May 2002, when we received the third redemption statement dated 10.5.2002: see IDB Bahagian B Jilid 1 page 65 to 66, again I spoke to Eason. By that time, the redemption amount was RM411,773.76. Therefore I told Eason he would have to pay the additional sum and the difference between his loan sum of RM354,000 and the redemption amount of RM411,773.76 as of May 2002.

As a ball park figure, give or take, I had indicated the figure of RM60,000.00 which includes the difference between the loan sum and the Purchase Price being RM44,700.00 and the additional sum of RM 13,073.76 being the difference between balance purchase price and the redemption sum. Eason told me he would discuss with Dato' Lim.

I therefore left it to them to sort that out. I just wish to also state that the balance purchase price of the property was RM398,700.00 and in effect the additional redemption sum to be paid to redeem at that time was only RM13,073.76.

In any event, I had gone ahead and secured a further extension from the State Authority and for the approval/consent to be valid for another year: see IDB Bahagian B Jilid 1page 56.

A However, in light of the notification by Eason that there was a notice for auction, everything was kept in abeyance from then and the firm waited for further instruction from Eason.

Q: Did the first plaintiff refuse to proceed with the transaction in light of the need to top up?

B A: The issue of 'topping up' was in existence and well known to the Plaintiff since August 2001. The Plaintiff never said they refuse to proceed.

In May 2002, again, Eason never said they did not want to proceed and I was under the impression that Eason and Jurumurni were still talking to each other, and proceeding with the sale.

C Q: What about termination of the Sale and Purchase Agreement with vendor, Jurumurni?

A: The options were discussed with Eason. But he never came back with his decision whether to terminate.

D Q: Were you aware that vendor, Jurumurni had been wound up?

A: No.

We were never put on query and there was no reason to suspect anything amiss as Dato' Lim at all material times, continued to deal with us.

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[79] Of course, on hindsight, the handling of the SPA could have been much better. In this regard, we agree with Dato' Low Beng Choo (DW2) (the conveyancing expert who was called by the defendant) who said that there were things which could have been done better. But, we do not think that, that in itself translates into a finding of negligence. F

[80] Indeed, the judge seems to have ignored DW2's evidence who had specifically exonerated the defendant of the allegation of conflict of interest. DW2 said that it is normal practice for a purchaser's solicitor to act for a vendor to redeem and discharge the property where there is no vendor's solicitors in the G SPA. She said that there is no conflict in this situation because it is a simple discharge of redemption.

[81] It was also submitted for the plaintiffs that there are no letters or any H advice by the defendant as to whether the SPA should be terminated or whether the plaintiffs should even proceed with the transaction.

[82] It was submitted for the plaintiffs that the defendant was negligent in failing to insert a clause in the SPA such that the SPA would automatically I terminate upon the vendor being wound up. As mentioned earlier, DW3 did say that the topic of termination of the SPA was brought up with P1. In any event, the question here is whether the termination of the SPA is really the issue, or whether the plaintiffs in fact wanted to complete the SPA ie to be able to purchase the property and be able to conduct their business. Clearly, from

the evidence, it was the latter as the plaintiffs were at all times desirous of continuing with and completing the SPA. That could have been accomplished by getting the OR's sanction. The problem here however was not the OR's sanction. Rather, the problem had everything to do with the redemption sum which had to be settled. That was something that had to be negotiated with the chargee bank. It had nothing to do with the defendant or the firm.

[83] According to the plaintiffs, the defendant should have also conducted a winding up search over the several years when he was handling the conveyancing transaction. But then DW2 said that there is no such duty to conduct intermittent searches. She said that a conveyancing solicitor cannot be burdened with such onerous tasks and keep track of the solvency of the opposite party. We agree with the opinion of DW2 in that there is no such duty on the part of the conveyancing solicitor to conduct intermittent winding up searches.

[84] As for the suggestion that the defendant would know about the vendor's standing or status because the firm had acted for the vendor in other financial transactions, the evidence shows that at the time, the firm was not acting for the vendor and there is no evidence whatsoever that the defendant or DW3 was/were aware of, or was put on notice of the vendor's insolvency.

[85] As for the continuing retainer, we think that once RJLGT took over from the firm in January 2006, the earlier retainer would necessarily or by implication have been terminated. We do not see how it can be said that the defendant or the firm continued to owe a duty after RJLGT took over. It is obvious that the so-called loss here is the plaintiffs' loss of opportunity (if any) to complete the sale per the SPA, which became legally impossible once the property was auctioned off. The auction took place on 16 February 2006. The plaintiffs' new solicitors (RJLGT) tried to stop the auction by making a request to the solicitors acting for chargee bank (see: RJLGT's letter dated 9 January 2006 to Messrs Sidek Teoh Wong & Dennis).

[86] But the chargee bank did not entertain the request and went ahead with the auction. This is hardly surprising because this was the second auction date as the first auction was fixed on 3 June 2004 and was called off to enable the vendor/the plaintiffs to settle redemption sum owing to the chargee bank. According to the defendant, the plaintiffs were trying to get a 'hair-cut' from the chargee bank. But that is neither here nor there. As we said earlier, the issue of the redemption sum was a matter for negotiation between Dato' Lim/P1 and the chargee bank.

[87] Thus, in so far as the allegation of breach of duty of care is concerned, looking at the evidence as a whole, we find no basis for the suggestion that the

defendant had breached his duty of care as a conveyancing solicitor. The plaintiffs had not even called an expert to testify that there was a departure from any particular standard of conveyancing practice (see: *Tetuan Theselim, Shearn Delamore*). Even if we accept the plaintiffs' assertion that the defendant was negligent, it is clear that the plaintiffs have not proven that any loss that they had suffered, was caused by the defendant's actions or omissions. Plainly, the plaintiffs have not satisfied the 'but for' test.

[88] In this regard, it is relevant to refer to Harmindar JCA's (as he then was) decision in *Tetuan Theselim* where he said:

> [32] In this respect as well, we are compelled to note that there was no inquiry as to whether it was the first defendant's breach of duty which led to the losses sustained. *The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. In other words, was the defendant's act the effective cause of the harm suffered by the plaintiff? In this respect, the courts look to the test of causation known commonly as the 'but for' test* (see *Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat & Other Appeals* [2017] 1 MLJ 328; [2017] 2 CLJ 274; *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors & Other Appeals* [2013] 2 MLJ 29; [2012] 7 CLJ 337 and *Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449 ; [2014] 3 CLJ 984; [2014] 1 AMCR 829).
>
> [33] The 'but for' test simply means that 'but for' the defendant's negligent act, the harm would not have occurred. Applying the 'but for' test in the present case, the question is whether the plaintiffs' damage would have accrued but for the defendants' negligence. In our view, the proximate cause of the plaintiffs' losses is the failure of the plaintiffs to obtain the financing and to settle the balance purchase price within the agreed period. That had nothing to do with the defendants as solicitors. It was indeed a matter entirely within the control of the plaintiffs and the bank. In other words, there was no nexus between the exercise of care and skill by the defendants as solicitors to the granting or otherwise of the loan facility. As such, it must follow that the plaintiffs have failed, in this respect, to establish liability on the part of the defendants. (Emphasis added.)

[89] As we said earlier, various events had intervened. The defendant had no control over these events which were all due to the vendor's financial situation. The plaintiffs lay the blame on the defendant. In our view, the defendant cannot be held responsible for the events which had occurred. Thus, taking all of the complaints of the plaintiffs with respect to the defendant's handling of the SPA transaction, we do not see how any of these would have made a difference to the situation or predicament that the plaintiffs found themselves in. It was just rather unfortunate that the plaintiffs had entered into the SPA with the vendor who had massive financial problems.

[90] Indeed, despite the vendor's problem and the threat of a sale by public auction, there was at all times a window of opportunity to salvage the transaction and that could have been achieved by payment of the redemption

sum. This would have entailed a top-up of the balance of the purchase price. In this regard, we have not lost sight of the fact that P1 did say that the defendant did advise the plaintiffs to pay the redemption sum on behalf of the vendor, so that the sale could be completed. However, because of a trust deficit, and P1's anger/annoyance with defendant's conduct in (not literally) 'kicking' him out of a meeting, the plaintiff declined to pay the redemption sum. Again, it is also important to emphasize that the chargee bank's attitude or lack of cooperation vis a vis the redemption statement etc are all matters beyond the defendant's control.

[91] According to the defendant, he had waited for instructions from P1 on the redemption sum and the redemption of property but instructions were not forthcoming from P1. He said, based on the firm's last record, P1 and Dato' Lim (representing the vendor) were negotiating directly with the chargee bank on the redemption sum.

[92] The firm also checked with the chargee bank for the redemption statement sometime in October and on 1 November 2004 but the chargee bank declined to release the redemption statement until the vendor gave a written confirmation. He said the firm never received any instructions on redemption from the plaintiffs. The defendant said that the plaintiffs never reverted to the firm or the defendant because they undertook negotiations directly with the chargee bank and had in fact appointed other solicitors (RJLGT) to take over and negotiate the redemption. Perhaps the outcome may have been different if the plaintiffs had timeously followed the defendant's advice.

[93] Next, we turn to the question of limitation. In this regard, if the defendant was negligent, and this had caused damage to the plaintiffs, then the damage must have occurred on the date when the property was no longer available and that event i.e. the impossibility of completion of the SPA, took place on 16 February 2006. It is necessary to bear in mind that the plaintiffs' pleaded case was in negligence. A cause of action in negligence is predicated on the existence of a duty of care, a breach of the duty of care and *lastly, damages which flow from that breach*. If there is no damage, then the cause of action in negligence fails.

[94] The legal position in this regard is made clear from the following passage from the decision of the Singapore Court of Appeal (per Wee Chong Jin CJ) in *KE Hilborne v Tan Tiang Quee; KS Chung v Tan Tiang Quee* [1972] 2 MLJ 94 (CA) (at pp 98–99):

> With regard to the argument on behalf of Mr Hilborne that *in a negligence action where no loss is proved the action ought to be dismissed* we are of the opinion that the cause of action in the present case is breach of contract and not tort. We refer with

approval to *Cordery on Solicitors* (6th Ed) where the author said at p 187:

> Negligence has been defined as the absence of such care as it was the duty of the defendant to take. The fact that a professional man has been negligent or that his client has suffered damage does not of itself give rise to a cause of action, for *negligence alone does not give a cause of action, and damage alone does not give a cause of action: the two must co-exist*. But if the negligence constitutes a breach of contract presumably there must be a cause of action if only for nominal damages.
>
> *Actionable negligence may be said to possess three essential ingredients: the complex concept of duty, breach of the duty, and damage suffered by the person to whom the duty was owing*. In the case of a solicitor and his client, such negligence involves:
>
> (a) a legal duty towards the client to exercise care or skill, or both;
>
> (b) a breach of that duty by the solicitor, ie a failure to attain the standard of care or skill prescribed by law; and
>
> (c) actual loss to the client as the direct result of such breach.
>
> Where there is professional negligence on the part of a solicitor the client's cause of action is breach of contract and not tort. (Emphasis added.)

[95] It would be appropriate now to turn to the specific and critical question — what is a cause of action? For this, we need look no further than the Court of Appeal decision in *Dato' Ahmad Johari bin Tun Abdul Razak v A Santamil Selvi a/p Alau Malay @ Anna Malay (administratix for the estate of Balasubramaniam a/l Perumal, deceased) & Ors and other appeals* [2020] 6 MLJ 133; [2020] 7 CLJ 588 (CA), where Suraya Othman JCA, comprehensively examined the relevant cases on the definition of cause of action and said:

> *Cause of action*
>
> [61] In the Court of Appeal case of *Lembaga Kumpulan Wang Simpanan Pekerja v OngLian Chee* [2010] 4 MLJ 762 at p 769; [2010] 5 CLJ 23 at p 30, 'cause of action' has been defined as '*simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person*':
>
> > [20] It is apposite to define the phrase 'cause of action'. It means 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person': per Diplock LJ in *Letang v Cooper* [1964] 2 All ER 929 at p 934. See also *Lim Kean v Choo Koon* [1970] 1 MLJ 158, *Nasri v Mesah* [1971] 1 MLJ 32 (FC), *Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 3 MLJ 301, *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (SC), and *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 (SC), as found in *Malaysian Court Practice 2007* Desk Ed LexisNexis at p 144. (Emphasis added.)
>
> [62] In the case of *Credit Corp (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 at p 411; [1991] 2 CLJ 871at p 72; [1991] 1 CLJ Rep 69, which was cited with approval by the Court of Appeal in *Lembaga Kumpulan Wang Simpanan,* Justice Hashim Yeop Sani CJ Malaya, speaking for the Supreme Court, held that a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and *when all the facts have happened which are material to be proved to*

entitle the plaintiff to succeed. Section 6(1)(a) of our Limitation Act 1953 (Revised 1981) provides, inter alia, that:

> *Save as hereinafter provided* actions founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. (Emphasis added.)

That provision invites the question as to what is the date on which the cause of action accrued. In *Cook v Gill* Brett J defined *'a cause of action' to mean 'every fact which is material to be proved to entitle the plaintiff to succeed'*. This definition was subsequently approved by the Court of Appeal in *Read v Brown* (1888) 22 QB 128. After reviewing the authorities Yong J in *Lim Kean v Choo Koon* [1970] 1 MLJ 158; [1969] 1 LNS 94 came to the conclusion that the period of limitation does not begin to run 'until there is a complete cause of action'. In that case he held that the plaintiff's cause of action was not complete until an order is obtained from the Rent Assessment Board fixing the amount of the rent legally recoverable under the Control of Rent Ordinance. He accordingly held that the period of limitation commenced to run only from the date of the order of the Board.

From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

And at pp 413–414 (MLJ); p 76 (CLJ) His Lordship, inter alia, *state that the limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation and that the rationale of the limitation law should be appreciated and enforced by the courts*.

The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercisedfor a long time is nonexistent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

The limitation law is promulgated for the primary object of discouraging plaintiffs' from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts. (Emphasis added.)

[63] It is trite that *a cause of action arises from the earliest possible moment in time when an action could be brought. This must be appreciated by the courts and parties alike*: see our Federal Court decisions in *Nasri v Mesah* [1971] 1 MLJ 32; [1970] 1 LNS 85 and in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 CLJ 207.

[12] In *Letang v Cooper* [1965] 1 QB 232, 242–3, Lord Diplock defined a 'cause of action' as 'a factual situation the existence of which entitled one person to obtain from the court a remedy against another', which definition was adopted in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; [1987] CLJ Rep 126, where Abdul Hamid Ag LP, as he then was, appended that 'there must be a cause of action before a plaintiff can claim a relief in an action'.

In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63,

19, the Supreme Court per Salleh Abbas CJ, expounded that to make up 'a cause of action', first, the plaintiff has a right at law or by statute and secondly, the right has been affected by the act of the defendant:

> 'A cause of action' is a statement of facts alleging that a plaintiffs right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.

[96] Next, it is important to state that when limitation is raised, then the burden shifts to these who contend that the action is not time-barred. In *Mohd Sari bin Datuk Okk Hj Nuar & Ors v Asia General Equipment and Supplies Sdn Bhd & Ors* [2010] 5 MLJ 766 (CA), Abdull Hamid Embong JCA (as he then was) said:

> [26] The defendants had raised the defence of limitation. That being the situation, the burden of proving that the action was brought within the limitation period shifts to the plaintiffs as was held in *Ong Ah Bee v Hii Chung Siong, Robin* [1364] MD 2; [1993] 1 CLJ 504 where Steve Shim Lip Kiong J said:
>
> > Now it has been held that when the defence of limitation is raised, the burden of pleading and proving that the action was brought within the limitation period shifts to the plaintiff. In *Cartledge (Widow and Administratrix of The Estate of Fred Hector Cartledge (deceased)) and others v E Jopling & Sons, Ltd* [1963] 1 All ER 341, Lord Pearce said:
> >
> > > *... I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period*. When, however, a plaintiff has proved an accrual of damages within the six years . the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date. (Emphasis added.)

[97] Thus, the answer to the question when does a cause of action arise is that it may arise on various events; *but it has always been held that the statute of limitation runs from the earliest time at which an action could be brought* (see: *Hemp v Garland* (1843) 4 QB 519, decided in 1843) (Emphasis added.)

[98] We may now refer to the Court of Appeal decision in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663; [2009] 1 LNS 1479 ('the *Ambank* case'). The question in the *Ambank* case was in relation to the accrual of a cause of action in negligence against the solicitors who had negligently (or incompetently) prepared the assignment which

ultimately could not be enforced. The unenforceability of the assignment was discovered more than six years after the document had been prepared. A

[99] The Court of Appeal held that the bank's cause of action 'accrued' when the damage occurred. And according to the Court of Appeal, the damage had occurred when the document was prepared more than six years before the document was sought to be enforced. The cause of action was therefore time-barred. B

[100] The brief facts of the *Ambank* case are as follows. The defendants in that case were all lawyers practising with a firm which was acting for the plaintiff/bank in a loan transaction pursuant to which a facility of RM800,000 was given to a company ('the borrower'). The loan was to be secured by the assignment of a subdivided piece of land ('Lot 465') by a third party ('the assignor'). Both the loan agreement and the assignment were executed on 6 April 1999, and the loan was released on the same day. C D

[101] The borrower defaulted in its repayments in November 2000, and in April 2004 the bank sought to enforce the assignment. The consent of the Ipoh City Council ('the council') (as master title holder) was then sought for the intended sale of Lot 465 by private auction. The council refused and the bank brought an action to compel the council to give its consent. E

[102] Subsequently, the bank — believing that the assignment itself was a void instrument for want of a good title on the part of the assignor — withdrew its action against the council and, instead, sued the lawyers for negligence and/or breach of contract on 17 March 2006. The bank's claim against the lawyers was struck out by the High Court on a preliminary point of limitation. It was held that the bank's claim had been time-barred under s 6(1)(a) of the Limitation Act 1953 because time began to run from the accrual of the cause of action (on 6 April 1999) and not from the bank's discovery of its cause of action (in April 2004). The bank appealed. The bank's appeal was dismissed. F G

[103] The reasoning of the Court of Appeal is to be found in the following paragraphs of the judgment of Abdul Malik Ishak JCA who said: H

> [34] It is trite law that a cause of action founded in tort accrues *when the appellant suffers damage* (*Goh Kiang Heng v Mohd Ali Abd Majid*).
>
> [35] According to the case of *Forster v Outred & Co* [1982] 1 WLR 86, CA, it was necessary to prove actual damage in order to constitute a cause of action in negligence and that on the pleaded facts the plaintiff had suffered actual damage through the defendant's negligence by executing a mortgage deed whereby her property was encumbered with a legal charge and she was subjected to a liability which might mature into a financial loss; and that, therefore, her cause of action accrued in February 1973 notwithstanding that she did not actually become liable I

for the repayment of the loan until the demand was made and, accordingly, the second writ was issued outside the six years' limitation period and the action begun by the first writ was rightly dismissed.

[36] Nourse J, in *Melton v Walker and Stanger* [1981] 125 Sol Jo 861 applied the case of *Forster v Outred & Co*) and came to the same conclusion to the effect that a cause of action founded in tort accrued when the plaintiff suffered damage and that the cause of action was completed on 7 April 1967.

[37] Templeman LJ, writing for the Court of Appeal in *Baker v Ollard & Bentley (a Firm) & Another* [1982] 162 Sol Jo 593, aptly said that:

> The period of limitation under the Limitation Act 1939 begins to run when the cause of action accrues. *In negligence actions damage is an essential part of the cause of action and thus the relevant period of limitation, in this case six years, runs from the date of the damage and not from the date of the act which causes the damage*.

[38] The next case would be the case of *DW Moore And Co Ltd and others v Ferrier And Others* [1988] 1 WLR 267, a decision of the Court of Appeal. Suffice for this exercise that we need only refer to the headnotes of the case at p 267 thereof:

> In March 1971 F approached the plaintiffs to join their business of insurance brokers. The plaintiffs agreed to take him as a shareholder and director of the first plaintiff, a company of which the second and third plaintiffs were directors. Clause 5 of the written agreement dated 1 July 1971, prepared by the defendant solicitors and made between the second and third plaintiffs and F, provided that if any of them ceased:
>
> to be a member of the company such person shall not engage in any other business connected with insurance or insurance broking in any way whatever within a radius of 15 miles of King's Lynn for a period of three years from the date of such person ceasing to be a member of the company ...
>
> The plaintiffs asserted that they were advised that that covenant was valid and binding and was sufficient in law to prevent F. from engaging into business as specified. In May 1975, by a further agreement, the second and third plaintiffs and F. agreed to increase F.'s shareholding. That agreement also contained, on the solicitors' advice, a restrictive clause in terms similar to cl 5 of the 1971 agreement. In December 1980 F. decided to leave the business and to establish an insurance brokerage at Swaffham, less than 15 miles from King's Lynn.
>
> He also wanted to canvass and accept as clients the plaintiffs' clients. The then plaintiffs discovered that the covenant was ineffectual to prevent F. from establishing his own business. On 16 April 1985 they issued a writ seeking damages for negligence. By consent the question whether s 2 of the Limitation Act 1980 afforded a defence was tried as a preliminary issue. The deputy judge held that the plaintiffs' action was statute barred.
>
> On appeal by the plaintiffs:
>
> Held, dismissing the appeals, that there was no presumption that on a solicitor's negligent advice damage occurred when the advice was acted on; that it was a question of fact in each case, whether actual damage had been established and when; and that, accordingly, *since the plaintiffs' damage occurred at the time of*

executing the agreements, when they received a worthless covenant rather than a valuable chose in action, their cause of action arose more than six years before the issue of the writ and was statute barred.

[39] Applying all these salient authorities to the appeal at hand, it is our judgment that on the facts as pleaded the appellant would have suffered damage when the third party assignment was executed because the appellant would have, on that date, been encumbered with the liability of dispensing the loan to the borrower in exchange for an invalid third party assignment. It is also our judgment, on the available evidence, that the appellant's loss would have crystallised the moment the loan sum was disbursed to the borrower in early April 1999 in exchange for an invalid third party assignment. *Time started to move from 6 April 1999*. (Emphasis added.)

[104] Hence, applying the principle which was enunciated in the *Ambank*'s case to the facts in this case, it is clear that 16 February 2006 is the earliest point in time that the plaintiffs could have commenced an action in negligence as the cause of action commenced on that date. The damage occurred on that date because thereafter it was legally impossible to complete the SPA. The six years limitation period for an action in tort per s 6(1)(a) of the Limitation Act 1953 would therefore have ended on 15 February 2012. However, the present suit was only filed on 9 August 2012. On that analysis, Suit 943 is plainly time barred.

[105] From the documents, it is not in dispute that P1 had lodged a complaint with the ASDB and it was predicated on the defendant's alleged negligence. The complaint is dated 26 June 2008. The damage occurred about two years earlier, when the property was sold at the auction on 16 February 2006.

[106] Prior to the auction, the plaintiffs had engaged RJLGT to act for them. it is only reasonable to expect that RJLGT would (or should) have advised the plaintiffs that time was running and that any action in negligence against the defendant had to be filed within six years from the date of accrual of the cause of action.

[107] Indeed, P1 did concede during cross-examination that he told RJLGT that the defendant did not know what he was doing. But despite forming the view that the defendant was negligent, the plaintiffs waited until 9 August 2012 to file Suit 943, which was beyond the six years period of limitation. The action was therefore time barred.

[108] Lastly, we note that the judge had made a finding that the action was not time-barred because the plaintiffs' claim was premised on events that occurred prior to the plaintiffs' loss of the property which crystallised on 16 February 2006. If that be the case, then the issue of time-bar is even more compelling as

anything that happened prior to 16 February 2006 would make the issue of time-bar even more egregious. The judge had therefore erred in her analysis of the issue of limitation.

THE OUTCOME

[109] In the result, for the reasons stated and discussed above, we are satisfied that the judge was plainly wrong, inter alia, on the issue of breach of duty of care and on the limitation issue. Thus, appellate intervention is warranted.

[110] As such, Appeal 1259 is allowed and the High Court's decision dated 31 May 2018 is set aside. The plaintiffs' claim is dismissed. We allow costs of RM10,000 (subject to allocator). Consequently, Appeals 2603 and 2580 are academic and are therefore dismissed with no order as to costs.

Appeal 1259 allowed with costs; Appeals 2603 and 2580 dismissed with no order as to costs.

Reported by Nuzul Fitrie