IN THE HIGH COURT OF MALAYA AT PULAU PINANG
[CIVIL SUIT NO. PA-22NCC-1-01/2022]

Between

BANK KERJASAMA RAKYAT MALAYSIA BERHAD
... Plaintiff

And

1. ANG ENG HOOI

2. TANG SOON HUAT ... Defendants

Heard together with

IN THE HIGH COURT OF MALAYA AT PULAU PINANG
[CIVIL SUIT NO. PA-22NCC-2-01/2022]

Between

BANK KERJASAMA RAKYAT MALAYSIA BERHAD
... Plaintiff

And

1. KEPALA BATAS BIHUN SDN BHD

2. BANK ISLAM MALAYSIA BERHAD ... Defendants

GROUNDS OF JUDGMENT

Introduction

[1] There are two suits before me which were ordered to be tried together. Namely Suit No. PA-22NCC-1-01/2022 ("**Suit No. 1**") and Suit No. PA-22NCC-2-01/2022 ("**Suit No. 2**").

(a) The Plaintiff in both suits is Bank Kerjasama Rakyat Malaysia Bhd ("**Bank**").

(b) The 1st Defendant in Suit No. 1 is Ang Eng Hooi ("**Ang**"). The 1st Defendant in Suit No. 2 is Kepala Batas Bihun Sdn Bhd ("**KBB**"). Ang is a director of KBB.

(c) The 2nd Defendant in Suit No. 1 is Tang Soon Huat ("**D2**"). D2 had entered into a sale and purchase agreement dated 4.1.2019 with Ang to purchase Ang's land.

(d) The 2nd Defendant in Suit No. 2 is Bank Islam Malaysia Bhd ("**Bank Islam**"). The Bank has withdrawn the claim against Bank Islam, as Bank Islam's charge on KBB's land has been discharged.

[2] The Bank's action against Ang and KBB (collectively "**D1**") is to compel D1 to register a charge over their land in favour of the Bank. The Bank's action against D2 is for the sale of land by Ang to D2 to be subject to the Bank's charge. And for the purchase consideration payable by D2 to Ang to be paid to the Bank. D1 and D2 respectively made a counterclaim against the Bank for removal of the caveat lodged by the Bank and for damages. After a full trial, I dismissed the Bank's claim. I allowed D1 and D2's counterclaim to the extent of removing the Bank's caveat, but rejected their claim for damages. Here are the grounds of my judgment.

The trial

[3] The trial took place over 3 consecutive days on 27.3.2023, 28.3.2023 and 29.3.2023. The witnesses who testified at the trial were:

Witness	Name	Description
For the Bank		
PW-1	Shahidan bin Busah	Pengurus, Jabatan Pemulihan Kredit at the Bank
PW-2	Mohd Naili bin Ahmad Basri	Penolong Pengurus, Jabatan Pemantauan Awal at the Bank
For the 1st Defendants		
D1W-1	Lye Kim Hock	Director of Great Line Success Sdn Bhd, who is a creditor of
D1W-2	Teow Choon Hock	Manager at Zai Shengs Construction Works ("**Zai Shengs**")
D1W-3	Loh Beng Hong	Accounts Manager at KBB
D1W-4	Ang Eng Hooi	Director of KBB and the 1st Defendant in Suit No. 1
For the 2nd Defendant		
D2W-1	Tang Soon Huat	The 2nd Defendant

Background facts

[4] Sometime in 2011, the Bank granted banking facilities to a company known as EKA Noodles Bhd ("**EKA**"). Pursuant to the loan facility, various security documents were executed between the parties. D1 is not privy to those security documents.

[5] EKA could not repay the loan provided under the aforesaid banking facilities. As a result, EKA proposed for a Scheme of Arrangement to be implemented ("**Scheme of Arrangement**"). In connection therewith, a Settlement Agreement dated 15.12.2017 was agreed upon by the Bank and EKA ("**Settlement Agreement**"). A

salient term of the Settlement Agreement is that EKA would pay a sum of RM35 million on or before 30.6.2018. This never happened.

[6] Another material term of the Settlement Agreement is for additional securities to be provided. In particular, for KBB (9 plots) and Ang (1 plot) to register a charge in favour of the Bank over several lots of land (collectively "**Land**") belonging to them on or before 30.6.2018. This also never happened.

[7] To this effect, two letters of undertakings dated 20.2.2018 were signed by KBB and Ang respectively (collectively "**Letter of Undertaking**").

[8] The Scheme of Arrangement failed to materialise and was subsequently called off. EKA was wound up on 10.9.2021. The Bank has now instituted this action on January 2022, primarily to compel D1 to register a charge over the Land in favour of the Bank.

The Bank's case

[9] The Bank's pleaded case can be summarised as follows:

(a) Premised on EKA's acceptance of the Bank's conditions to the Settlement Agreement and the execution of the Letter of Undertaking, the Bank voted in support of the Scheme of Arrangement;

(b) On 28.8.2018, the High Court sanctioned and approved the Scheme of Arrangement (with some slight modification). Hence, the obligation under the Letter of Undertaking is valid and binding; and

(c) The Bank asserts that throughout various periods between 2018 and 2020, despite the indulgence granted by the Bank, D1 breached the Letter of Undertaking by failing to register a charge over the Land in favour of the Bank.

The 1st Defendants' case

[10] D1's pleaded defence can be summarised as follows:

(a) The Letter of Undertaking is invalid and unenforceable, and has lapsed or expired. Because, amongst others, the terms of the Settlement Agreement were breached by EKA and the Scheme of Arrangement failed to materialise;

(b) There was a failure for want of consideration affecting the validity of the Letter of Undertaking. To which the Bank was cognisant of the arrangement between D1 and EKA leading to the execution of the Letter of Undertaking;

(c) The Bank is barred by laches and estoppel;

(d) The Bank's remedy is confined to the securities provided by EKA;

(e) The Settlement Agreement and the Letter of Undertaking, executed to the exclusion of EKA's other creditors in the Scheme of Arrangement, is in contravention of the law and amounts to undue preference on the part of the Bank;

(f) The decision of the Court of Appeal dated 17.8.2022, holding amongst others that the Bank has no caveatable interest on KBB's Land, has a bearing on the Bank's claim in the instant suits; and

(g) KBB has suffered loss as a result of the wrongful entry of caveat by the Bank.

The 2nd Defendant's case

[11] D2's pleaded defence is that he is a bona fide purchaser for value of Ang's Land without any notice of the Bank's claim.

Issues to be Tried

[12] The core issues for determination may be stated as follows:

(a) Whether the Letter of Undertaking is valid and enforceable, and whether D1 is obliged to register a charge over the Land in favour of the Bank. Or whether the Letter of Undertaking is void and has lapsed;

(b) If the Letter of Undertaking is valid, whether the defences pleaded by D1 bars the enforceability of the Letter of Undertaking.

[13] Here are my findings.

The Letter of Undertaking is not an independent obligation

[14] The position taken by the Bank in respect of the validity and enforceability of the Letter of Undertaking is that:

(a) D1 is not entitled to imply a term that its obligation under the Letter of Undertaking was subject to the fulfilment of the Settlement Agreement, which is contrary and inconsistent with the Letter of Undertaking; and

(b) D1 is required to fulfil its obligation under the Letter of Undertaking, which is separate and independent of and was never conditional upon the fulfilment of the Settlement Agreement or the Scheme of Arrangement.

[15] The salient terms of the Settlement Agreement are reproduced below:

"A. Manner of Payment

1. RM35.0 million (Ringgit Malaysia: Thirty Five Million Only) being the payment to be made to the Bank as the

secured creditor on or **before 30.6.2018** via cash proceeds arising from ...

…

B. Additional Securities

1. The Customer shall provide additional securities in favour of the Bank as follows:-

a) A Third Party 2nd legal charge(s) over Lot Nos. 2991, 2992, 2993, 5928, 5929, 5932, 5935, 5939 and 5942, Mukim Grant Nos. 1656, 1657, 1658, 3086, 3079, 3100, 3103, 3039 and 3274 respectively, Mukim 5, Province Wellesley North, Penang together with a noodles factory bearing the address no. 1239, Jalan Lahar Kepar, 13200 Kepa!a Batas, Pulau Pinang and 4 units of single storey semi-detached houses.

…

The **perfection of the above additional securities must be completed on or before 30 June 2018."**

[16] The Bank argues that D1's obligation pursuant to the Letter of Undertaking is separate and independent, and is not subject to the fulfilment of the terms of the Settlement Agreement. The Bank further contends that D1's stance to associate both documents and to bring in additional conditions to the Letter of Undertaking is an afterthought.

[17] I disagree. In my opinion, the well-established legal concept of 'Incorporation by reference' is applicable in the instant case. I refer to the following authorities in respect of the aforesaid concept.

[18] The Court of Appeal in *Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor* [2008] 3 CLJ 741 at 747 said:

"[7] Once again, the point which lies at the axis of the dispute was dealt with in Bauer (M) Sdn Bhd v. Daewoo Corp [1999] 4 CLJ 665, where at p. 676 it was held as follows:

We were once again regaled with authorities where ***a term either was, or was not, held to have been incorporated into a contract by reference thereto in another document****. Again, I must say that the cases cited by counsel amount to no more than illustrating the application of a* ***well-established principle*** *to particular fact patterns. Upon the principle there is no dispute. It was stated with clarity by Venkatarama Aiyar J, in TN Rao v. Balabhadra 1954 AIR Mad 71 at p 72:*

> *When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principle has been extended to cases where* ***the contract does not actually contain the terms but a reference is made to another document or contract where those terms are to be found****. The reason for holding that those* ***terms must be taken to have been incorporated by reference in their signed agreement*** *is that it was possible for any of them to look into that document and ascertain the terms. An examination of the authorities in which this view has been adopted shows that they are either cases in which* ***the other contract is one between the same parties*** *and therefore the terms including the arbitration clause might be taken to have been* ***within the knowledge of the parties****; or cases in which there is a* ***reference to a specific document which was in existence and whose terms could easily be ascertained*** *if the parties wanted to. It is reasonable to hold that* ***when the parties had referred to a document which was in existence they had knowledge or what comes to the same thing, could have had knowledge, of all the terms contained in that document*** *and an arbitration clause contained in that document must, therefore, be*

held to be binding on them exactly as if it had been incorporated in extenso in the signed contract."

[19] The Federal Court in *Ajwa For Food Industries Co (Migop), Egypt v. Pacific Inter-Link Sdn Bhd* [2013] 7 CLJ 18 at 34 - 35 said:

> *"[26] Section 9(5) of the Act therefore clarifies that the applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration made "by reference". Section 9(5) of the Act in our view addresses the situation where the parties, instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration agreement or clause. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement. The document referred to need not to be signed by the parties to the contract. (See the case of Astel-Peiniger Joint Venture v. Argos Engineering & Heavy Industries Co Ltd [1994] 3 HKC 328. We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required."*

[20] The following principles can be distilled from the above-mentioned case law:

(a) A document can be incorporated into an agreement by reference or by conduct;

(b) The document referred to need not be signed by the same parties; and

(c) There is no need for specific clause(s) to be expressly stated when a document is referred to.

[21] I now refer to the salient provisions of the Letter of Undertaking which reads:

> "1. We refer to the above matter, the Customer's proposal dated 12 September 2017, your letter dated 15 December 2017 and the Customer's acceptance dated 28 December 2017 (hereby collectively referred to as "the Settlement Proposal").
>
> 2. In consideration of you agreeing to grant the Settlement Proposal at the Customer's request and in pursuant to the terms and conditions for additional security as stated therein, I hereby irrevocably, expressly and unconditionally agree, covenant and undertake with you as a continuing obligation that:
>
> …
>
> 3. For the avoidance of the doubt, the **execution of this letter is pursuant to the terms and conditions as agreed upon by parties in the said settlement proposal** and shall not in any way affect the right and interest of the bank under the security documents."

[22] It is germane to note that:

(a) The Letter of Undertaking makes specific reference to the Settlement Agreement;

(b) It is expressly stated that the execution of the Letter of Undertaking is pursuant to the terms and conditions as agreed upon by parties in the Settlement Agreement; and

(c) The parties to the Settlement Agreement are EKA and the Bank, not D1.

[23] I am of the opinion that both the Letter of Undertaking and the Settlement Agreement form one document that must be read together. And not in isolation or independently, as submitted by the Bank. By reading them together, I find that the obligation under the Letter of Undertaking is tied to the fulfilment of the terms under the Settlement Agreement. The starting premise is that EKA must pay RM35 million to the Bank and additionally procure a third party charge (i.e. from D1) over the Land in favour of the Bank, as per the Settlement Agreement. On that premise, D1 gave an undertaking to charge the Land in favour of the Bank, as per the Letter of Undertaking.

[24] The Settlement Agreement stipulates that both the payment of RM35 million and the perfection of the charge over the Land must be completed on or before 30.6.2018. However, EKA breached its obligation to make the requisite payment under the Settlement Agreement at various junctures, despite extensions given by the Bank to EKA.

[25] As per the terms of the Settlement Agreement, the deadline for D1 to register a charge over the Land in favour of the Bank was on or before 30.6.2018, which had long lapsed before the filing of the instant suits.

The Letters of Undertaking is void and has lapsed

[26] The Bank contends that D1's obligation under the Letter of Undertaking is continuing, notwithstanding the status of the Settlement Agreement, the Scheme of Arrangement or the winding up of EKA. I disagree. I am cognizant that the Letter of Undertaking is expressed as a "continuing obligation". However, the totality of the evidence establishes that the Letter of Undertaking is void and has lapsed.

[27] At the outset, I would point out that PW-2's testimony during the trial consisted of the following issues which were not the Bank's pleaded case:

(a) A new or revised Scheme of Arrangement;

(b) The capacity of Ang as a director in both KBB and EKA; and

(c) An entity known as Vibrant Class being a 'white knight'.

[28] In this regard, I refer to the Federal Court case of *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665 at 679 - 680 which said:

> *"[33] Second, the proposition of the Court of Appeal was not even pleaded by the respondent. The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. It is a* ***cardinal rule in civil litigation that the parties must abide by their pleadings****. This is trite as can be seen from the decision of this court in Menah Sulong v. Lim Soo & Anor [1983] 1 CLJ 26 where Ong Hock Thye CJ said:*
>
> > *I think it is necessary in this case to emphasise once again that the Courts should give their decision in strict compliance with the pleadings. As Lord Radcliffe said in Esso Petroleum Co Ltd v. Southport Corporation [1956] 2 WLR 81, 91*
> >
> > *If an Appellate Court is to treat reliance as pedantry or mere formalism I do not see what part they play in our trial system.*

[34] In fact, the Court of Appeal itself has reiterated this in Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 where Gopal Sri Ram JCA (as he then was) said:

It is trite law that a party is bound by its pleadings.

[35] On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts."

[29] Be that as it may, here is my explanation as to why the Letter of Undertaking is void and has expired. Firstly, it was revealed from PW-2's testimony and the documentary evidence, that there were revised or new schemes subsequent to the original Scheme of Arrangement. According to PW-2, there were about 3 schemes of arrangements in total that were going back and forth between the Bank and EKA. With only the original Scheme of Arrangement being within the knowledge of D1.

[30] Further, PW-2's own email on 10.9.2020 acknowledges the fact that the original Scheme of Arrangement has been rendered void. His testimony during cross-examination also confirms this.

"Q: Sekarang sila rujuk kepada muka surat 1119. Ini adalah emel anda pada 10/09/2020. Betul?

A: Betul, Yang Arif.

Q: Kita lihat kandungannya. "Kindly be informed that during the meeting on 05/08/2020 the bank has clearly stated that." Ok, kita lihat B. "The cut-off for outstanding

liabilities of EKA to the bank should be at the latest month instead of 30/09/2017 since the **original SOA is already void**." So, setuju tak bahawa En Naili sendiri mengatakan bahawa skim pengaturan pertama atau asal telahpun luput?

A: Setuju, Yang Arif.

Q: Dan adakah Kepala Batas Bihun dimaklumkan mengenai isu ini?

A: Tidak, Yang Arif."

[31] Notably, PW-2 himself agrees that the Letter of Undertaking was given based on the original Scheme of Arrangement. PW-2 further confirmed that D1 was not informed about any revision of the Scheme of Arrangement or the implementation of a new scheme.

"Q: Dan apabila akujanji-akujanji tersebut, kedua-dua akujanji diberikan, pada masa tersebut ia berdasarkan skim pengaturan original, betul? The first one.

A: Betul, Yang Arif.

Q: So, apabila terdapat perbincangan di antara EKA Noodles dan Bank Rakyat terhadap, berkenaan dengan revision of these schemes ini, faham tak, ada, bila ada perbincangan antara Bank Rakyat dengan EKA berkenaan dengan revision atau skim baru yang anda katakan, ada tak bagi tahu KBB?

A: Tiada, Yang Arif."

[32] Also noteworthy is the fact that EKA's failure to implement the Scheme of Arrangement had nothing to do with D1, as admitted by PW-2.

"Q: Ok, dalam surat tersebut, kita lihat muka surat berikutnya, khasnya perenggan ke-3, "However, despite the same you have still failed to complete the proposed regularization plan within the simulated period. Furthermore, till to date you have failed to regularly update our client as to the

current status and / or stage of the proposed regularization plan for our client's attention and record." Soalan pertama, kegagalan EKA atau UHY untuk complete regularization plan ini tidak ada kena mengena dengan KBB, setuju?

A: Setuju, Yang Arif."

[33] Secondly, recall that the Letter of Undertaking does not exist independently of the Settlement Agreement. EKA had failed to comply with the terms of the Settlement Agreement, by failing to make the payment of RM35 million on or before 30.6.2018. I consider this an essential term and a pre-condition under the Settlement Agreement. Such pre-condition being unfulfilled, I find that D1's undertaking to charge the Land in favour of the Bank, pursuant to the Letter of Undertaking, is rendered void. I refer to the following decisions of the Court of Appeal that are instructive on this point.

[34] In *Flyglobal Charter Sdn Bhd v. Alfajr Travel & Tours Sdn Bhd & Another Appeal* [2023] 2 CLJ 888 at 899, the Court of Appeal held:

> *"[23] On the issue that the learned High Court Judge erred in law and fact in deciding the plaintiff's case solely based on the LOU, we are in agreement with the plaintiff's contention that the learned High Court Judge has erred in law and fact in deciding the plaintiff's case solely based on the LOU as the* ***contractual relationship between the parties are not only confined to the terms of the LOU*** *and covered by the pertinent terms and conditions in the agreements which included a crucial third-party, namely NESMA. The learned High Court Judge is thus* ***wrong to confine his consideration of the plaintiff's case within the four corners of the LOU****, in coming to his decision to dismiss the plaintiff's claim.*
>
> *[24] A perusal of the agreements showed that the plaintiff's case would involve the application of the terms and conditions of the agreements, the LOU and the involvement of three parties*

namely the plaintiff, the defendant and NESMA and not just the plaintiff and the defendant.

[25] Thus, we are of the considered view that the learned High Court Judge's finding that the plaintiff's case solely based on the LOU is erroneous as it showed that learned High Court Judge ***did not judicially consider all other relevant evidence such as the terms and conditions of the agreements and the role and involvement of three parties namely the plaintiff, the defendant and NESMA in the whole arrangement*** *and not just the plaintiff and the defendant."*

[35] In *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259 at 297 - 298; [2005] 4 MLJ 101 at 133 - 135, the Court of Appeal said:

"The term 'Conditions Precedent' as the title for clause 2 and the words "conditional upon and subject to" used in the following body of that clause speak for themselves. They state the true intention of the parties that the sale and purchase of the said land was contingent upon the approvals stipulated in sub clauses (a), (b) & (c) that follow being obtained first. In other words, there is ***no enforceable contract unless and until the three conditions are fulfilled.*** *...*

...

It is submitted before us as was done in the court below that the undertaking given by the respondent in clause 2.1(b) was a condition precedent of the agreement. And the respondent is alleged to have committed a breach of that undertaking by its failure to obtain the approval of the shareholders of Brisdale Holdings Bhd and consequently was in breach of the agreement. It is perhaps for the same reason that the learned judge was led into error. The argument is substantially flawed, missing the wood for the trees. As shown earlier and looking at the relevant clause of the agreement the intentions of the parties as

expressed by the words they used are clear as to what the conditions precedent were. ***Notwithstanding any undertaking being given, if any precondition is not fulfilled the agreement would still be unenforceable.*** *…"*

[36] In other words, the Letter of Undertaking cannot be a standalone document with perpetual validity and enforceability, as portrayed by the Bank. To insist that the Letter of Undertaking is still valid and binding when it was given in respect of the Scheme of Arrangement which has failed, in my view, is untenable.

[37] Thirdly, no consent was sought from D1 in respect of any revised or new scheme of arrangement. Hence, there was no 'consensus ad idem' between the parties upon the original Scheme of Arrangement becoming void. As a result, I consider that the Letter of Undertaking is rendered void too.

[38] Fourthly, I find that the Letter of Undertaking has lapsed or expired. The Bank contends that contrary to the timeline stipulated in the Settlement Agreement, the Letter of Undertaking is valid and binding as it does not have an expiry date. I disagree. In fact, the Bank's own documents confirms that it took the position that the Letter of Undertaking expired on 30.6.2018. This is reflected in the Bank's Form 19B applying for a caveat on the Land.

[39] The Bank's witness PW-2 also admitted to this.

"Q: Boleh rujuk kepada ikatan dokumen B1, khususnya di muka surat 173. Ini adalah permohonan untuk memasukkan kaveat oleh Bank Rakyat. Betul?
A: Betul, Yang Arif.
Q: Dan setuju tak di muka surat 174 Bank Rakyat telah menandatangani oleh wakil kuasanya, 174?
A: Betul, Yang Arif.
Q: Sekarang kita lihat kepada perenggan 2. "Alasan-alasan tuntutan saya/kami ke atas tanah itu adalah bahawa

berdasarkan surat bertarikh 20/02/2018, Ang Eng Hooi telah memasuki suatu perjanjian penyelesaian bertarikh 15hb Disember dengan kami untuk penyelesaian pembiayaan berjumlah RM44.5 juta." Tertulis di situ. Betul?

A: Betul, Yang Arif.

Q: Dan surat bertarikh 20/02/2018 adalah surat akujanji. Betul?

A: Betul, Yang Arif.

Q: Lihat di perenggan B. "Antara terma-terma penting di dalam perjanjian penyelesaian tersebut adalah seperti berikut. (b) Bahawa penyempurnaan pendaftaran gadaian ke dalam hak milik hartanah ini oleh tuan punya tanah adalah **selewat-lewatnya pada 03/06/2018** [sic]." Ini yang tertera dalam dokumen bank sendiri. Betul?

A: Betul, Yang Arif."

[40] Even the Surat Akuan (Statutory Declaration) affirmed by the Bank's solicitors states the following:

> "b) Bahawa penyempurnaan pendaftaran gadaian ke dalam hak milik Hartanah ini oleh Pihak Peminjam adalah **selewat-lewatnya pada 30/6/2018**."

[41] The phrase "selewat-lewatnya pada 30.6.2018" used by the Bank on those two occasions shows that the Bank accepts that the last date for the charge over the Land to be registered by D1 is on 30.6.2018. The Bank cannot be permitted to blow 'hot and cold' by taking an incongruous stand now. Given that the Letter of Undertaking had an expiry date of 30.6.2018, this begs the question - what did the Bank do to safeguard its alleged interest? This brings me to the next point of laches and acquiescence.

The Bank's action is barred by laches or acquiescence and estoppel

[42] Even if the Letter of Undertaking is valid, it is my finding that the Bank's action is barred by laches or acquiescence and estoppel.

[43] Concerning laches, a recent Court of Appeal decision in *Tan Keng Yong @ Tan Keng Hong & Anor v. Tan Hwa Ling @ Tan Siew Leng & Ors* [2022] 3 MLRA 414 is instructive. The Court of Appeal said (at page 456 - 457):

> *"[95] The law on the doctrine of laches is well settled. This court in Tung Kean Hin & Anor v. Yuen Heng Phong [2019] 3 MLRA 580; [2019] 2 MLJ 334 had succinctly summarised the doctrine as follows:*
>
> > *"[37] For laches to be raised, there must be delay amounting to acquiescence (see: Cheah Kim Tong & Anor v. Taro Kaur [1989] 1 MLRH 281; [1989] 3 MLJ 252; [1989] 1 CLJ 378; Foo Holdings Sdn Bhd & Anor v. Foo Choon Ying [2014] 2 MLRH 417; Archibald v. Scully [1861] IX HLC 360). The doctrine of laches is based on the maxim that 'equity aids the vigilant and not those who slumber on their rights. Lord Selbome succinctly explained in the landmark case of Lindsay Petroleum Co Hurd [1874] LR 5 PC 221:*
> >
> > > *But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval which might affect either party and*

cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

[38] Edgar Joseph Jr J in the case of Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1989] 1 MLRH 144; [1989] 2 MLJ 202; [1989] 1 CLJ (Rep) 219 explained the doctrine of laches:

Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 Halsbury's Laws of England (3rd edn) paras 1181-1182. Laches has been succinctly described as 'inaction with one eye's open.

[39] The doctrine of laches is based on the Latin maxim vigilantibus non donnientibus jura subveniunt (the law serves the vigilant, riot those who sleep). It is a defence of an equitable claim based on the length of time the plaintiff has allowed to lapse before commencing proceedings. Similarly, in the appeal before us, we are of the considered

view that His Lordship erred when he failed to give due consideration to the fact that the plaintiff had slept upon her alleged rights and interest over the property if any. and had not taken any steps upon the discovery of the alleged forgery only deciding to commence this action in 2014. No reason was given for the delay in commencing action, an inaction with one eye's open so to speak. "

[96] We further refer to the rationale of the doctrine of laches given by the Australian Federal Court in the case of Lewski v. Australian Securities & Investments Commission Vid 752 of 2014 [2016] 337 ALR 1 at 73-74 as cited by the counsel for defendants as follows:

"[262] Then there is another aspect of the late commencement of the proceedings that also needs to be kept in mind. As alluded to already, there was a significant lapse of time since the relevant events and the trial of the proceedings. Undoubtedly, '[w]here there is delay the whole quality of justice deteriorates': R v. Lawrence [1982] AC 510; [1981] 1 All ER 974; 73 Crim App Rep 1 at 517 per Lord Hailsham LC. As McHugh J commented in Brisbane South Regional Health Authority v. Taylor [1996] 186 CLR 541; 139 ALR 1 at 551:

> *As the United States Supreme Court pointed out in Barker v. Wingo "what has been forgotten can rarely be shown ". So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in*

> *the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."*
>
> *[97] Back to the appeal before us, we find that the plaintiffs have slept upon their rights and acquiesced for a great length of time. They had slept with one eye open for about half a century and therefore, it is unjust to consider the plaintiffs' claim for a remedy where they have by their own conduct might fairly be regarded as equivalent to a waiver or an estoppel.*
>
> *...*
>
> *[99] We are of the opinion that the learned JC's finding on the defence of laches put forward by the defendants is erroneous. Even if the plaintiffs succeeded in proving their claim that defendants hold the disputed properties on trust on their behalf, we still find that the plaintiffs failed to overcome the hurdle of the doctrine of laches."*

[44] Concerning estoppel, the Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 at 296; [1995] 3 MLJ 331 at 346 said:

> *"Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in De Bussche v. Alt 8 Ch. D. 286, 314:*
>
> > *If a person having a right, and seeing another person about to commit or in the course of committing an act infringing*

> *upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.*
>
> *In MAA Holdings v. Ng Siew Wah [1984] 1 LNS 144 [1986] 1 MLJ 170, George J. (now JCA) was faced with a case where the defendant had remained silent while the purchaser had paid monies to him. Of the defendant's silence that learned Judge said:*
>
> > *Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirement to apply to the FIC although the parties had expressly agreed that whether the FIC approval was obtained or not was not to have any effect on the contract is I think the height of inequity."*

[45] The Bank argues that the doctrine of laches or acquiescence and estoppel is not applicable in the instant case as, amongst others, the Bank is at liberty to waive the time requirement stipulated in the Settlement Agreement. Further, that the Bank had acted in good faith by waiting for D1's adherence to the Letter of Undertaking, which was not forthcoming. I disagree.

[46] PW-1 himself admits that the follow up on the implementation of the Scheme of Arrangement was only between the Bank and EKA or EKA's financial adviser i.e. UHY Advisory ("**UHY**"). It did not include D1. Further, PW-1 admitted that during these follow ups with EKA, the Letter of Undertaking and its status or compliance were not brought up. The focus of the Bank towards the end of the status follow up, around August 2019, was geared towards securing the RM35 million from EKA as envisaged in the Settlement Agreement.

To which PW-1 admitted that EKA was already in breach of the Settlement Agreement by that time.

> "Q: Ok, boleh. Setuju tak, sekarang kan emel yang di depan anda itu berkenaan pembayaran oleh EKA RM35 juta kan? Dia cakap di sini, "Setuju tak pembayaran RM35 juta ini sepatutnya dibuat oleh EKA pada atau sebelum 30/06/2018 mengikut terma cadangan penyelesaian?"
> A: Betul, Yang Arif.
> Q: Dan di emel ini, EKA menyatakan bahawa mereka akan bayar pada 10 September 2019. Setuju?
> A: Setuju, Yang Arif.
> Q: Iaitu lebih dari setahun daripada tarikh asal yang ditetapkan dalam cadangan penyelesaian. Setuju?
> A: Setuju, Yang Arif.
> Q: Maka setuju tak bahawa EKA Noodles pada detik ini, iaitu 22/08/2019, telah pun melanggar cadangan penyelesaian di antara EKA dengan Bank Rakyat?
> A: Setuju.
> Q: Ok. Dan lanjutan masa yang EKA tulis, I mean UHY yang dilantik oleh EKA tulis akan bayar pada September 2019. Ada tak sebarang dokumen di mana KBB atau Ang diberitahu bahawa, sekarang ini dah EKA kata nak bayar pada September 2019?
> A: Saya tidak pasti Yang Arif.
> Q: Ok anda tak pasti. Soalan saya, September 2019 EKA ada bayar jumlah ini tak?
> A: Tiada Yang Arif."

[47] The evidence establishes the following:

(a) As of 22.8.2019, EKA had long breached the terms of the Settlement Agreement. The Bank admitted they were entitled to terminate the Settlement Agreement, as stated in the Bank's own letter of demand;

(b) Extension to make payments were given to EKA by the Bank until September 2019, which was more than 1 year from the expiry date under the Settlement Agreement. EKA still failed to do so;

(c) As mentioned previously, no communications were made to D1 in respect of these extensions given by the Bank. The extensions were made without D1's knowledge;

(d) The Bank did not write any correspondence directly to D1 to ask why the charge over the Land has yet to be registered in favour of the Bank; and

(e) No caveat was entered by the Bank in respect of the Land at that juncture, despite securing the Letter of Undertaking.

[48] According to D1, at a meeting held in October 2019, Ang mentioned that the Letter of Undertaking had lapsed and that KBB's Land had been charged to Bank Islam. PW-2 disagreed to this in cross-examination. I acknowledge that there is no documentary evidence to confirm this event. However, I take cognisance of the following undisputed facts:

(a) Ang forwarded an e-mail to PW-2 on 8.10.2019, attaching a letter dated 7.10.2019 by EKA. PW-2 himself admits that, prior to the said e-mail, there has not been a single correspondence made by D1 to the Bank;

(b) KBB's Land was charged to Bank Islam on 25.9.2019 i.e. just a few weeks before the aforesaid e-mail was sent by Ang;

(c) PW-2's evidence during cross-examination confirms that latest by the end of 2019, the Bank already knew about the charge to Bank Islam:

"Q: So, lepas tu kita lihat jawapan anda di 5.5. "Plaintif dengan serta-merta telah mengarahkan peguam cara Plaintif untuk memasukkan kaveat ke atas tanah Ang dan Tetuan Nizam Haswira & Partners untuk memasukkan kaveat ke atas tanah-tanah, kaveat atas tanah-tanah KBB. Jadi, anda dah sahkan peguam cara anda melakukan carian carian rasmi kepada tanah KBB pada sepanjang 2019, betul?

A: Betul, Yang Arif.

Q: Dan anda juga telah mengesahkan bahawa pada, Bank Rakyat mendapat tahu bahawa pada September, no, sorry, salah soalan. Mengikut carian rasmi, ia ditunjukkan bahawa tanah-tanah tersebut telah dicagarkan kepada Bank Islam pada 25/09/2019, betul?

A: Betul, Yang Arif.

Q: Dan sekitar, at least pada akhir 2019, pada akhir tahun 2019, anda dah tahu bahawa KBB telahpun cagarkan tanahnya, tanah-tanahnya kepada Bank Islam. Betul?

A: Betul, Yang Arif."

[49] Hence, D1's assertion that Ang did inform that the Letter of Undertaking had lapsed and that KBB's Land has been charged to Bank Islam appears plausible. Even if this is not the case, PW-2 himself in his evidence states that the Bank's solicitors made searches throughout the year 2019. Hence, going by the Bank's own testimony, the Bank would have known about the charge to Bank Islam by October 2019.

[50] Having knowledge of the charge to Bank Islam by 2019, what did the Bank do? Did they file a suit against D1 in 2019 for the said breach? No. Instead, they proceeded to write a long letter of demand on 29.10.2019 to UHY complaining that EKA has failed to update the Bank on the current status of the Scheme of Arrangement. And in the

event EKA failed to complete the Scheme of Arrangement, the Bank is entitled to terminate the Settlement Agreement and claim for the whole sum owing by EKA.

[51] Pertinently, in the said letter of demand, the Bank took a position that EKA failed to register the charge on the Land on or before 30.6.2018. At the time that the letter was issued, the Bank already knew that the Land was charged to Bank Islam. At the end of the letter, the Bank threatened to take legal action should there be no response to the said letter within 14 days of its issuance. It appears that the Bank proceeded to have a meeting with EKA on 30.10.2019, again to the exclusion of D1. It also appears that there were discussions of a supplementary settlement proposal. This, to my mind, shows that EKA and the Bank had already taken a position by 30.10.2019 that the Settlement Agreement has lapsed.

[52] In response to the letter of demand, EKA and its solicitors both replied to the Bank on 14.11.2019 and 27.11.2019. But the replies appear to be of no consequence. So as of 27.11.2019, more than 1 year after the deadline to register the charge over the Land in favour of the Bank and for EKA to pay the monies under the Settlement Agreement and given the lack of proper response from EKA or its solicitors, the Bank did not see it fit to:

(a) terminate the Settlement Agreement and claim for the monies owing, as stated in the Bank's own letter of demand;

(b) enter a caveat on the Land, after obtaining the Letter of Undertaking;

(c) write a single correspondence directly to D1 to ask why the charge over the Land has yet to be registered in favour of the Bank; or

(d) institute an action for breach against D1 at that point in time.

[53] The upshot of the above can be seen by PW-2's agreement to the following suggestion during cross-examination.

"Q: Jadi, saya, sekarang saya dah lihat, berbalik kepada Soalan Jawapan 3 anda di penyata saksi anda. Dan saya telah go through semua bukti-bukti yang anda letak di sini. Saya cadangkan, boleh setuju atau tidak, saya cadangkan, selama hampir dua tahun tiada sebarang tindakan susulan yang diambil oleh bank atau peguam caranya terhadap KBB atau Ang mengenai akujanji-akujanji yang disign. Setuju?

A: Setuju, Yang Arif."

[54] Moving on to the timelines in 2020, caveats were entered by the Bank on Ang's Land on 9.1.2020 and on KBB's Land on 13.3.2020. According to the Bank, its solicitors were diligently conducting land searches throughout the year 2019. And upon discovery of the charge in favour of Bank Islam, the Bank instructed its lawyers to enter the caveats 'dengan serta merta'. To put things in perspective, even if the Bank discovered the charge on KBB's Land on the very last day of 2019, entering the caveat about 3 months later i.e., on 13.3.2020 can hardly be described as 'serta merta'.

[55] I think the real narrative is this. On 1.3.2020, KBB's factory was burnt due to a fire incident. The Bank realised that with the fire incident, it was impossible that the Scheme could materialise. So, PW-2 wrote an email on 9.3.2020 to EKA attaching a Bursa Announcement on the same. The following transpired during PW-2's cross-examination.

"Q: Ok. Di muka surat 1095, ini adalah emel anda bertarikh 09/03/2020 kepada Fong Yit Meng, pengarah EKA. Setuju?

A: Setuju, Yang Arif.

Q: Sekali lagi, tiada, emel ini disalin kepada KBB atau Ang. Setuju?

A: Setuju, Yang Arif.

Q: Ok. Kita lihat isi kandungan emel ini. Anda menyatakan, "Hi Mike, please update the bank on the following." Lepas tu, anda lampirkan yang ini, di muka surat 1096. Ini adalah Bursa announcement, betul?

A: Betul, Yang Arif.

Q: Lihat perenggan ketiga. "Pursuant to the acquisition, the company wish to announce that a fire incident had occurred at the target acquisition company's factory located at Jalan Lahar Kepar, Kepala Batas, Penang, belonging to KBB. The fire started at about 03:42AM on 01/03/2020." Setuju? Ini tarikhnya?

A: Setuju, Yang Arif.

Q: Di bawah, "The company is waiting for information from KBB, and is unable to estimate the consequences and impact of the incident on the acquisition pursuant to the regularisation plan." Ini pun tertera di situ. Dan anda meminta Mike untuk memberikan update, betul?

A: Betul, Yang Arif.

Q: Boleh. Emel ini anda hantar pada 9hb Mac kepada pengarah KBB, Mike Fong, betul?

A: Betul.

Q: Ok. Dan dalam emel ni, anda meminta penjelasan berkenaan Bursa ini, Bursa announcement ni. Setuju?

A: Setuju, Yang Arif.

Q: Setuju tak, bank dah sedar bahawa, at least the latest date, pada 09/03/2020, bank dah sedar bahawa kilang KBB dah terbakar pada 1hb Mac. Setuju tak?

A: Setuju, Yang Arif.

Q: Dan saya cadangkan, selepas sedar bahawa pada 09/03/2020, bahawa kilang KBB sudah terbakar, peguam

cara Bank Rakyat dengan serta-merta memasukkan permohonan kaveat terhadap tanah KBB. Setuju atau tidak?

A: Tidak setuju, Yang Arif."

[56] Although PW-2 disagreed to the suggestion above, the timeline of events does not support his answer. I do not think it is a coincidence that whilst on one hand PW-2 admits to knowing about the charge to Bank Islam by 2019, but only entered the caveat in March 2020 right after the fire incident. Hence, the fact that the caveat was entered 'dengan serta-merta' may be true. But that happened upon the discovery that the factory has been burned and that the acquisition of KBB, which formed an integral part of the Scheme of Arrangement, could not materialise. This was confirmed by EKA's letter on 29.6.2020 to the Bank. I consider this to be the more probable version as to what truly transpired.

[57] What happened thereafter is that various correspondence were exchanged between the Bank and EKA or its financial adviser until 21.4.2021 in respect of the following matters:

(a) Discussions and drafts of the revision of the scheme or a new scheme to replace the original Scheme of Arrangement;

(b) Discussions on the amount of RM500,000 to be paid to the Bank in order for the Bank to consider the new or revised scheme; and

(c) The entry of an entity known as 'Vibrant Class Sdn Bhd' to try to salvage EKA and the new or revised scheme, but which ultimately failed.

[58] In the first place, the above matters are unpleaded issues. In any event, those documents do not show how D1 breached its obligation under the Letter of Undertaking. Rather, the evidence shows that there

was not a single correspondence from the Bank in respect of the charges over the Land or otherwise.

[59] It is my conclusion that even if the Letter of Undertaking is valid, the Bank is barred by laches or acquiescence and estoppel as it has slept on its rights. I consider that the Bank sat on its rights and only embarked on bringing this action in the year 2022, after the Scheme of Arrangement was rendered void and EKA was wound up.

[60] I find the Bank to be guilty of laches. I therefore refuse the relief sought for by the Bank pursuant to section 32 of the Limitation Act 1953 which reads:

> "32. Acquiescence
>
> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise."

[61] Further, it bears emphasis that the completion of the documents needed for the registration of the charge is a joint obligation. Whereby both parties need to fill up their respective portion before the charge can be properly registered. There was no point of time that the Bank actually made the effort to complete the forms from their end. Or to enquire about the requisite consent from the first chargee i.e. CIMB Bank, since the undertaking to charge KBB's Land relates to a second charge.

[62] PW-2 concedes to the following under cross-examination:

> "Q: Dan sorry, satu correction. Dia tanah Ang saja, satu plot saja. Maafkan saya. Bank mengambil, setuju dengan saya tak bahawa bank mengambil, Bank Rakyat mengambil posisi bahawa sepatutnya KBB atau Ang yang patut lengkapkan dokumen-dokumen bagi gadaian ini? Setuju?
>
> A: Setuju, Yang Arif.

Q: Dan untuk gadaian di, dokumen-dokumen gadaian dilengkapkan, sekiranya anda tahu, ia melibatkan dua parti, a joint obligation. Setuju?

A: Setuju, Yang Arif.

Q: So, kalau apa yang bank katakan adalah benar, bahawa Ang dan KBB tak berikan dokumen-dokumen gadaian berkaitan gadaian ni, ada tak bank mengambil tindakan untuk dia prepare bahagian dia, lepas tu majukan kepada Ang dan KBB, dan cakap "sekarang dah ready. Lengkapkan"? Ada tak?

A: Saya tidak pasti, Yang Arif.

Q: Ok. Dan di Soalan Jawapan 4.2 anda, ini khas bagi tanah-tanah KBB, ya. Anda menyatakan bahawa pada masa itu, tanah KBB dicagarkan kepada CIMB Bank, KBB gagal mengemukakan dokumen persetujuan yang sewajarnya untuk membolehkan Plaintif mendaftarkan gadaian kedua. So jika saya faham penjelasan anda, KBB patut mendapatkan sesuatu dokumen persetujuan dari CIMB?

A: Benar, Yang Arif.

Q: Ada tak Bank Rakyat pada mana-mana ketika menulis kepada KBB atau mengemel kepada KBB dan cakap "di manakah dokumen persetujuan ini daripada CIMB yang anda patut bagi saya?", ada tak?

A: Tidak pernah, Yang Arif."

[63] Instead, the Bank gave EKA extension after extension to comply with the Settlement Agreement (to the exclusion and consent of D1). PW-2 agreed that the extensions given to EKA had nothing to do with D1, as it was done without D1's knowledge. And that the extensions given by the Bank to EKA were not communicated to D1.

[64] No extensions were given to or by D1 in respect of the Letter of Undertaking. No consent was sought from D1 in respect of any such extension. Further, the fact that the Scheme of Arrangement was rendered void was not communicated to D1. It bears repetition that

the Letter of Undertaking was executed in respect of the Scheme of Arrangement.

No consideration for the Letter of Undertaking

[65] Another reason why I find the Letter of Undertaking to be void and unenforceable is because there was no consideration received in exchange for the Letter of Undertaking.

[66] It has always been the position that EKA was supposed to acquire the entire shareholding of KBB. In doing so, KBB would become a wholly- owned subsidiary of EKA. This was the understanding between the parties. This is reflected in various documents to which the Bank was privy and had knowledge from the very beginning, as listed below:

(a) Letter from UHY to the Bank dated 12.9.2017;

(b) Draft Scheme of Arrangement; and

(c) Approved Scheme of Arrangement.

[67] The Letter of Undertaking was executed under these circumstances. The Bank on the other hand contends that the arrangement between EKA and D1 is an issue between them, that does not concern the Bank in terms of enforcing the Letter of Undertaking. Such a contention, in my view, is without merit. From the very beginning, the Bank knew about the aforesaid arrangement. This fact was corroborated by the testimony of the Bank's own witness, PW-1, under cross-examination.

"Q: Ok. Perenggan 3 yang second last, dijelaskan di sini, muka surat 7, 35 perenggan 3, second last, "The acquisition of KBBSB iaitu Kepala 36 Batas, will also commensurate and bring EKA Group to become a large scale of rice vermicelli providers in Malaysia and KBBSB was founded in the year 1949 and it's managing group by professionals

with more 2 than 30 years of experience. Soalan saya dari permulaan tarikh ini, 12/09/2017, bank tahu mengenai proposed acquisition saham Kepala Batas ini. Setuju?

A: Setuju, Yang Arif."

[68] PW-1 further admitted to the following:

"Q: Dan proposed acquisition di bahagian tengah selepas PN17, tertera di situ bahawa, "Proposed acquisition of 5,500,002 KBB shares representing the entire issued share capital in KBB for a purchase consideration of RM55 million to be satisfied by cash of RM33 million and the issuance of consideration shares amounting to RM22 million." Jelas sekali dalam skim yang diluluskan ini, definisi bagi proposed acquisition telah dinyatakan, setuju?

A: Setuju, Yang Arif.

Q: Dan saya juga cadangkan bahawa proposed acquisition, pembelian saham ini, proposed acquisition ini adalah terma ekspress yang dinyatakan dalam draf skim dan juga dalam skim yang diluluskan, setuju atau tidak?

A: Setuju, Yang Arif."

[69] The Bank knew all along that the acquisition of KBB for approximately RM55 million formed an integral part of the Scheme of Arrangement. This was the consideration that led to the execution of the Letter of Undertaking. However, the acquisition did not materialise as KBB's factory was burned down by a fire incident. As a result, EKA decided to not proceed with the said acquisition. Yet, this arrangement by EKA and D1 is brushed aside by the Bank.

[70] In essence, what the Bank is asking the court to do is to uphold its end of the bargain i.e., to allow the Bank to register a charge over the Land in exchange for its vote given to the Scheme of Arrangement (which is already void). But disregard D1's end of the bargain which

was for KBB to be acquired for circa RM55 million, that formed the basis of issuing the Letter of Undertaking. That is unacceptable.

[71] I am of the view that the factual matrix leading up to the Letter of Undertaking cannot be disregarded. I rely on the Federal Court case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 at 296 which said:

> *"[42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is* ***not confined to the four corners of the document****. It is* ***entitled to look at the factual matrix forming the background to the transaction****. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See, Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98. As Lord Clyde said in Bank of Credit and Commerce International SA v. Munawar Ali [2001] 2 WLR 735:*
>
> > *The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the*

> *words which they have used* ***read in the context of the circumstances in which they made the agreement****. The exercise is not one where there are strict rules, but one where the solution is to be found by* ***considering the language used by the parties against the background of the surrounding circumstances****."*

[72] Here, the Letter of Undertaking was given in consideration that EKA would acquire the entire shareholding of KBB to make KBB a wholly-owned subsidiary of EKA. The acquisition did not take place. EKA decided not to proceed with acquisition after the fire incident. As such, to insist that the Letter of Undertaking is a continuing obligation irrespective of these facts, to my mind, makes no commercial sense and is unjust to D1. This is also consistent with the Bank's conduct where the Bank entered caveat on KBB's Land only after the fire incident and the Bursa Announcement. In short, there is no reason for D1 to offer the Land to the Bank in return for nothing.

The Bank's actual remedy

[73] Recall that the perfection of the additional securities (i.e. the charge over the Land), was not completed on or before 30.6.2018 as contemplated under the Settlement Agreement. Even assuming that D1 was in breach for its failure to perfect the charge, I consider that the Bank's remedies are confined to the express terms of the default clause contained in the Settlement Agreement.

[74] The relevant extract of the Settlement Agreement reads:

> "Failure to comply with any of the above mentioned terms and conditions of this Settlement Proposal, the Bank shall reserve the right to cancel or revoke this Settlement Proposal. The Customer shall then be liable to pay in full the outstanding sum of the Facility less any amount received by the Bank (if any) which shall immediately become due and payable.

> In connection therewith the Bank shall have the right to exercise all or any remedies available under the Security Documents as defined in the Facility Agreement which shall not be limited to any legal proceeding(s) to be taken against you and / or your guarantors with or without any further notice of demand to you."

[75] In other words, the Bank can only avail itself to remedies under the security documents which are defined in the facility agreement. This is especially so, when even the Letter of Undertaking refers to the security documents in an event of a breach. To be clear, the Land does not form part of the securities defined under the facility agreement or the security documents, as those security documents were executed between the Bank and EKA as early as 20.6.2012. Whereas the Settlement Agreement only came about on 15.12.2017. This was confirmed by PW-1 under cross-examination.

> "Q: Setuju, ya, ok. Kemudian, di muka surat 23, khususnya di perenggan 3, "For the avoidance of doubt, the execution of this letter is pursuant to the terms and conditions as agreed upon by parties in the said settlement proposal and shall not in any way affect the rights and interest of the bank under the security documents." Setuju ia tertera di sini?
> A: Setuju, Yang Arif.
> Q: Ok. Tadi, pada permulaan, saya menanyakan pasal security documents ini, En Shahidan sahkan bahawa security-security document ini adalah di antara EKA Noodles dan bank, setuju?
> A: Setuju, Yang Arif."

[76] In the premises, I am of the opinion that a relief to compel D1 to register a charge on the Land in favour of the Bank (as additional security) is not an exercisable remedy that is available to the Bank in an event of a breach. The Bank's remedy is as stipulated in the Settlement Agreement read together with the Letter of Undertaking, which the Bank itself drafted. The Bank cannot be permitted to

enlarge or modify the terms of the Settlement Agreement and seek redress from D1 now that EKA has been wound up.

The Court of Appeal decision regarding the Bank's caveatable interest

[77] On 30.9.2021, the Bank filed an application vide Originating Summons No. PA-24NCvC-636-09/2021 to maintain the Bank's caveat on KBB's Land. On 22.2.2022, the High Court allowed the Bank's application to maintain the caveats on KBB's Land pending the disposal of these actions to be filed by the Bank. KBB filed an appeal to the Court of Appeal vide Civil Appeal No. P-01 (NCvC) (A)-161-03/2022. On 17.8.2022, the Court of Appeal set aside the High Court decision and held that the Bank has no caveatable interest on KBB's Land.

[78] D1 argues that the aforesaid decision of the Court of Appeal has a material bearing on the Bank's claim in the instant suits. Specifically that issue estoppel bites. Whilst the cause of action and the relief sought in both proceedings may differ, D1 claims that the issues raised and the position taken by the parties in both proceedings are largely identical to each other. Since the Court of Appeal found that the Bank has no caveatable interest on KBB's Land, D1 contends that the Bank's primary relief in these actions, i.e. to compel D1 to register a charge over the Land in favour of the Bank, cannot be granted in the absence of an interest on the Land.

[79] In rebuttal, the Bank maintains that the aforesaid Court of Appeal decision which ordered the Bank's caveats to be removed has decided as such, for the caveat documents had not made reference to KBB's Letter of Undertaking on the face of the Form 19B. The focus of the Court of Appeal in coming to its conclusion was in relation to the form used by the Bank and there was no finding on the Bank's interest in rem under KBB's Letter of Undertaking. The Bank points to the court's minutes which reads - *"We are not satisfied that the 1st*

Respondent has caveatable interests over the land and we further noted that the LOU, Letter of Undertaking not even stated in the Form 19B, to support the interests of the 1st Respondent."

[80] I agree with the Bank that the decision of the Court of Appeal, on the face of it, is confined to the fact that the Form 19B failed to describe KBB's Letter of Undertaking. Hence, I am inclined to think that it does not have a similar bearing to this action, which is premised on KBB's Letter of Undertaking.

[81] More importantly, whilst KBB had earlier opposed the caveat lodged on KBB's Land (which affidavits were all affirmed by Ang) and successfully sought the removal thereof, Ang did not oppose the caveat lodged on Ang's Land. Having regarded the Bank as possessing a registrable interest over Ang's Land and not having challenged the caveat lodged or the basis thereof, Ang cannot now take an inconsistent stance in the instant action and assert that the Bank has no interest over the Land. The counterclaim now filed by Ang only after the filing of the instant action is an afterthought and it is too late for D1 to now contend otherwise.

The Defendants' counterclaim

[82] I now turn to the Defendants' counterclaim. In view of my finding that the Letter of Undertaking is void and has lapsed, it follows that the Bank is not entitled to compel D1 to register a charge over the Land in favour of the Bank. Nor is the Bank entitled to compel D2 to pay the purchase consideration for Ang's Land to the Bank. It is unnecessary for me to deal with D2's defence of a bona fide purchaser for value without notice. Nor is it necessary for me to deal with D1's allegation of undue preference.

[83] Consequent upon my finding, the caveat lodged by the Bank on the Land must be removed. The Bank's caveat on KBB's Land has already been ordered to be removed by virtue of the Court of Appeal

order dated 17.8.2022. What remains is for me to order the removal of the Bank's caveat on Ang's Land, and I so order.

[84] In respect of the counterclaim for damages, I do not find the Bank liable to compensate the Defendants for any loss allegedly suffered. The Defendants have not discharged the burden to prove any real or actual loss suffered as a result of the entry of the Bank's caveat. The law is trite that compensation is not payable as of right to a caveatee under section 329(1) of the National Land Code 1965. The onus of proof lies on the Defendants, who claim that they sustained damage, to prove the actual loss suffered.

[85] The Court of Appeal in *Antonina Marleen Yarendra v. Chai Wei Chung* [2017] 4 MLJ 359 at 386 - 370 held:

> *"[13] It is clear to us that s 329 casts upon the caveatee, that is the appellant, a liability to pay compensation. That liability arises only in the circumstances as defined under s 329(1) and that is where the appellant has wrongfully entered the private caveat; where the appellant has lodged the caveat without reasonable cause; or where the appellant has failed to withdraw the caveat, presumably after being asked to do so or when the appellant realises that the caveat ought to be removed but fails to do so. In such instances, s 329(1) provides that the appellant shall be liable to pay compensation.*
>
> *[14] Again, such payment of compensation is only where the person has suffered damage or loss by virtue of such caveat - 'pay compensation to any person or body who thereby suffers any damage or loss'. This clearly means that before the order for compensation may be made, the court must be satisfied that damage or loss by reason of the caveat has been established on the facts and in law. These terms in s 329(1) are not surplusage but are instead the conditions which must be met before compensation may be ordered.*

[15] The respondent, as the aggrieved party bears the burden of proving liability to pay compensation. The court must be satisfied, on a balance of probabilities that liability is attached on the particular facts and circumstances. ***To suggest that s 329(1) is mandatory in that the court must necessarily order compensation upon a removal of a caveat under s 327 is to read into s 329 words and intention that are just not there. Section 329(1) provides for a liability to pay; it does not provide that the appellant shall pay compensation for the wrongful entry of the caveat****.*

...

[22] ***Given that s 329(1) itself requires that compensation is only for damage or loss which is 'thereby' suffered, it is evident that proof of the existence of damage or loss is first of all, required.*** *The respondent must prove on a balance of probabilities that he has suffered a particular damage or loss 'thereby' or as a result of, the wrongful act of the appellant. How is compensation to be ordered unless there is in existence proof of the damage or loss allegedly suffered?* ***Damage or loss is not presumed for this wrongful act; it must be established in law and on the facts.*** *If the respondent fails to discharge that burden, the court may either refuse compensation or order nominal compensation to be paid. Until and unless the respondent has discharged that burden, it would be an improper exercise of discretion by the court to order any compensation or assessment. ...*

[23] Consequently, the respondent's entitlement to compensation remains very much a matter of absolute discretion of the court. The order to pay compensation is not automatic but subject to proof of the existence of damage or loss suffered."

The First Defendants' counterclaim

[86] KBB claims to have suffered the following loss:

(a) legal costs of RM199,797 incurred in defending the caveat proceedings to the Court of Appeal;

(b) difference in interest rate incurred of RM3,850,000. As a result of the caveat, KBB was prohibited in obtaining loans to rebuild its burned factory from other banks despite initial offer letters being given. As a result, KBB had to resort to obtaining loan from a private lender known as Finsource Solutions Sdn Bhd ("**Finsource**") for a significantly higher interest rate resulting in losses to the amount of RM3,850,000;

(c) higher construction cost incurred of RM10,141,597.20. Soon after the fire at KBB's factory on 1.3.2020, KBB had to appoint a contractor to rebuild its factory. KBB had to bear a higher construction cost incurred due to the delay in securing the financing facility; and

(d) loss of a potential customer. Due to the delay in obtaining finance to rebuild the factory, KBB lost a potential customer known as Kawan Food Manufacturing Sdn Bhd ("**Kawan Food**"). Despite the initial completion of due diligence by Kawan Food, Kawan Food did not proceed to place any orders with KBB because of the unavailability of the 'Halal Certificate' which is needed by KBB to operate.

[87] However, such loss was not proven. Nor that the Bank caused any such loss. KBB's evidence never showed:

(a) the reason HSBC Bank Malaysia Bhd ("**HSBC**") and MBSB Bank Bhd ("**MBSB**") refused loan to KBB;

(b) the reason a purported higher interest imposed by Finsource was attributable to the refusal of loans by HSBC and MBSB;

(c) the reason for the higher costs incurred to rebuild KBB's factory:

(d) the reason for the cancellation of orders by Kawan Food;

(e) and that they were all attributable to or how they were caused by the Bank's caveat on KBB's Land.

[88] D1W-3 (Accounts Manager at KBB) merely testified as to what she believed had happened. But she had no direct or personal knowledge of any matter relating to the Bank's caveat. Additionally she gave opinions which were not relevant to the issues at hand and which opinions were also not credible. I consider her testimony to be of little evidential value. The following transpired during the cross-examination of D1W-3.

"Q: Right. So if you don't know anything about the Bank Islam charges, then why do you say that it is Bank Rakyat's caveat that stopped the ... that caused the rejection of the loans?
A: I come to know from management.
Q: Right. So it is management who tells you that this is the reason?
A: Yes, Yang Arif.
Q: And it is not your own finding that this is the reason?
A: Yes, Yang Arif."

[89] To the contrary, the evidence shows that:

(a) KBB has current accounts with Public Bank, CIMB Bank, Maybank Islamic, Bank Pertanian, Bank Islam and MIDF. And performing loans with Bank Pertanian, Bank Islam, MIDF and SME Bank at the same time. But chose to attempt to apply for loans not from their existing banks but from new banks.

(b) D1W-3 admitted that there was no official rejection of KBB's loan requests. Or any evidence to indicate that the said requests were in fact rejected by HSBC and MBSB. Or that they were attributable to the Bank's caveats.

"Q: Yes. You said in your evidence that the bank rejected this application, your application for a loan, yes?
A: Yes, Yang Arif.
Q: Do you know why?
A: Because land cannot be recharged.
Q: Alright. Is there a rejection letter for this?
A: Yes, Yang Arif.
Q: Can you show us where this rejection letter is, please?
D1/C: Yang Arif, to save time, there isn't.
Q: There isn't. There is no such letter. Alright. Thank you, counsel. So, let's just move on to the MBSB loan application ...
…
Q: Can you confirm, and I believe there's no document by MBSB rejecting the loan application, would you agree? There isn't?
A: Agree, Yang Arif.
Q: Yes, you agree?
A: Yes, Yang Arif, I agree.
Q: Yes. And you say that you, so is this your evidence that you are just saying that the application was rejected because you cannot charge the land in February and April 2021, because you cannot charge the land, but there is no rejection letter, yes?
A: Yes, Yang Arif."

(c) Ang too admitted that the reason KBB's Land were unable to be charged to HSBC or MBSB was due to the existing

Bank Islam charges already created by KBB on KBB's Land.

"Q: Betul. En Ang, adakah En Ang bersetuju bahawa pada masa, pada tahun September 2019, En Ang tahu bahawa tanah-tanah KBB telah digadaikan dan dicagarkan kepada Bank Islam?

A: Ya, saya tahu.

Q: Betul?

A: Betul.

Q: Dan En Ang juga tahu bahawa pada masa gadaian Bank Islam sedia ada, Bank Rakyat telah masukkan kaveat pada tahun 2020, betul? Januari dan Mac 2020, betul?

A: Ya.

Q: Dan En Ang juga tahu bahawa gadaian Bank Islam baru dikeluarkan pada bulan November 2021, betul? Ya?

A: Ya.

Q: Betul, ya. So, apabila En Ang memohon kepada MBSB untuk loan pada bulan ... HSBC pada bulan Februari 2021 ya, pada masa itu, Bank Islam punya gadaian sedia ada, betul?

A: Ya, betul.

Q: Betul. Dan apabila En Ang memohon untuk pembiayaan atau financing daripada MBSB pada bulan Mei 2021, pada masa itu memang Bank Islam punya gadaian masih ada, betul?

A: Ya.

Q: Betul. So, saya cadangkan bahawa En Ang mengatakan bahawa En Ang tidak dapat mendapat kedua-dua loan sebab terdapat, tidak dapat gadaikan kepada MBSB dan HSBC adalah pada masa itu ada Bank Islam punya gadaian, betul?

A: Betul."

(d) Sarevenan Moorthi from HSBC and Mohd Yusof A Rahman from MBSB were not called although they would be witnesses who would be able to verify KBB's allegations, if true.

[90] The evidence suggest that it was KBB's own decision to borrow from Finsource. And the reason for the higher interest was to enable KBB to use the funds to repay Bank Islam. KBB opted not to apply for a further loan from Bank Islam, or from any of its existing banks, or to apply for a lower loan sum from HSBC or MBSB. The following transpired during the cross-examination of D1W-3.

"Q: Yes. So, Ms Loh, it will be your evidence now that you are applying to two new banks for RM24 million loan, yes, and you were rejected, you agree? HSBC and MBSB?

A: Yes.

Q: And you are also aware that when you applied for these two loans, there was no rejection letter stating why the loan had to be rejected, right?

A: Yes.

Q: Yes. And you never also applied for a smaller loan, yes?

A: Yes, Yang Arif.

Q: Yes. Now, you went on to apply for a loan from Finsource, but you only asked for RM8 million, you agree?

A: Yes.

…

Q: So, at the time when you were paying for the construction, and there was more than RM12 million paid as I have showed you just now, there was an existing loan and it had nothing to do with you not able to charge the lands, you agree?

…

A: I disagree, Yang Arif.

Q: Right. You say you disagree. You had to borrow money for the construction. Where did you borrow it from? Was it Bank Islam?

A: Yes, from Bank Islam.

...

Q: So, you did not need to get a charge to get another loan, do you agree, because you had an existing Bank Islam loan?

A: Charge to Finsource and then Finsource to Bank Islam.

Q: Right. So, at the time you were applying for MBSB and HSBC loans, you already had a Bank Islam loan, you agree?

A: I can't remember, Yang Arif.

Q: Now you can't remember. Now, Ms Loh, do you agree with me that whe you say that there is a problem with registering a charge, there is no such problem because you had financing from Bank Islam at the time that you're constructing the factory? Do you agree?

A: Because it's written there, rejected by the bank because the land cannot be charged.

Q: Right. And you say it's stated there but you don't have the rejection letters, right?

A: Yes, Yang Arif.

Q: And so if you -

A: Not in the bundles, Yang Arif. Not before the Court.

Q: If you actually borrowed from Finsource to pay Bank Islam, then it is your decision to incur high interest and it has nothing to do with any problem with registration of the charge, you agree?

A: Agree, Yang Arif.

...

Q: And you also said that Bank Islam had a charge on the working capital loans given, yes? ...

A: From my knowledge, Yang Arif, the charge on the machine is for the purpose of settle CIMB loan, purchase new

machine and also for working capital for example cash flow. That's all I know.

Q: Thank you, Ms Loh. Now if you are aware that Bank Islam lent you monies for working capital and machines, you will agree that you did not ask Bank Islam for further loans in, as per the same application to MBSB and HSBC, yes, which is for RM24 million. You did not ask, you did not apply?

A: No, Yang Arif.

Q: Yes. And what KBB did was to merely apply for the RM8 million loan at Finsource at page 284 of B1, yes?

A: Yes, Yang Arif.

Q: Yes. So you will agree with me that it is the management decision to choose to apply to Finsource for the RM8 million loan, yes?

A: Yes, correct, Yang Arif."

[91] D1W-3 and Ang made bare allegations that the Bank's caveat caused delay in the completion of KBB's factory and the cancellation of orders by Kawan Food. But they did not provide any particulars of how it caused the alleged delay or cancellation.

(a) KBB admitted that the fire that took place in March 2020, caused a withdrawal and revocation of KBB's halal certificate. And KBB could not make any fresh application until after the factory is rebuilt and equipped.

(b) KBB accordingly admitted that Kawan Food cancelled orders with KBB because KBB had not re-applied for halal certification after the fire and because the factory had not been rebuilt.

(c) KBB also admitted that KBB had given "additional works" and enhancement works to Zai Shengs to complete the factory despite an earlier quotation given by TJL

Renovation Sdn Bhd ("**TJL**") in May 2020 (and who promised to complete the buildings within 8 months). Because KBB had a personal preference to engage Zai Shengs, who required more time (i.e. 1 to 2 years to complete the works). As a result, and to date the construction works started much later in October 2020 and remains uncompleted after a 3 year lapse. The following transpired during the cross-examination of Ang.

"Q: Apakah jangka masa yang diperlukan oleh TJL untuk membina kilang sekali lagi?

A: Dalam 8 bulan.

…

Q: Dan En Ang mengatakan kepada Zai Sheng Constructions, "Let us strictly abide by the timeline prescribed under the tender documents for completion of the work". Apakah timeline tersebut, 12 bulan?

A: Timeline 12 bulan.

Q: Tapi adakah En Ang bersetuju bahawa sudah melebihi 12 bulan dan masih belum siap?

A: Ya. Dia tinggal drainage pasal lepas ini, saya lagi ada bagi tambahan bagi dia buat tambahan, tambahan.

Q: So Encik, adalah persetujuan En Ang, adalah keterangan En Ang bahawa En Ang sendiri mahu buat tambahan kepada construction dan ia mengambil lebih dari 12 bulan?

A: Ya.

…

Q: Ok. Dan so, memang pembinaan ini mengambil masa yang lebih lama daripada satu tahun tetapi En Ang terima sendiri masa pembinaan ini?

A: Ya."

(d) KBB also admitted that KBB did not have financial or operational difficulties for if it did, KBB would have accepted TJL's cheaper quote and would immediately source for funds in May 2020 in order for TJL to commence works.

(e) KBB instead accepted the RM21 million higher quote from Zai Shengs and at the time was able to pay RM12 million to Zai Shengs from its existing facilities from Bank Islam and its insurance recovery, before having to apply for additional funding from Finsource.

(f) KBB also admitted that KBB approached HSBC and MBSB for financing only in 2021. And did not negotiate for a lower quote from Zai Shengs to match that of TJL's, notwithstanding that Ang had given TJL's quotation to Zai Shengs for reference. It was KBB's decision to spend more monies. The following transpired during the cross-examination of Ang.

"Q: Ya. En Ang telah mengatakan bahawa En Ang tidak bersetuju kepada downpayment dan progress claim yang dibangkitkan oleh TJL, betul?
A: Ya, betul.
Q: Ya. Dan ini adalah sebab En Ang tidak melantik TJL membuat kerja-kerja, betul?
A: Ya, betul.
…
Q: Dan En Ang tidak mahu terima RM11 million, betul?
A: Ya. Itu jam tak setuju dengan dia. Tak setuju pasal funding tak tentu lagi.
Q: Oh, En Ang tak bersetuju sebab funding tidak tentu lagi?
A: Ya.

Q: Ya. Dan ini bukan sebab En Ang tak setuju kepada terma-terma TJL, betul?

A: Ya.

…

Q: Sila lihat resit-resit ini yang diberikan oleh Zai Sheng di antara November 2020 dan Oktober 2022 di muka surat 520. So this is, ini adalah kesemua bayaran yang dibuat kepada Zai Sheng, betul?

A: Ya.

Q: Pertama sekali En Ang ada memberi downpayment atau deposit kepada Zai Sheng, betul?

A: Ya.

Q: Di muka surat 495.

A: Ya.

Q: Ya. Dan ini adalah 20%, betul?

A: Ya.

Q: Ya. Peruntukan 20% downpayment ini juga diperlukan oleh TJL, betul? 20% ini.

A: Ya.

…

Q: Quotation ini mempunyai butir-butir yang agak sama seperti muka surat 223. Adakah Zai Sheng juga membuat quotation ini sendiri atau mengikut TJL punya format?

A: TJL punya quotation saya ada bagi dia buat rujuk.

Q: You ada bagi TJL punya quotation kepada Zai Sheng buat rujuk?

A: Ya, untuk buat rujuk."

(g) Notably, D1W-2's (Manager at Zai Shengs) evidence contradicted Ang, with regards to the giving of TJL's quotation to Zai Shengs. The following transpired during the cross-examination of D1W-2.

"Q: Can I refer you to page 223 of Bundle B1? This is a quote by TLJ Renovation Sdn Bhd. Do you know there was another quote given by TJL Renovation for the same job?

A: I do not know, Yang Arif."

(h) Ang also made bare allegations of TJL subsequently increasing its quotation to RM16 million without supporting evidence. All in all there is no justification for KBB to engage Zai Shengs whose costs is higher than TJL's highest quotation simply on the basis that TJL required a RM2 million advance payment or concern for their lack of workers or TJL would stop work if there is a delay in payment. As it turned out, KBB made a 20% advance payment to Zai Shengs. The following transpired during the crossexamination of Ang.

"Q: Ya. En Ang telah mengatakan bahawa En Ang tidak bersetuju kepada downpayment dan progress claim yang dibangkitkan oleh TJL, betul?

A: Ya, betul.

Q: Ya. Dan ini adalah sebab En Ang tidak melantik TJL membuat kerja-kerja, betul?

A: Ya, betul.

…

Q: Sila lihat resit-resit ini yang diberikan oleh Zai Sheng di antara November 2020 dan Oktober 2022 di muka surat 520. So this is, ini adalah kesemua bayaran yang dibuat kepada Zai Sheng, betul?

A: Ya.

Q: Pertama sekali En Ang ada memberi downpayment atau deposit kepada Zai Sheng, betul?

A: Ya.

Q: Di muka surat 495.

A: Ya.

Q: Ya. Dan ini adalah 20%, betul?

A: Ya.

Q: Ya. Peruntukan 20% downpayment ini juga diperlukan oleh TJL, betul? 20% ini.

A: Ya."

[92] I conclude that KBB made decisions on the reconstruction of its factory, the securing of new contracts and the timing of its applications for halal certification based on its own business plans. And which had nothing to do with the Bank's caveat. It is my finding that KBB did not suffer any loss attributable to the Bank and should not be entitled to make any claim against the Bank.

[93] Moreover, D1 never had any urgent need to remove the Bank's caveat. In fact Ang did nothing. D1 never advanced any reason for their inaction. Ang who dealt with the Bank never as much as asked the Bank to remove the Bank's caveat for more than 1/ years. The delay is solely attributable to D1 and the Bank should not be liable for the purported loss sustained by KBB. The Court of Appeal had awarded costs of "RM15,000 here and below" in KBB's favour in the caveat proceedings. I do not think KBB is entitled to reopen any claim for legal fees not awarded to them.

[94] Ang also did not tender any evidence of his alleged loss. My conclusion is that D1's counterclaim for damages is unproven and ought to be rejected.

The Second Defendant's counterclaim

[95] D2 seeks special damages of RM25,000 for legal fees. I reject this special damages claim on the ground that it was not strictly proven. In *Ong Ah Long v. Dr S Underwood* [1983] CLJ (Rep) 300 at 305, the Federal Court said:

> *"It is a well established principle that special damages in contrast to general damages, have to be specifically pleaded and **strictly proved**."*

[96] D2 produced a letter dated 27.4.2022 from his solicitors (who is also his counsel in the instant suit), which quoted a fee of RM25,000. D2 claimed to have paid this fee. But no receipt of such payment was produced to substantiate his claim. D2 also claimed damages for entry of the Bank's caveat affecting the transfer of Ang's Land to him. But D2 did not tender any evidence of his alleged loss. My conclusion here likewise is that D2's counterclaim for damages is unproven and ought to be rejected.

Conclusion

[97] For the reasons above, the Bank's claim is dismissed. I ordered the removal of the caveat lodged by the Bank on Ang's Land. D1 and D2's counterclaim for damages is also dismissed. As the parties have failed in their respective claim and counterclaims, I felt it fair that they bear their own costs. I therefore made no order as to costs.

Dated: 26 JULY 2023

(Quay Chew Soon)
Judge
High Court of Malaya, Penang
Civil Division NCvC 1

Counsel:

For the plaintiff in suit no. 1 & suit no. 2 - Ng Sai Yeang & Janice Yip Yi Wen; M/s Raja, Darryl & Loh

For the 1st defendant in suit no. 1 & suit no. 2 - Lachman Kumar & Tahusha Manikam; M/s T.P Chua & Co

For the 2nd defendant in suit no. 1 - Tan Bak Lee; M/s Tan Bak Lee & Co

Cases referred to:

Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor [2008] 3 CLJ 741

Ajwa For Food Industries Co (Migop), Egypt v. Pacific Inter-Link Sdn Bhd [2013] 7 CLJ 18

Flyglobal Charter Sdn Bhd v. Alfajr Travel & Tours Sdn Bhd & Another Appeal [2023] 2 CLJ 888

Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2005] 3 CLJ 259; [2005] 4 MLJ 101

Tan Keng Yong @ Tan Keng Hong & Anor v. Tan Hwa Ling @ Tan Siew Leng & Ors [2022] 3 MLRA 414

Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283; [1995] 3 MLJ 331

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269

Antonina Marleen Yarendra v. Chai Wei Chung [2017] 4 MLJ 359

Ong Ah Long v. Dr S Underwood [1983] CLJ (Rep) 300

Legislation referred to:

Limitation Act 1953, s. 32

National Land Code 1965, s. 329(1)