MANIAN K MARAPPAN & ANOR v. SINWUFU ENTERPRISE SDN BHD; MASHUDAN KAMAR & ORS (THIRD PARTIES) AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
LAU BEE LAN JCA
AZIZAH NAWAWI JCA
[CIVIL APPEALS NO: J-02(NCVC)(W)-2082-10-2017
& J-02(NCVC)(W)-2084-10-2017]
7 SEPTEMBER 2020

LAND LAW: *Transfer – Validity – Whether transfer effected under valid power of attorney – Whether society empowered under its constitution to appoint agent – Whether duties to be carried out by society and office bearers or trustees – Whether s. 28 of Trustee Act 1949 applicable – Whether power of attorney ultra vires constitution of society – Whether non-delegation rule applicable – Whether power of attorney invalid – Whether rendered transfer void*

UNINCORPORATED ASSOCIATIONS: *Societies – Constitution – Provisions governing position of trustees – Whether immovable assets vested in names of trustees – Whether society empowered under its constitution to appoint agent – Whether duties to be carried out by society and office bearers or trustees – Whether power of attorney ultra vires constitution of society – Whether power of attorney invalid – Societies Act 1966, s. 9*

The two appeals herein were: (i) Appeal 2082 which originated from a suit ('Suit 87') filed by the appellants, who claimed to be the registered proprietors of five lots of lands ('five lands'), against Sinwufu Enterprise Sdn Bhd ('Sinwufu') for vacant possession and trespass on the five lands; and (ii) Appeal 2084 pursuant to a claim of ownership of the lands by the Trustees of Persekutuan Guru-Guru Melayu Johor, Batu Pahat Branch ('PGMJ') and its office bearers against the appellants and one Omar bin Haji Kassim ('Omar'). Arising from Suit 87, Sinwufu issued third party notices against the trustees of PGMJ and Messrs TK Lim & Co as third parties to the suit. Sinwufu's case was that it had entered into a tenancy agreement of 15 years with PGMJ, the original registered owner of the five lands, and relied on Messrs TK Lim's legal expertise in preparing the said agreement. Sinwufu sought to be indemnified by PGMJ and Messrs TK Lim in the event the appellant's claim was allowed. PGMJ, in turn, brought in Omar, who executed the transfer of the five lands on behalf of PGMJ as its attorney under a power of attorney ('PA'). PGMJ's case was that the PA, which vested Omar with the authority, was invalid and it had no knowledge of the transfer of the five lands to the appellants. PGMJ filed Suit 46 to set aside

the appellants' title on the grounds of negligence and dishonesty against the appellants and fraud against Omar. The High Court Judge ('HCJ') held that: (i) the PA was invalid *vis-à-vis* s. 28 of the Trustee Act 1949 ('Trustee Act'); (ii) the PA was never given to Omar towards the transfer of the five lands; (iii) Omar had acted beyond PGMJ's knowledge in relation to the five lands; and (iv) the appellant's title was defeasible on the basis of fraud. Hence, in Suit 87, the appellants' claim against Sinwufu and Sinwufu's claim against PGMJ and Messrs TK Lim were dismissed. Whereas, in Suit 46, (i) PGMJ's claim against the first and second appellants in para 26.1(a), *ie*, a declaration that the sales and purchase agreement for the five lands was null and void, and para 26(1)(b), *ie*, to deliver vacant possession of the five lands to transfer the same to PGMJ within 30 days, was allowed; and (ii) PGMJ's claim against Omar was also allowed . The primary issue in the appeals was the validity of the PA, in that, if the PA was invalid, the transfer of the five lands to the appellants was, in law, invalid.

Held (dismissing Appeal 2084 and Appeal 2082; affirming decision of High Court)
Per Lau Bee Lan JCA delivering the judgment of the court:

(1) The validity of the PA is fundamental. If the PA is invalid, then the transfer is also invalid. In equity, the principle of *delegatus non protest delegare* by a trustee is a strict rule and statute intervenes to mitigate the strictures of the strict rule. Section 28 of the Trustee Act is the exception to the equitable rule of *delegatus non protest delegare*. PGMJ's case fell within the rule of equity and not within s. 28. (paras 15, 16 & 21)

(2) The suggestion by the appellants that the trustees in Appeal 2084 were 'dummy trustees', in that, they could only sell with the direction or consent of the 'Jawatankuasa Tadbir' and therefore, the non-delegation rule should not apply, was flawed. Nowhere in the Trustee Act does it create an exception in respect of 'dummy trustees'. It was the appellants' submission that the PGMJ trustees signed the PA, the application form for consent as instructed, in a mechanical way which was ministerial in effect. However, the PGMJ trustees were not merely performing ministerial acts and the act of selling the five lands was not a mere ministerial act. Hence, the HCJ correctly found that s. 28 of the Trustee Act did not apply and pursuant to the non-delegation rule, the PA was not valid. A wrongful delegation and a breach of the non-delegation rule rendered the PA void. (paras 22, 24 & 26)

(3) Clause 12 of the constitution of PGMJ, which governed the position of trustees of the association, expressly vested the immovable assets of the association in the names of the trustees, in line with s. 9 of the Societies Act 1966. Further, the *Turquand* rule did not arise because of the absence of provision allowing for the appointment of agent by way of

power of attorney in the PGMJ constitution, which goes to capacity and not to the exercise of power. PGMJ was a society registered under the Societies Act; its objects and powers were defined by the provisions of the constitution which was approved by the Registrar of Societies. There was no power in the PGMJ constitution to appoint an agent. Everything must be carried out by PGMJ and its office bearers or trustees. So, the *ultra vires* doctrine applies to prevent the appellants from contending a position of reliance on the *Turquand* rule. (paras 28, 33 & 37)

(4) The PA was thus not valid as (i) it breached the non-delegation rule; and (ii) it was *ultra vires* the constitution of PGMJ. (para 38)

Case(s) referred to:

Allam & Co Ltd v. Europa Poster Services Ltd [1968] 1 WLR 638 ***(refd)***
Chapleo And Wife v. The Brunswick Permanent Building Society And Others [1881] QBD Vol VI 696 ***(refd)***
Doresamy v. Public Services Commission [1971] 1 LNS 28 HC ***(dist)***
Green v. Whitehead [1930] 1 Ch D 38 ***(refd)***
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(foll)***
Malayan Banking Bhd v. Chairman of Sarawak Housing Developers' Association [2014] 6 CLJ 409 FC ***(dist)***
Malaysia Shipyard And Engineering Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd [1985] 1 LNS 166 SC ***(refd)***
Re Estate Of O R M M S M Sevugan Chettiar Deceased [1949] 1 LNS 74 HC ***(dist)***
Re Schmidt's Trademark [1886] CH D Vol XXXV 162 ***(refd)***
Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch 246 ***(refd)***
Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2020] 1 CLJ 337 FC ***(dist)***
Wong Weng Hong v. Tsoi Lau Ying [1940] 1 LNS 118 HC ***(refd)***

Legislation referred to:

National Land Code, s. 340
Probate and Administration Act 1959, s. 60(4)
Societies Act 1966, s. 9(b)
Trustee Act 1949, s. 28(2)

Trustee Act 1925 [UK], s. 23

Other source(s) referred to:

Lewin On Trusts, 18th edn, 2009 South Asian Edition, para 29.90
Geraint Thomas, *Thomas On Powers*, 2nd edn, paras 7.57, 7.58

(Civil Appeal No: J-02(NCVC)(W)-2082-10-2017)
For the appellants - Gurdial Singh Nijar, Abraham Au & Julie Lim; M/s Julie Lim, Vasanthan & Co
For the respondent - Chew Hui Xian; M/s SK Koh & Co
For the 1st third party - Michael Chow, Shahareen Begum Abdul Subhan & Wendy Yeong; M/s Shahareen Begum
For the 3rd third party - Manjit Singh Saini; M/s Adelyn Loh Chambers

(Civil Appeal No: J-02(NCVC)(W)-2084-10-2017)
For the 1st & 2nd appellants - Gurdial Singh Nijar, Abraham Au & Julie Lim; M/s Julie Lim, Vasanthan & Co
For the 3rd appellant - Manjit Singh Saini; M/s Adelyn Loh Chambers
For the respondents - Michael Chow, Shahareen Begum Abdul Subhan & Wendy Yeong; M/s Shahareen Begum

[Editor's note: Appeal from High Court, Muar; Suit No: 22NCVC-87-12-2013 (affirmed).]

Reported by S Barathi

JUDGMENT

Lau Bee Lan JCA:

[1] These are two appeals lodged by the appellants against the decision of the learned High Court Judge made on 27 September 2017 regarding two suits filed and heard together in the Muar High Court:

(i) Appeal No: J-02(NCVC)(W)-2082-10-2017 pursuant to a claim filed by the appellants against Sinwufu Enterprise Sdn Bhd ('Sinwufu') for vacant possession and trespass of lands ('Appeal 2082'); and

(ii) Appeal No: J-02(NCVC)(W)-2084-10-2017 pursuant to a claim for ownership of the lands filed by the trustees of Persekutuan Guru-Guru Melayu Johor, Batu Pahat Branch ('PGMJ') and its office bearers against the appellants and one Omar bin Haji Kassim ('Appeal 2084').

[2] Appeal 2082 originated from Civil Suit 22 NCVC-87-12-2013 in the High Court ('Suit 87') filed by the appellants (Manian and Vijaya, his wife) who claimed to be registered proprietors of five lots of land held under leasehold titles known as HS(D) PTB 2551, 2552, 2553, 2554 and 2555 in Bandar Penggaram, Batu Pahat ('the five lands') against Sinwufu (the respondent in Appeal 2082) for vacant possession and trespass on the five lands. Arising from Suit 87, Sinwufu issued third party notices against the trustees of PGMJ and Messrs TK Lim & Co as third parties to the suit.

[3] Sinwufu's case is that it had entered into a tenancy agreement of 15 years with PGMJ (original registered owner of the five lands) and that it relied on Messrs TK Lim's legal expertise in preparing the said agreement. Sinwufu sought to be indemnified by the first third party (PGMJ) and second third party (Messrs TK Lim and Co) in the event the appellants' claim be allowed.

[4] PGMJ brought in Omar bin Kassim ('Omar') as the third third party. Omar executed the transfer of the five lands on PGMJ's behalf as PGMJ's attorney under a power of attorney ('PA') granted by PGMJ. PGMJ's case is that the said PA, which vested Omar with the said authority is invalid and it had no knowledge of the transfer of the five lands to the appellants.

[5] PGMJ through its trustees and office bearers filed Civil Suit 22 NCVC-46-05-2013 ('Suit 46') for the appellants' title to be set aside on grounds of negligence and dishonesty against the appellants and fraud against Omar.

[6] In her grounds of judgment dated 14 December 2017 ('grounds'), the learned High Court Judge (i) held that the PA was invalid *vis-a-vis* s. 28 of the Trustee Act 1949, (ii) accepted PGMJ's contention that the PA was never given to Omar towards the transfer of the five lands, (iii) held Omar had acted beyond PGMJ's knowledge in relation to the five lands, and (iv) held that the appellants' title to be defeasible on the basis of fraud.

[7] In Suit 87, the learned High Court Judge had dismissed with costs:

(i) the plaintiffs' (appellants) claim against the defendant (Sinwufu);

(ii) the defendant's (Sinwufu) claim against the first third party (PGMJ) and the second third party (Messrs TK Lim); and

(iii) the first third party's claim (PGMJ) against the third third party (Omar) is to be decided in Suit 46.

[8] In Suit 46, the learned High Court Judge had allowed with costs:

(i) the plaintiffs' (PGMJ) claim against the first and second defendants (first and second appellants) in para 26.1 (a) ie, a declaration that the sales and purchase agreement dated 28 June 2011 for the five lands is null and void and para 26.1 (b) ie, to deliver vacant possession of the five lands and transfer the same to the plaintiffs (PGMJ) within 30 days; and

(ii) the plaintiffs' (PGMJ) claim against the third defendant (Omar).

[9] Learned counsel for the appellants, Dato' Dr Gurdial Singh Nijar highlighted during oral submission that the appellants had three primary issues as to why the learned High Court Judge had erred:

(i) by relying on s. 28(2) of the Trustee Act 1949 in that the learned High Court Judge held that the POA was not valid because of s. 28(2) of the Trustee Act;

(ii) the transfer in any event, premised on the evidence was also flawed in that PGMJ did not authorise the sale of the five lands to the appellants; and

(iii) the registration of title should be set aside because of the fraud of Omar and the allegation of conspiracy allegedly between Omar and the appellants.

[10] After careful consideration of the submissions of the respective counsel, written and oral and having perused the records of appeal before us, we are of the view that the primary issue is the legal issue of the validity of

A the PA, in that if the PA is invalid, then the transfer of the five lands to the appellants is in law invalid as submitted by Mr Michael Chow, learned counsel for PGMJ on the authority of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697, which we will address later.

B **[11]** In the High Court in Suit 46, one of the main issues was whether the PA dated 3 January 2019 which was registered in the High Court, Muar is valid under the Constitution of PGMJ and s. 28 of the Trustee Act, wherein the said PA was given by PGMJ to Omar. Having examined the contentions of the appellants, Omar and PGMJ (paras 27 to 51, grounds), the learned C High Court Judge held:

> [52] Oleh itu terma-terma di dalam surat kuasa wakil tersebut yang telah memberi kuasa kepada Omar bin Kassim untuk memindahmilik hartanah kepada pihak yang lain telah melanggar peruntukan di bawah seksyen 28(2) dan 30 Akta Pemegang Amanah 1949.

D **[12]** The appellants argued that the learned High Court Judge was wrong to hold that the PA issued to Omar was invalid by ruling that any transfer of properties must be done by trustees on instructions of jawatankuasa tadbir and no one else for the following reasons:

E (i) "Section 28(2) says when trustees or personal representatives MAY appoint an attorney to act or sell property in any place outside Malaysia. It does not say that this is the only situation when trustees can appoint an attorney. In other words, it is merely to regulate this one situation. It is not prohibitory in nature". The case of *Re Estate Of O R M M S M Sevugan Chettiar Deceased* [1949] 1 LNS 74 was cited as follows:

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> The only other provisions of the Probate and Administration Enactment (Cap. 8) to which I need refer are ss. 42 and 79.
>
> > When any executor is absent from the Federated Malay States and there is no executor within the Federated Malay States willing to act, letters of administration with the will annexed may be granted to attorney of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration to himself.
>
> In my view that is merely an enabling provision; It does not provide that where an executor is absent from the country, administration of the deceased's estate can be granted only to an attorney of the absent executor.

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(ii) The right of any person *sui generis* to appoint an attorney exists in law as a matter of course under the common law citing *Jackson & Co v. Napper*. In *Re Schmidt's Trademark* [1886] CH D Vol. XXXV p. 162 at p. 172 as follows:

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> In *re Whitley* before the Court of Appeal (1) with reference to signing a memorandum under the Companies Act of 1862, in which the Court held that the signature might be by an agent.

> And I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who STIRLING, J. is *sui juris* to appoint an agent to act on his behalf.

The proposition that it is a common law right which cannot be taken away except by express provision was approved in:

(a) *Doresamy v. Public Services Commission* [1971] 1 LNS 28; [1971] 2 MLJ 127 where the High Court held at p. 129 (MLJ) as follows:

> On appeal Dean J. held that the common law right to appear and be heard through an agent cannot be restricted in the absence of an expressed provision restricting or taking away that right; and

(b) *Malayan Banking Berhad v. Chairman of Sarawak Housing Developers' Association* [2014] 6 CLJ 409 at p. 418 (CLJ); [2014] 5 MLJ 169 (FC) at p. 178 as follows:

> [23] If the Act wishes to take away that right, words must be used that point unmistakably to that conclusion (*National Assistance Board v. Wilkinson* [1952] 2 Q 648). Devlin J in clear terms said:
>
> > It is a well-established principle construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion ... It is another principle of statutory interpretation that the court leans against an interpretation which produces unjust and arbitrary consequences.

(c) In *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337 at p. 369; [2019] 12 MLJ 1 at 31 [101] the Federal Court held as follows:

> [101] The general principle may be stated thus: a statute abrogates a common law principle where it expressly states an intention to abrogate that principle, or where it implicitly abrogates the principle by adopting a scheme that is wholly incompatible with the continued application of the common law principle.

[13] In their rebuttal submission, the appellants argue that *Letchumanan*'s case is distinguishable in that (i) the PA in the former case was found to be invalid as a result of forgery and lack of authentication unlike the present appeal where forgery was not PGMJ's pleaded case, (ii) there was clear intent on part of PGMJ to give the PA to Omar based on the evidence of Ekhwan (the last surviving committee member of PGMJ) that PGMJ trusted Omar and discussed matters with Omar; Omar was the authorised

A intermediary between PGMJ and Jomari Holdings (company belonging to Manian and his late father), all correspondence was copied to Power Corporate Consultants (Omar's company) and was instrumental in all of PGMJ's affairs including refinancing of the Muar land; Ekhwan's evidence that it was Omar who conducted the sale and purchase transactions and was
B the one who guided them how the sale should proceed, (iii) PGMJ's own lawyer, Anandan's (SP2) testimony that he drafted the PA on the instruction of PGMJ to appoint Omar and (iv) PGMJ did not tender the PA which they claimed was issued only in relation to the Muar land while the appellants tendered the PA that was executed in relation to the Muar land and the Batu
C Pahat lands.

[14] With respect, we are unable to agree with the submission of the appellants for the following reasons. We agree with PGMJ's reliance on the case of *Letchumanan* (*supra*) wherein the Federal Court at p. 699 (MLJ), among others, opined at held 1 (see also 743[63]) that:

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> In any case for the instant claim to succeed, the validity of the impugned PA should first be proved. If the respondent could not show that the impugned PA was valid, then the instrument of transfer was defective. If the instrument of transfer was defective, then it would follow that the title of the respondent was obtained by a void instrument. Title could not pass
E to the respondent if the instrument of transfer was not executed by the first appellant or lawful attorney. In the instant case, the respondent relied on a power of attorney, which, on its face, without the form of authentication, was not valid

[15] We are of the considered view that *Letchumanan*'s case stands for the
F proposition that the validity of the PA is fundamental and if the PA is invalid, then the transfer is also invalid. The other reasons proffered by the appellants ie, (ii), (iii) and (iv) abovementioned [para 13] are not relevant to the legal argument at hand as they impinge on factual matters.

[16] As was correctly submitted by Mr Michael Chow, s. 28 of the Trustee
G Act is the statutory exception to the rule of equity. In equity, the principle of *delegatus non protest delegare* (non delegation) by a trustee is a strict rule and statute intervenes to mitigate the strictures of the strict rule.

[17] We agree with counsel for PGMJ's submission as we are fortified in our views by the following authorities. First, the learned authors, Geraint
H Thomas and Alastair Hudson in *The Law of Trusts*, 2nd edition state:

> (i) The office of trustee is one of personal trust and confidence. The person who holds it is required to exercise his own judgment and discretion. In the absence of express provision to the contrary, an individual trustee or the trustees collectively cannot refer or commit the
I trust or the exercise of trustee powers to a co-trustee or to another, or *delegatus non potest delegare* ... Nor is it the case that only dispositive powers are subject to the rule: it also applies to administrative powers.
>
> (at para 15.01); and

(ii) The strict rule could always be excluded or modified by express provision in the trust instrument. Moreover, there were limited exceptions to the rule.

(at para 15.03)

[18] A case which demonstrates the application of the non-delegation principle is the case of *Green v. Whitehead* [1930] 1 Ch D 38 where the trustees held property in trust for themselves jointly and so were also the beneficial owners as can be gleaned from the argument canvassed by counsel for the vendors/plaintiffs (at p. 40). Even in such a situation, the non-delegation principle applied as per the *dicta* of the English Court of Appeal at p. 45:

Is such a delegation permissible? I think not. Sect. 23 of the Trustee Act, 1925, no doubt gives to the trustees enlarged and somewhat wide powers of employing agents, including (sub-s 2) an agent for the purpose of selling, converting, collecting, getting in and executing and perfecting (what is printed in the Act as "insurances" – obviously a misprint for "assurances") assurances of or managing or cultivating or otherwise administering any property real or personal movable or immovable subject to the trust in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property …, but *giving the section the liberal construction which it was doubtless intended to bear I do not think it is possible to extract from it any corresponding authority to depute similar powers to an agent or attorney in respect of trust property within the United Kingdom*.

(emphasis added)

[19] This case is of persuasive value given that s. 23 of the UK Trustee Act, 1925 referred in the aforesaid judgment is equipollent to our s. 28 of the Trustee Act. The material provision ie, s. 28(2) reads as follows:

(2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering any property, movable or immovable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside Malaysia or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

[20] In any event, *Green v. Whitehead*'s case was endorsed in the case of *Wong Weng Hong v. Tsoi Lau Ying* [1940] 1 LNS 118; [1941] MLJ 141 at p. 118 where the court ruled:

But as was pointed out by Eve J, in *Green v. Whitehead*, she cannot, under section 25(i) in reference to property within the jurisdiction, appoint an agent to exercise such wide powers as she would be able to under section 25(ii) in respect of property outside the jurisdiction.

[21] Counsel for PGMJ pointed out that s. 28 of the Trustee Act is the exception to the equitable rule of *delegatus non protest delegare*. PGMJ's case falls within the rule of equity and they do not fall within s. 28 of the Trustee Act. Section 28(2) of the Trustee Act only allows for delegation by way of power of attorney in two limited situations and outside these two situations, the trustee cannot delegate. The two situations are:

(i) the trustee wants to deal with property outside Malaysia; and

(ii) the trustee is leaving the country.

We have no reason to disagree with the above submission of counsel for PGMJ.

[22] There was a suggestion by the appellants that the trustees in this appeal (respondents in appeal 2084) were "dummy trustees" in that they could only sell with the direction or consent of the "jawatankusa tadbir", and therefore the non-delegation rule should not apply. We find this argument of the appellants to be flawed. In this regard, we agree with counsel for PGMJ's rebuttal submission that nowhere in the Trustee Act does it create an exception in respect of "dummy trustees". Further, we agree that an analogy can be drawn to an administrator appointed to administer an estate of a deceased who is by definition of the Trustee Act, a trustee and is subjected to the provisions of the Trustee Act and has no power to sell unless he or she obtains consent of the court as provided under s. 60(4) of the Probate and Administration Act 1959. Therefore, with respect, we find there is no merit in the submission of the appellants that the analogy drawn by counsel for PGMJ to the role of an administrator under the Probate and Administration Act 1959 to be misplaced as an administrator is vested with powers to deal with the deceased's estate and leave of the court is required as to the way the power is to be exercised.

[23] The appellants in their rebuttal submission submitted that the maxim *delegatus non protest delegare* does not extend to the case before us as on the evidence, PGMJ's trustees do not possess any powers and there is no discretion to exercise at all. PGMJ trustees perform functions as they were told by the jawatankuasa tadbir; that while the lands were vested in the trustees, they cannot do anything in respect of the lands save for written instructions by the jawatankuasa tadbir particularly, "dengan tidak mendapat izin dan kuasa daripada jawatankuasa tadbir yang diberi dengan bertulis oleh Setiausaha Agong" of the PGMJ Constitution connotes that the trustees in actual fact have no power. The appellants submitted that the PGMJ trustees signed the PA, the application form for consent as instructed, in a mechanical way which is ministerial in effect.

[24] We have no quarrel with the legal position submitted by the appellants that the term "ministerial" in law in the *Definition in Legal Free Dictionary* means "done under the direction of supervisor: not involving discretion or

policy making" and the authorities cited as in *Allam & Co Ltd v. Europa Poster Services Ltd* [1968] 1 WLR 638 at 639, 642 & 643 etc for the proposition that the non-delegation principle applies in circumstances where discretion and confidence is reposed in a trustee. In fact this is in accord with the statement of law in the textbook by Geraint Thomas and Alastair Hudson in *The Law of Trusts*, cited by counsel for PGMJ reproduced in para. 17 above. However, with respect, we do not agree that the PGMJ Trustees are merely performing ministerial acts and we have explained why we say so in para. 22 above. Added to that, the act of selling the five lands cannot be said to be a mere ministerial act.

[25] Further, in light of the legal position expressed above, we agree with counsel for PGMJ's oral submission that the cases of *Tony Pua, Jackson & Co v. Napper, Doresamy and Malayan Banking* (*supra*) relied on by the appellants cannot apply as in those cases, statute came in to take away what was given at common law whereas in the appeal before us, statute intervenes to mitigate the rigours of the rule of equity. As for the case of *Re Estate of ORM* (*supra*), we find that the passage referred to by the appellants, is not relevant and has nothing to do with the non-delegation rule, rather it concerns the appointment of the executors of an estate.

[26] We agree with the submission of counsel for PGMJ that the learned High Court Judge was correct in Her Ladyship's finding (paras. 45 and 52, grounds) that s. 28 of the Trustee Act does not apply, and by relying on the non-delegation rule held that the PA was not valid. Her Ladyship's finding that a wrongful delegation and a breach of the non-delegation rule renders the PA void is justified. Support for this legal position is articulated in *Lewin On Trusts*, 18th edn, 2009 South Asian Edition at para 29.90, where the learned authors state as follows:

> Consequences of wrongful delegation
>
> If a trustee is wrongfully delegates to an agent or attorney acts involving the exercise of his discretion, then not only is the trustee answerable for all the wrongful consequences of the delegation but the exercise of the discretion by the agent or attorney will also be void.

[27] In reply to a query from the court as to whether PGMJ can rely on its wrong, counsel for PGMJ answered that it will be dependent on the facts. However, counsel argued that even putting aside that there was no finding of fraud or of conspiracy, the singular finding of the voidability of the instrument, ie, the PA was void is sufficient to justify the decision of the learned High Court Judge which was decided in favour of PGMJ. This is because having regard to the void instrument, s. 340 of the National Land Code will apply, besides having regard to the principle in *Letchumanan*. We are of the view that this argument of PGMJ is acceptable as we find that PGMJ's case fell within the principle of *Letchumanan* as alluded to in paras. 14 and 15 above.

Counsel for PGMJ submitted that the learned High Court Judge did rely on *Letchumanan albeit* on what is fraud but was alive to the principle in *Letchumanan* that the voidability of the PA would taint whatever transfer effected pursuant to the PA. We find this submission is consistent with the findings of the High Court at paras. 72, 51 and 52, grounds.

[28] Putting aside the argument on the purported delegation by the trustees, in our view, there is another aspect to be considered. The Constitution of PGMJ in cl. 12 which governs the position of the trustees of the association (material parts) reads as follows:

FASAL 12

Penjaga Amanah:

1. Tiga orang Penjaga Amanah yang mesti berumur lebih daripada dua puluh satu (21) tahun dan yang bukan Jawatankuasa Tadbir akan di lantik dalam mesyuarat Agong Perwakilan Tahunan yang pertama akan memegang jawatan selama tempoh yang disukai oleh Persekutuan. Kepada ketiga-tiga *Penjaga ini akan diserahkan segala harta benda yang tidak bergerak dan mereka akan menjalankan dengan cara yang diarahkan oleh Jawatankuasa Tadbir*.

2. *Penjaga Amanah ini tidak boleh menjual, mengeluarkan atau menukar apa-apa juga harta benda Persekutuan ini dengan tidak mendapat izin dan kuasa daripada Jawatankuasa Tadbir yang diberi dengan bertulis oleh Setiausaha Agong*.

(emphasis added)

From the above, it can be seen that the Constitution of PGMJ expressly vests the immovable assets of the association in the names of the trustees, which is in line with s. 9 of the Societies Act 1966 (Act 335).

[29] Section 9(b) of the Societies Act provides:

(b) **the immovable property of a society may, if not registered in the names of trustees**, notwithstanding the provisions of any written law to the contrary **be registered in the name of the society**, and all instruments relating to that property shall be as valid and effective as if they had been executed by a registered proprietor provided that they are executed by three office-bearers for the time being of the society, whose appointments are authenticated by a certificate of the Registrar, and sealed with the seal of the society.

(emphasis added)

The registration in the name of the society is a fallback position, so if not registered in the name of the trustees, then it can be registered in the name of the society and can be dealt with in a particular fashion which is not relevant here as the undisputed fact is that the five lands were registered in the name of the trustees *qua* trustees of the said association.

[30] It can be observed that nowhere in the Constitution of PGMJ nor for that matter in the Societies Act 1966 is there any provision permitting delegation whether by PA or otherwise. As a society, the extent of the powers of the association are determined by the constitution of the association and everyone dealing with the association is deemed to have knowledge of the powers of the association and what it can or cannot do.

This can be contrasted with Table A of the Companies Act 1965, which contains provisions which permit directors to appoint agents by way of power of attorney.

[31] There is a suggestion by the appellants that in order to get over the non-delegation rule, they say the PA is the power of attorney of PGMJ. To rebut this submission, counsel for PGMJ submitted (i) nothing in the PGMJ Constitution which allows for delegation by way of appointment of PA (ii) the principle of constructive notice ie, everybody is deemed to have knowledge of the articles of association of a body, whether incorporated or otherwise. As there is absence of the provision allowing for the appointment of agent by way of power of attorney in the Constitution, the question of the application of the *Turquand* rule does not arise at all because this goes to capacity and not to exercise of power.

[32] Learned counsel for PGMJ conceded the *Turquand* rule applies even to a society but there is a distinction between abuse of power or improper exercise of power and the *ultra vires* doctrine. If a body does not have the capacity, that goes to *ultra vires*, the *Turquand* rule does not cure the *ultra vires* action which in law is *ultra vires*, outside the capacity of the body. We have no quarrel with the distinction to be drawn as the following cases will demonstrate.

[33] We agree with the aforesaid submission of the PGMJ that in this case, the *Turquand* rule does not arise at all because of the absence of provision allowing for the appointment of agent by way of power of attorney in the PGMJ Constitution, which goes to capacity and not to the exercise of power. We draw support from the textbook, *Thomas On Powers*, 2nd edn by Geraint Thomas which demonstrates the application of the *Turquand* rule and how it has no application when one is talking of the absence of capacity. At para 7.57, the learned author, among others, states:

> It is fundamental principle that a company, being an artificial person, has no capacity to do anything outside the objects specified in its memorandum of association. The same principle applies, in fact, to statutory corporations generally and, indeed, to societies which 'owe their constitution to, or are regulated by deeds of settlement or rules, deriving their effect more or less from Acts of Parliament' ... The core significance of the doctrine is that, if a transaction is outside the legal capacity of the entity in question, such as outside the objects of a company, then it is *ultra vires* and in law it is wholly void. Hobhouse LJ stated in basic position in *Credit Suisse v. Allerdale Borough Council*.

A At para 7.58, the learned author quoted a passage from the judgment of Browne-Wilkinson LJ in the case of *Rolled Steel Products (Holdings) Ltd v. British Steel Corporation* [1986] Ch 246, 302-03, as follows:

> ... much of the confusion that has crept into the law flows from the use of the phrase '*ultra vires*' in different senses in different contexts. The
B reconciliation of the authorities can only be achieved if one first defines the sense in which one is using the words '*ultra vires*'. Because the literal translation of the words is 'beyond the powers', there are many cases in which the words have been applied to transactions which, although within the capacity of the company, are carried out otherwise than through the correct exercise of the powers of the company by its officers ... the use
C of the phrase '*ultra vires*' should be restricted to those cases where the transaction is beyond the capacity of the company and therefore wholly void.

[34] Applying the principle in the passage above to the case at hand, we find there is merit in the submission of counsel for PGMJ *vide* illustration
D of the following two scenarios:

(i) Clause 12 of the Constitution of PGMJ states that trustees can only sell with the consent or the direction of the jawatankuasa tadbir. If the trustees had gone on to sell property belonging to PGMJ and then seek subsequently to say they cannot sell because of the need for consent of
E the jawatankuasa tadbir, that argument is defeated by the *Turquand* rule.

(ii) However, it is quite different from what the court is being asked to accept as the appellants are saying that they do not know what the articles provide, we assume everything is regular even though the
F transaction is effected by an attorney pursuant to a power of attorney. This argument is not defeated by the *Turquand* rule.

[35] In *Chapleo And Wife v. The Brunswick Permanent Building Society And Others* [1881] QBD Vol VI 696 at p. 712 the English Court of Appeal held as follows:

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> To this argument I can only reply that persons who deal with corporations and societies that owe their constitution to or have their powers defined or limited by Acts of Parliament, or are regulated by deeds of settlement or rules, deriving their effect more or less from Acts of Parliament, are bound to know or to ascertain for themselves the nature of the
H constitution, and the extent of the powers of the corporation or society with which they deal. *The plaintiffs and everyone else who have dealings with a building society are bound to know that such a society has no power of borrowing, except such as is conferred upon it by its rules, and if in dealing with such a society they neglect or fail to ascertain whether it has the power of borrowing, or whether any limited power it may have has been exceeded, they must take the consequences*
I *of their carelessness.*
>
> (emphasis added)

[36] In *Malaysia Shipyard And Engineering Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd* [1985] 1 LNS 166; [1985] 2 MLJ 359 the Supreme Court at p. 360 F-I opined:

> Unlike a natural person whose position in law is that he or she can do anything unless prohibited or restricted by law, a co-operative society (of which the appellants being registered under section 7 of the Act are one) being a statutory corporation is not allowed to do anything unless authorised by the statute under which it is incorporated. In other words, the principle of law regarding powers applicable to a co-operative society is the very reverse of that which is applicable to a natural person. The principle is succinctly stated in 9 *Halsbury's Laws of England*, 4th edition, para 1333; at p. 779, as follow:
>
> > 1333. Statutory corporation. The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

In this case, the court was dealing with a co-operative society (respondent) whose powers is set out within the four corners of the statute, the Co-operative Societies Act 1948 under which it is incorporated. The Supreme Court held that the giving of guarantee was *ultra vires* the powers of the co-operative society to give the guarantee and therefore the same was held to be unenforceable.

[37] Applying the principles gleaned from *Chapleo* (*supra*) and *Malaysia Shipyard and Engineering* (*supra*), as the PGMJ is a society registered under the Societies Act 1966, the objects and powers of the PGMJ are defined by the provisions of the Constitution which are approved by the Registrar of Societies. There is no power in the PGMJ Constitution to appoint an agent. Everything must be carried out by the PGMJ and its office bearers or trustees. So the *ultra vires* doctrine applies to prevent the appellants from contending a position of reliance on the *Turquand* rule.

Conclusion

[38] For the reasons which we have adumbrated above, we find that the PA is not valid on two grounds as follows:

(i) it breaches the non-delegation rule; and

(ii) it is *ultra vires* the Constitution of PGMJ.

[39] For the given reasons above, we find that the learned High Court Judge did not err in ruling the PA to be invalid. In the circumstances, we unanimously dismiss the appeals of the appellants in Appeals 2084 and 2082

A with costs. Consequently, in view of our decision, there is no necessity to deal with encl. 26 in Appeal 2082. The decision of the learned High Court Judge dated 27 September 2017 is hereby affirmed.

[40] In Appeal 2084, we award costs of RM40,000 against the appellants. In light of our finding that the PA is void, there has to be a refund of the
B money which has been paid by the first and second appellants and which has been acknowledged by PGMJ. Hence, we order the refund of RM94,200 by PGMJ to the first and second appellants based on the "Schedule of Earlier Payments Made by Jomari Holdings Sdn Bhd Towards And In Account Of Purchase Of 5 Lots From PGMJ in Batu Pahat" (p. 131 first and second
C appellants' written submission (consolidated).

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