IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
IN THE FEDERAL TERRITORY OF KUALA LUMPUR
[CIVIL SUIT NO: WA-22NCC-180-05/2016]

BETWEEN

PILECON ENGINEERING BERHAD
(Company No: 29223-P) **... PLAINTIFF**

AND

1. **MALAYAN BANKING BERHAD**
(Company No: 3813-K)

2. **MALAYSIAN TRUSTEES BERHAD**
(Company No: 21666-V) **... DEFENDANTS**

JUDGMENT

[1] Enclosures 3 and 19 are two applications arising from the present action of the Plaintiff filed before this court.

[2] Enclosure 3 is the Plaintiff's application to restrain the 1st Defendant from, *inter alia*, commencing winding up proceedings against the Plaintiff ('the Injunction Application') under Order 29 rule 1 of the Rules of Court 2012 ('ROC') and/or inherent jurisdiction of the Court under Order 92 rule 4 of the ROC.

[3] Enclosure 19 is the Defendants' application to strike out the Plaintiff's Writ and Statement of Claim dated 16.5.2016 ('the Striking

Out Application') pursuant to Order 18 rule 19 (a), (b) and/or (d) of the ROC and/or the inherent jurisdiction of the Court.

[4] Both applications were heard together and on 29 September 2016, this court dismissed the application in Enclosure 3 and allowed the Defendants' application in Enclosure 19.

Background

[5] The 1st Defendant ("Maybank") is one of the financial institutions which had initially granted credit facilities to the Plaintiff.

[6] Due to the Plaintiff's inability to settle its debts, the Plaintiff had presented a scheme of arrangement under s. 176 of the Companies Act 1965 to its creditors to restructure its debts, including to Maybank and the other financial institutions. Pursuant to the said scheme and the Court Order sanctioning such scheme made on 12.1.2006, the Plaintiff, *inter alia*, issued:

(a) RM120 million of Redeemable Convertible Secured Loan Stocks ("RCSLS") to its secured creditors, including Maybank;

(b) RM58,483,707.00 of Irredeemable Convertible Unsecured Loan Stocks ("ICULS") and a number of ordinary Shares of RM0.50 each, to its unsecured creditors.

[7] The other financial institutions to whom the Plaintiff presently owes monies and who are also secured creditors, are:

(a) The 1st Defendant, Malayan Banking Berhad

(b) Affin Bank Berhad

(c) Affin Investment Bank Berhad

(d) Alliance Bank Malaysia Berhad

(e) Alliance Investment Bank Berhad

(f) AmBank (M) Bhd

(g) EON Bank Berhad

(h) HSBC Bank Malaysia Berhad

(i) Public Bank Bhd

(j) RHB Bank Bhd

(k) OCBC Bank (Malaysia) Berhad

(l) CIMB Bank Berhad

(collectively with Maybank, these 12 financial institutions shall be referred to as "the FI Holders").

[8] The FI Holders were issued some of the RCSLS under the scheme, which are secured by various properties.

[9] The 2nd Defendant ("the Trustee") was appointed as the Trustee for the holders of the RCSLS issued by the Plaintiff to the RCSLS holders. The Trustee held the security for the RCSLS holders. The RCSLS holders initially consisted of the 12 FI Holders and other banks.

[10] Pursuant to the aforesaid, the Plaintiff was to redeem the RCSLS and make payments to the RCSLS to the RCSLS Holders, upon the respective maturity dates of the RCSLS. The Plaintiff defaulted in payments on due dates under the RCSLS, since 28.3.2008, despite reminders, and had failed to redeem the same.

[11] Arising from the default of the Plaintiff in failing to make payments of the RCSLS, the Trustee convened an Extraordinary General Meeting

("EGM") of the RCSLS holders on 30.4.2010 to pass a resolution, *inter alia*, that the Trustee be authorized to take all steps and actions against the Plaintiff to enforce payments of all amounts due ("the Said Resolution").

[12] However, before the EGM on 30.4.2010 one Allure Gold (S) Ltd ("Allure Gold"), which is connected to the Plaintiff, bought RCSLS comprising 25.8% of the RCSLS from some holders of the RCSLS (not the FI Holders).

[13] At the said EGM on 30.4.2010, all the FI Holders, as RCSLS holders voted in favour of the Said Resolution. However, this only represented 74.2% of the RCSLS, as Allure Gold hold the balance 25.8%. As a result, the Said Resolution was not carried as a special resolution, which required at least 75% votes.

[14] As under the terms of the Trust Deed and Security Trust Deed, only the Trustee could take action against the Plaintiff or realize the security, the FI Holders took the matter to Court.

Kuala Lumpur High Court Originating Summons

No: D-24NCC-337-2010

[15] The FI Holders (including Maybank), filed Kuala Lumpur High Court Originating Summons No. D-24NCC-337-2010 ("the KL Action") against the Trustee, to compel the Trustee to exercise its discretion (as was permitted under the Trust Deed) and take all necessary steps to recover the amounts owing under the RCSLS.

[16] On 27.10.2010, the Court granted the Order as sought by the FI Holders, in the KL Action.

[17] The Plaintiff, and Allure Gold who holds the balance 25.8% of the RCSLS, applied to intervene in the KL Action to set aside the Court

Order of 27.10.2010. On 27.1.2011, the Court dismissed the said applications with costs.

[18] On 27.4.2011, the Plaintiff's and Allure Gold's respective appeals to the Court of Appeal were heard together and dismissed by the Court of Appeal. Allure Gold did not take the matter further to the Federal Court.

[19] The Plaintiff's subsequent application for leave to appeal to the Federal Court was also dismissed on 29.6.2011. The Trustee was thus bound by the Court Order of 27.10.2010 to take all steps to recover monies for the RCSLS holders. The Plaintiff then embarked on a series of litigation to stop the FI Holders and the Trustee from recovering monies due to them.

The Litigation

The Plaintiff's 1st Suit

[20] On 31.1.2011, the Plaintiff filed a suit under Shah Alam High Court Suit No.22NCVC-131-2011 to, *inter alia*, remove the Trustee as the RCSLS Holders' trustee as well as to perpetually restrain the Trustee from taking action to recover the outstanding RCSLS monies ("the Plaintiff's 1st Suit"). The Plaintiff also applied for an interim injunction pending the disposal of the Plaintiff's 1st Suit.

[21] The Plaintiff's injunction application was dismissed by the Court on 15.4.2011 and the Plaintiff's appeal therefrom was also dismissed by the Court of Appeal on 4.10.2011.

The Plaintiff's 2nd Suit

[22] On 29.9.2011, the Plaintiff then filed another action *vide* Kuala Lumpur High Court Suit No: 22NCC-1577-09/2011 ("the Plaintiff's 2nd Suit") to prevent the Trustee and the FI Holders from pursuing recovery action. The Plaintiff's application for an injunction thereunder to restrain the Trustee from commencing legal proceedings to recover the RCSLS debt was dismissed by the Court on 14.12.2011.

[23] On 21.12.2011, on the application of the FI Holders, the Plaintiff's 2nd Suit was also struck out by the Court.

[24] The Plaintiff's appeals against the dismissal of its injunction on 14.12.2011 and the striking out of its actions on 21.12.2011 respectively were all withdrawn on 25.7.2013 without liberty to file afresh.

Allure Gold's Suit

[25] On the same day that the Plaintiff's injunction application in the Plaintiff's 2nd Suit was dismissed, ie, on 14.12.2011, Allure Gold and another company associated with Allure Gold filed an action in Kuala Lumpur High Court Suit No. 22NCC-2079-12/2011 ("Allure Gold's Suit") together with an injunction application to restrain the FI Holders and the Trustee from enforcing and/or giving effect to the Order of 27.10.2010 obtained in the KL Action.

[26] Allure Gold's application for an injunction thereunder to restrain the Trustee from commencing legal proceedings to recover the RCSLS debt was dismissed by the Court on 21.3.2012. There was no appeal thereafter.

[27] On the application of the FI Holders, Allure Gold's Suit was struck out by the Court on 20.6.2012. Allure Gold's appeal against the striking

out of their action was withdrawn on 25.7.2013 without liberty to file afresh.

[28] The above actions were in addition to a failed attempt to obtain a restraining order under section 176 of the Companies Act 1965, by the Plaintiff, to restrain the FI Holders and the Trustee from enforcing their rights.

The Trustee's Recovery Action and Consent Judgment

[29] After having set aside all the various attempts to restrain the Trustee from instituting any recovery action, the Trustee finally was able to commence its action in Kuala Lumpur High Court Suit No. 22NCC-778-05/2012 ("the Trustee's Recovery Action") against the Plaintiff on 17.5.2012.

[30] By the Trustee's Recovery Action, the Trustee sought to recover against the Plaintiff the outstanding sums due under the RCSLS, on behalf of all the RCSLS Holders, i.e. the FI Holders and Allure Gold.

[31] The Plaintiff then embarked on negotiations with the FI Holders to try to resolve the debt owed. By consent, on 11.7.2013, the Court allowed all the Holders of the RCSLS (the FI Holders and Allure Gold) to be parties to the Trustee's Recovery Action.

[32] Eventually, after a series of mediation meetings before Justice Nallini Pathmanathan (then sitting in the High Court), the Plaintiff through its representatives, Madam Pang Sor Tin and Ong Kok Keng, and their lawyers, Messrs Edwin Lim & Suren ("Messrs ELS"), agreed to and did so enter, into a Consent Judgment ("the Consent Judgment").

[33] It was specifically agreed by the Plaintiff, who was represented by external counsel and its internal legal advisor, Mr Ong Kok Keng, that by the Consent Judgment, the amounts due to each of the FI Holders in respect of the portion of RCSLS held by them, would be paid directly by

the Plaintiff to each of them. The amounts due and owing by the Plaintiff to each of the FI Holders (including Maybank) had been particularized individually in the said Consent Judgment. The matter, however, did not end there. By the terms of the said Consent Judgment, the Plaintiff was to effect payments by due dates to the FI Holders as expressly set out in the Consent Judgment.

[34] Yet again, the Plaintiff failed to do so and defaulted under the terms of the Consent Judgment. The FI Holders (including Maybank) began to take steps to enforce the Consent Judgment and realize the security.

The Plaintiff's 3rd Suit

[35] The Plaintiff filed yet again another suit under Kuala Lumpur High Court Suit No: 22NCC-207-06/2014 to set aside the Consent Judgment and obtained an injunction order on an *ex-parte* basis to restrain Maybank from, *inter alia*, instituting winding up proceedings against the Plaintiff. On 3.7.2014, the FI Holders and the Trustee applied to strike out the Plaintiff's 3rd Suit.

[36] On 12.3.2015, the Plaintiff withdrew the Plaintiff's 3rd Suit without liberty to file afresh.

[37] The Plaintiff's present application is similar to the Plaintiff's 3rd Suit.

The Plaintiff's 4th Suit

[38] On 13.8.2014, the Plaintiff also filed its 4th Suit under Shah Alam High Court Originating Summons No: 24NCC-74-08/2014 and obtained a restraining order dated 18.8.2014 on an ex-parte basis, to restrain, *inter alia*, the FI Holders and the Trustee from taking or continuing any action whatsoever against the Plaintiff for recovery of the sums due to the FI

Holders. This was subsequently withdrawn by the Plaintiff on 30.12.2014 without liberty to file afresh.

Negotiations again and Settlement Agreement

[39] After filing numerous actions against the FI Holders/Trustee and failed in these actions, and subsequently negotiated with the FI Holders/Trustee and agreed to enter the Consent Judgment, the Plaintiff defaulted thereunder.

[40] The Plaintiff again requested the FI Holders (including Maybank herein) to enter into negotiations to resolve the amounts due and owing under the Consent Judgment. Again, the Plaintiff was represented, *inter alia*, by Madam Pang Sor Tin, Mr Ong Kok Keng (internal counsel) and their solicitors, Messrs Edwin Lim & Suren, in these negotiations.

[41] Eventually, on 5.3.2015, a Settlement Agreement was entered into between the Plaintiff, the Trustee and the FI Holders (including Maybank) ("the Settlement Agreement") to settle the amounts due and owing under the Consent Judgment, subject to the terms and conditions therein.

[42] The aforesaid settlement was to provide the Plaintiff an opportunity to settle its debts to the FI Holders, under the Consent Judgment, failing which the FI Holders were expressly given the right to enforce the Consent Judgment against the Plaintiff to recover the original Judgment sums due thereunder.

[43] In brief, these included terms to the effect that:

a) a Settlement Sum (totaling RM64,617,363.46) was to be paid as satisfaction of the Consent Judgment subject to the terms and conditions of the Settlement Agreement, together with all costs and expenses as provided for thereunder;

b) the Settlement Sum would be paid from the proceeds of the sale and/or redemption of the security properties held by the Trustee, ("the Assets") in the manner and within the prescribed time-frame as set out in the Settlement Agreement;

c) the security properties are owned by the Plaintiff, and two other chargors, Dual Vest (M) Sdn Bhd ("Dual Vest") and Awal Kelana (M) Sdn Bhd ("Awal Kelana") (the latter two collectively known as "the Other chargors"). The Plaintiff and the Other chargors had to appoint KPMG Deal Advisory Sdn Bhd ("the Independent Agent") as their independent agent to undertake the sale of some of the Assets in accordance with the Settlement Agreement. The relevant Powers of Attorney for such sale were given to the Independent Agent;

d) the Settlement Completion Date of the Settlement Agreement was on 19.12.2015, ie, the Plaintiff has to settle all monies due under the Settlement Agreement by this date;

e) if there was any default under the Settlement Agreement, the Trustee and FI Holders shall be entitled to recover full Consent Judgment Sum and realise all security;

Mechanism of the Disposal of Assets

f) The Assets are broadly split into two types, ie, the Assets to be redeemed (the Redemption Properties), and the Tranche Sale Properties which are to be sold by the Independent Agent in three (3) tranches as identified in the Settlement Agreement, and categorized as Tranche 1 Properties, Tranche 2 Properties and Tranche 3 Properties;

The Tranche Sale Properties

g) Tender sale exercises would be conducted by the Independent Agent for the Tranche Sale Properties in the manner as specified in the Settlement Agreement;

h) If, *inter alia*, there was no acceptable offer after 2 attempts at sale, the Plaintiff would be entitled to nominate a person ("the Nominated Party") to be offered the Right of First Refusal ('ROFR') to purchase any of the Tranche Sale Properties;

i) When the Nominated Party chooses to exercise the ROFR, the Nominated Party would be required to submit its offer in writing to the Independent Agent to purchase such Tranche Sale Property in accordance with the terms of the Settlement Agreement therein together with its payment of an earnest deposit of 2% of the price offered by it;

j) In the event there is no offer from the Nominated Party with payment of the requisite earnest deposit received by the Independent Agent within the prescribed timeline, the Nominated Party shall be deemed to have rejected the Right of First Refusal.

Redemption Properties

k) The Settlement Agreement also provided for two blocks of lands (identified as "the Mentakab Lands" and "the Raub Land") (collectively "the Redemption Properties") to be redeemed by the Plaintiff by 10.6.2015;

Guarantee dated 5.3.2015

l) In the light of the previous history of the Plaintiff filing numerous actions against the FI Holders and the Trustee, for the FI Holders to agree to enter into the Settlement Agreement, the FI Holders had insisted that a personal guarantee be provided by one of the directors of the Plaintiff, Mr Tan Hock Keng ("the said Tan"). The Plaintiff and the said Tan agreed and the Settlement Agreement thus provided for the said Tan, a Singaporean citizen and director of the Plaintiff, to execute a Guarantee to guarantee payment of the RCSLS Settlement Sum up to RM60,000,000 and the said Tan did execute such Guarantee.

m) The said Tan's Guarantee dated 5.3.2015 was to ensure that if a further default were to arise under the Settlement Agreement, the FI Holders would have an additional security to resort to, in recovering the amounts owing by the Plaintiff.

The Purported Sale of the Tranche Sale Properties

[44] As stated in the above, on 25.2.2015, the Plaintiff, Awal Kelana and Dual Vest had granted the Independent Agent, KPMG Deal Advisory Sdn Bhd a Power of Attorney in accordance with Clause 4.2 of the Settlement Agreement to among other things, sell the Sale Assets under the Settlement Agreement which include both the Tranche Sale Properties and the Redemption Properties.

[45] The Independent Agent then placed the Tranche Sale Properties on sale by tender. Two tender exercises closed on 8.4.2015 and 12.6.2015 but resulted in no acceptable offer to purchase the following Tranche Sale Properties:

1. 17A-2-1, Second Floor, Block A, Casa Vista Condominium, 17A-4-1, Fourth Floor, Block A, Casa Vista Condominium, 17A-4-2, Fourth Floor, Block A, Casa Vista Condominium ("Casa Vista Properties"); and

2. No. 1 Glenmarie Property.

[46] On 3.7.2015, the Independent Agent wrote to the Plaintiff's Nominated Parties to offer them a Right of First Refusal ("ROFR") in respect of the above properties.

[47] On or about 13.7.2015, the Plaintiff wrote to inform the Independent Agent that its Nominated Parties were as follows:

(a) Persepsi Projek Sdn Bhd ("Persepsi"), in respect of the Casa Vista Properties; and

(b) Aspen Aspirasi Sdn Bhd ("Aspen"), in respect of No. 1 Glenmarie Property.

[48] In the same letter, the Plaintiff informed the Independent Agent of the exercise of the ROFR in respect of the above two properties. It further informed the Plaintiff that the 2% earnest deposit, were being sent to the relevant Obligor's solicitors M/s Edwin Lim Suren & Soh ("ELSS").

[49] On the same day, 13.7.2015, the Plaintiff forwarded three United Overseas Bank Singapore ("UOB Singapore") cheques nos. 390921, 390923, and 390922, in the sum of S$64,000, S$5,178, and S$10,124 respectively, to ELSS and not to the Independent Agent. These corresponded to the 2% earnest deposit required to exercise the

respective ROFR. However, these cheques were never presented for payment, as the solicitors for the FI Holders and the Trustee rejected the same.

[50] By the Settlement Completion Date of 19.12.2015 (as provided for by the Settlement Agreement) the Tranche Sale Properties (save for the Faber Tower Properties) were not sold. Neither were the Redemption Properties redeemed, and other defaults had also arisen under the Settlement Agreement. These had been set out in the letter dated 26.1.2016 issued by the Trustee's solicitors, to the Plaintiff's solicitors.

[51] Arising from the failure of the Plaintiff, the Other chargors and their nominees / Nominated Parties to fulfill their various obligations in respect of the relevant Tranche Sale Properties, the Trustee issued its Notices of 1.3.2016 and 2.3.2016 ("the Notices of Default") to the Plaintiff, the Other chargors and their solicitors, stating that defaults have occurred under the Settlement Arrangement and giving 14 days for the defaults to be remedied.

[52] On 1.3.2016, the Trustee wrote directly to Awal Kelana, the vendor for AK Casa Vista which is one the Case Vista Properties stating *inter alia* the following:

> *"2. We regret to note that your nominee / Nominated Party has failed to fulfill its obligations in respect of the relevant Tranche Sale Property within the stipulated timeframe as provided for in M/s Shook Lin & Bok's [letter dated 26 January 2016] and that by reason of such failure, event of default under Clause 15 of the Settlement Agreement has occurred. Details are as follows:*
>
> *Casa Vista Properties - AK Casa Vista Property*

i) The Sale and Purchase Agreement dated 14.8.2015 was entered into between you and Persepsi Projek Sdn Bhd for the AK Casa Vista Property.

ii) The Nominated Party, Persepsi has failed to pay the balance deposit (less the retention sum), earnest deposit and balance purchase price due.

3. Pursuant to the instructions of the Holders and Clause 15.1(2) of the Settlement Agreement, we declare that Event of Default has occurred and we hereby give notice to you, for you to remedy such default for the aforesaid property within fourteen (14) days from the date hereof, failing which the settlement arrangement shall be forthwith terminated and we / the Holders of Pilecon's notes, shall be entitled to continue with all recovery action, including the realization of the security, to recover the original full debts owed under the Judgment dated 11.7.2013 to the relevant Holders less any payments received."

[53] On 2.3.2016, the Trustee wrote directly to Awal Kelana, the vendor for DV Casa Vista which is one the Case Vista Properties stating the following:

"2. We regret to note that your nominee / Nominated Party has failed to fulfill its obligations in respect of the relevant Tranche Sale Property within the stipulated timeframe as provided for in M/s Shook Lin & Bok's [letter dated 26 January 2016] and that by reason of such failure, event of default under Clause 15 of the Settlement Agreement has occurred. Details are as follows:

Casa Vista Properties - DV Casa Vista Property

iii) The Sale and Purchase Agreement dated 14.8.2015 was entered into between you and Persepsi Projek Sdn Bhd for the DV Casa Vista Property.

iv) The Nominated Party, Persepsi Projek Sdn Bhd has failed to pay the balance deposit (less the retention sum), earnest deposit and balance purchase price due.

3. Pursuant to the instructions of the Holders and Clause 15.1(2) of the Settlement Agreement, we declare that Event of Default has occurred and we hereby give notice to you, for you to remedy such default for the aforesaid property within fourteen (14) days from the date hereof, failing which the settlement arrangement shall be forthwith terminated and we / the Holders of Pilecon's notes, shall be entitled to continue with all recovery action, including the realization of the security, to recover the original full debts owed under the Judgment dated 11.7.2013 to the relevant Holders less any payments received."

[54] On 2.3.2016, the 2nd Defendant wrote to the relevant Obligators' solicitors ELSS stating *inter alia* as follows:

"2. We regret to note that Pilecon, Awal Kelana Sdn Bhd and Dual Vest Sdn Bhd and their nominees/Nominated Party have failed to fulfilled their various obligations in respect of the relevant Tranche Sale Properties within the stipulated time frame as provided for in Messrs Shook Lin & Bok's aforesaid letter of 26.1.2016 and that by reason of such failure, events of default under Clause 15 of the Settlement Agreement have occurred. Details are as follow:

a) No. 1 Glenmarie Property

i) The Sale and Purchase Agreement dated 14.8.2015 for the aforesaid property was entered into between Pilecon and Aspen Aspirasi Sdn Bhd.

ii) The Nominated Party, Aspen Aspirasi Sdn Bhd failed to pay the balance deposits (less the retention sums), earnest deposit and balance purchase price due.

b) Casa Vista Properties

i) The Sale and Purchase Agreement dated 14.8.2015 was entered into between Awal Kelana and Persepsi Projek Sdn Bhd for the AK Casa Vista Property.

ii) The Sale and Purchase Agreement dated 14.8.2015 was entered into between Dual Vest and Presepsi Projek Sdn Bhd for the DV Casa Vista Properties.

iii) The Nominated Party, Persepsi Projek Sdn Bhd, has failed to pay the balance deposits (less the retention sums), earnest deposits and balance purchase price due.

c) No. 3 Glenmarie Property

i) The Sale and Purchase Agreement dated 3.11.2015 was entered into for the aforesaid property between Pilecon and the Nominated Party, Aspen Aspirasi Sdn bhd.

ii) The Nominated Party, Aspen Aspirasi Sdn Bhd failed to pay the earnest deposit and the balance deposit (less the retention sum) and balance purchase price due.

3. Pursuant to the instructions of the Holders and Clause 15.1 (2) of the Settlement Agreement, we declare the Event of Default has occurred and we hereby give notice to you, for you to remedy such default for the aforesaid property within fourteen (14) days from the date hereof, failing which the settlement arrangement shall be forthwith terminated and we/the Holders of Pilecon's notes, shall be entitled to continue with all recovery action, including the realization of the security, to recover the original full debt owed under the Judgment dated 11.7.2013 to the relevant Holders less any payment received."

[55] No payments were made by the Plaintiff or the Other chargors nor were there any attempts by the Plaintiff and Other chargors to remedy the defaults as demanded by the Trustee.

[56] Accordingly, a letter of 22.3.2016 (clarified by a letter dated 25.4.2016) ("Notice of Termination") was issued by Messrs Shook Lin & Bok to the Plaintiff and the Other chargors, notifying that the settlement arrangement under the Settlement Agreement was terminated, as expressly provided for in the Settlement Agreement.

Maybank's S. 218 Notice

[57] Maybank thus proceeded with the issuance of the section 218 Notice under the Companies Act dated 27.4.2016 to the Plaintiff to demand for the Judgment sum of RM26,263,504.38 due to Maybank as at 27.4.2016.

[58] On 18.5.2016, Messrs Shook Lin & Bok was then informed by the Plaintiff's solicitors that the Plaintiff had obtained an Injunction order on 17.5.2016 on an *ex-parte* basis against Maybank from commencing winding-up proceedings against the Plaintiff.

[59] A holding over injunction was granted until the *inter-partes* hearing of the Injunction application on 29.9.2016.

The Plaintiff's present Action

[60] The basis of the Plaintiff's action herein are as follows:

a) the Consent Judgment debt owed by the Plaintiff has been "compromised" and "extinguished" by way of the Settlement Agreement

b) the Notices of Demand issued by the Trustee were allegedly wrongfully issued to the Plaintiff;

c) Maybank is not entitled to take unilateral steps to enforce its rights under the Consent Judgment even if an event of default under the Settlement Agreement has occurred

d) there would be "harm" caused to the Plaintiff as a consequence of winding up proceedings which may be commenced by Maybank

[61] The Plaintiff's reliefs are as follows:

a) a declaration that the Notices of Default are unlawful and be set aside;

b) a declaration that the Notice of Termination dated 22.3.2016 is unlawful and be set aside;

c) a declaration that the Settlement Agreement is still valid, binding and subsisting;

d) Maybank and/or any party engaged by Maybank be restrained from presenting any winding up petition, or attempting to

present a winding up petition, or taking any steps whatsoever in relation thereto, against the Plaintiff.

The Plaintiff's Contentions

[62] Firstly, the Plaintiff contended that there are substantial and real disputes over the Defendants claim and/or the Settlement Agreement. The Plaintiff argued that the Defendants have compromised the claim under the Consent Judgment by entering into the Settlement Agreement. It is the Plaintiff's case that as Maybank and the Trustee and the other FI Holders are parties to the Settlement Agreement, they have accepted Clause 2.1 of the Settlement Agreement that the RCSLS Settlement Sum of RM63,269,795.34 is "*full and final settlement of outstanding sum due and payable by the FI Holders under the Consent Judgment*".

[63] According to the Plaintiff, by entering into the Settlement Agreement, which also involve parties alien to the Consent Judgment, the original claims under the Consent Judgment were compromised effectively in a binding Settlement Agreement; that the rights of the parties are to be determined in accordance with the Settlement Agreement and as such, the only remedy that the F1 holders including the Defendants have would be to claim for damages for breach thereof. In other words, the debt owed by the Plaintiff to among others the 1st Defendant under the Consent Judgment is extinguished and/or superseded by the Settlement Agreement.

[64] The following authorities are cited in support of the Plaintiff's contention herein:

(i) **Section 52 and 68 of Contracts Act 1950;**

(ii) ***Hadi Bin Hassan v. Suria Records Sdn Bhd & Ors*** **[2005] 3 MLJ 522.**

(iii) ***McCallum v. Country Residences Ltd*** **[1965] 2 All ER 264; and**

(iv) ***Green v. Rozen*** **[1955] 2 All ER 797.**

(v) ***Lai Kok Kit v. MBf Finance Bhd*** **[2000] 3 CLJ 213**

[65] The Plaintiff further submits that it is pertinent for this court to note that there are 3 parties in the Settlement Agreement that are not parties in the Consent Judgment namely, Dual Vest, Awal Kelana and Mr Tan Hock Keng who had signed the Guarantee and that the settlement sum under the Settlement Agreement is to be paid not just by proceed of sale from the Plaintiff's properties but also from the sale of Dual Vest and Awal Kelana's properties. The Plaintiff further highlighted that the terms of the settlement in the Settlement Agreement is clearly not within the ambit of the Consent Judgment in so far as it relates to not only the Plaintiff's properties but also Awal Kelana and Dual Vest's properties as well as the Guarantee by Mr Tan Hock Keng. The Plaintiff argued that by executing the Settlement Agreement, the Defendants as well as the other FI Holders' rights must be governed by the Settlement Agreement and as a result, the whole Consent Judgment has been superseded and/or compromised by the Settlement Agreement.

[66] The Plaintiff denied that there is any Event of Default and even if there is, the Plaintiff argued that the Defendants ought to have sought remedy in a fresh action based on the Settlement Agreement. The Plaintiff finds support in the case of *Tong Lee Hwa & Anor v. Chin Ah Kwi* [1971] 2 MLJ 75 where the then Federal Court found that as there were terms of settlement which were not within the ambit of the probate action constituting a contract between the parties to the probate action in relation to their shares in the company which substantial number of shares in the company in fact belonged to persons who were not parties to the action, the settlement agreement involving the parties other than those

who were parties to the probate action supersede the whole of the probate proceedings.

[67] Secondly, it is the Plaintiff's case that the Notice of Default, Notice of Termination and the Statutory Demand of the Defendants were wrongful. It is the Plaintiff's position that the termination of the Settlement Agreement is wrongful as the Notice of Default was issued without proper basis on the following grounds:

(i) Firstly, it is the FI Holders and the 2nd Defendant's position that an Event of Default had occurred by reason of Persepsi and Aspen's purported failure to pay, among other things, the earnest deposit due in respect of its exercise of the ROFR for the purchase of Casa Vista Properties, No. 1 Glenmarie Property and No. 3 Glenmarie Property;

(ii) However, nowhere in Clause 15 of the Settlement Agreement that sets out the circumstances in which an Event of Default would arise and that nowhere it is stated that the failure to pay the earnest deposit amounts to an Event of Default;

(iii) Second, insofar as the FI Holders and the 2nd Defendant take the position that no earnest deposit has been paid by Persepsi and Aspen, it is expressly stated in Clause 8.3 of the Settlement Agreement that:

> *"the Nominated Party shall be deemed to have rejected the Right of First Refusal to purchase such Tranche Sale Property and the Independent Agent shall immediately thereafter be entitle to and shall sell the Tranche Sale Property to the Successful Offeror or such other party as may be approved by the Majority FI Holders"*

(iv) In the premises, Persepsi and Aspen are not entitled to enter into any Sale and Purchase Agreement in respect of the Casa Vista Properties, No. 1 Glenmarie Property and No. 3 Glenmarie Property pursuant to Clause 8.3 of the Settlement Agreement. Its purported failure to pay the earnest deposit amounts to a rejection of the ROFR.

(v) The Plaintiff states that two consequences arise from a rejection of the ROFR by a Nominated Party:

(aa) the Nominated Party should not enter into any Sale and Purchase Agreement ("SPA") in respect of the relevant Tranche Sale Property, and therefore the issue of any claim for the balance deposit or the full purchase price by the FI Holders and/or the 2nd Defendant will not arise; and

(bb) In fact, the Tranche Sale Property should have been sold to the Successful Offeror or such other party approved by the Majority FI Holders.

[68] Based on the above, the Plaintiff submits that the Trustee's demand for payment of the balance deposit and full purchase price in the Notice of Default is wrongful and is contrary to the parties' express intentions under Clause 8.3 of the Settlement Agreement which states that:

"In the event no offer in writing from Nominated Party together with its payments of the requisite earnest deposit is received by the Independent Agent for such Tranche Sale Property within the Exercise Period or the price offered by the Nominated Party does not comply with the relevant provision of Clause 8.1, the Nominated Party shall be deemed to have rejected the Right of First Refusal to purchase such Tranche Sale Property and the Independent Agent shall immediately thereafter be entitled to and

shall sell the Tranche Sale Property to the Successful Offeror or such other party as may be approved by the Majority FI Holders."

[69] Further and/or in alternative, the Plaintiff argued that the Defendants were aware of the facts relating to Persepsi and Aspen's exercise of the above mentioned ROFR. Having taken the position that the tender of earnest deposit by Persepsi and Aspen were not good, the Independent Agent, Maybank, the other FI Holders and the Trustee ought to take steps to sell the said properties to another buyer. In this regard, Clause 8.7 of the Settlement Agreement states that:

"Where the Nominated Party exercise the Right of First Refusal to purchase a Tranche Sale Property, then if:

(a) the Nominated Party fails to execute the relevant SPA and/or pay the balance of the Deposit in accordance with the provisions of Clause 8.5; or

(b) the Nominated Party fails to pay the Purchase Price for the Tranche Sale Property or any part thereof by respective due date for payment; or

(c) the SPA executed by the Nominated Party is terminated for any reason whatsoever, then without prejudice to the FI Holders' rights and remedies hereunder the Independent Agent shall terminate such sale (if it has not already been terminated), and if so directed by the Majority FI Holders, the Independent Agent shall immediately put up the Tranche Sale Property for sale. In such event, any and all offers received by the Independent Agent in respect of such Tranche Sale Property shall be referred to the FI Holders and the Majority FI Holders shall have the final say as to whether an offer to purchase of such Tranche Sale Property is to be accepted by the Independent Agent or the relevant obligator. In the event any such offer is approved by the Majority FI Holders, the

relevant Obligator (failing which the Independent Agent) shall enter into the relevant SPA with the successful Offeror thereof and the provisions of Clause 6.7 shall apply mutatis mutandis to such sale."

[70] The Plaintiff further argued that as to the Redemption Properties, Clause 7.3 of the Settlement Agreement states that:

> *"If any of the Redemption Sums or any part thereof is not paid to and received by the Trustee by 10 June 2015, then without prejudice to the FI Holders' rights under Clause 15.1 and 9.1, the Company's right to redeem the relevant Redemption Property pursuant to Clause 7.1 shall terminate forthwith without notice to the Company and the Independent Agent shall immediately take such steps as may be necessary to dispose of such Redemption Property in accordance with the relevant provisions of Clause 6 as if such Redemption Property were a Tranche Sale Property and all references to "Tranche Sale Property" in this Agreement shall include reference to such Redemption Property save and except that the Independent Agent shall not be required to and shall not offer the Right of First Refusal to the Nominated Party to purchase such Redemption Property. For avoidance of doubt, the Redemption Sum set out in Clause 7.1 shall not apply to any such disposal by the Independent Agent."*

[71] The Plaintiff contended that it appears the Defendants and the other FI Holders must have agreed amongst themselves not to, and they certainly failed, to take any further steps to sell the properties under the Settlement Agreement "*by way of a tender exercise to be conducted by the Independent Agent on behalf of the respective Obligators with an interval of not more ten (10) weeks between the commencement of the tender exercise in respect of each tranche of the Tranche Sale Properties...*" as provided in Clause 6.2 of the Settlement Agreement. The

Plaintiff argued that the Independent Agent i.e. KPMG is under an obligation to provide the Defendants and the other FI Holders with a monthly report on the status and progress of the disposal of properties as stipulated in Clause 4.1 of the Settlement Agreement. They would therefore have known that the Independent Agent was not taking steps to dispose of the properties.

[72] The Plaintiff argued that the Independent Agent, KPMG Deal Advisory Sdn Bhd ("KPMG") was ostensibly appointed as the Plaintiff's agent only because it was necessary for KPMG to act in place of the Plaintiff in the disposal of the Sale Assets. According to the Plaintiff, in reality, KPMG acted as the agent of Maybank and the Trustee and the other FI Holders (collectively, the "Sellers") in respect of the sale and disposal of the Sale Assets. Plaintiff argued that KPMG's appointment was solely for the benefit of the Sellers, for whom it facilitated the repayment of the Settlement Sum through the sale of the Sale Assets. According to the Plaintiff, pursuant to Clause 4.1 of the Settlement Agreement, KPMG was also obliged to report to and update the Sellers on the progress of the disposal of the Sale Assets. Further, the Sellers ultimately had exclusive control over the disposal of the Sale Assets, a process managed by KPMG, as evidenced in Clauses 4.1, 6.4, 6.5, 6.8, 7.3 and 8.7 of the Settlement Agreement and therefore the Plaintiff submitted that what the Independent Agent does is under the watch of the Defendants.

[73] It is the Plaintiff's contention that the Settlement Agreement as such must in the circumstances be interpreted broadly in the context of prevailing conditions, situation and realities of the material time when parties entered into it and the Defendants should not be allowed to drive a coach and horses through it.

[74] On this second ground, the Plaintiff submits that the Defendants and the other FI Holders are in breach of their obligation in failing to

take reasonable steps to dispose of and/or to sell the Sale Assets. This obligation according to the Plaintiff is underscored by the express term under Clause 2.2 of the Settlement Agreement that the Settlement Sum is to be paid by way of the sale proceeds arising from the redemption and/or sale of the Sale Assets. In other words, the means of satisfying the Settlement Sum would not come from the Plaintiff or the other Obligors, but rather the sale proceeds of the Sale Assets. This, in the Plaintiff's argument reinforces the importance of the Independent Agent, the FI Holders and/or the Trustee in taking reasonable steps to realize the aforesaid sale proceeds but they did not do and instead, Maybank has nevertheless elected to declare an event of default. As such, the Plaintiff contended that the Defendants are not entitled to issue Statutory Demand and to present any winding up petition against the Plaintiff in respect of the Consent Judgment as there is clear *bona fide* dispute against Maybank's claim for an alleged debt based on the Consent Judgment on substantial grounds, insofar as the claim has been compromised by way of the Settlement Agreement and that the Defendants as well as the other FI Holders have all breached their obligations under the Settlement Agreement.

[75] Thirdly it is the Plaintiff's contention that Maybank cannot take unilateral enforcement action to enforce its rights under the Consent Judgment for the following reasons:

(a) First, insofar as the 1st Defendant is purporting to take unilateral action to recover monies purportedly due from the Plaintiff under the Consent Judgment, it is acting in breach of Clause 8A.3 of the RCSLS Trust Seed where in Clause 8A.4 of the RCSLS Trust Deed expressly prescribes that:

> *8A.3. The Trustee shall not be bound to take any step (including, without limitation, giving notice that the RCSLS are due and repayable in accordance with*

> *Condition 22 or issuing an Enforcement Notice) to enforce the performance by the Company of any of the provisions of this Trust Deed or of the RCSLS unless it shall have been directed to do so by a Special Resolution; or it shall have been indemnified to its satisfaction against all actions, proceedings, claims, demands and liabilities to which it may thereby become liable and all costs (including solicitors costs on solicitor and client basis), charges, damages and expenses which may be incurred by it in connection therewith.*
>
> *8A.4.Only the Trustee may pursue the remedies available under the general law or under this Trust Deed or the RCSLS to enforce the rights of the Holders or the provisions of this Trust Deed or of the RCSLS. No Holder shall be entitled to proceed directly against the Company to enforce the performance of any of the provisions of this Trust Deed or of the RCSLS unless the Trustee, having become bound as aforesaid to take proceedings, fails or neglects to do so within a period of thirty (30) Business Days from such failure and such failure or neglect is continuing.*

[76] According to the Plaintiff, the Trustee has not become bound to enforce the rights of the FI Holders as no special resolution (of which no less of 75% of the FI Holders must vote in favour of the resolutions) has been passed to do so pursuant to Clause 8A.3 of the RCSLS Trust Deed that there is no separate or individual sum due to Maybank under the Consent Judgment as the Consent Judgment has been superseded and/or compromised by the Settlement Agreement.

[77] **Fourthly**, the Plaintiff submitted that there are alternative remedies available that insofar as the Settlement Agreement remains valid and binding, the sale and purchase of the Sale Asset have not been completed, the Defendants and the other FI Holders are fully entitled to exercise their rights under the Settlement Agreement and dispose of the Sale Assets to pay the Settlement Sum. According to the Plaintiff, the Independent property valuation of some of the Sale Assets undertaken in March and April 2015 pursuant to Clause 5 of the Settlement Agreement shows that there is a ready pool of Sale Assets worth RM80,055,000.00 in market value and RM62,874,000.00 in terms of forced sale value. The Settlement Sum under the Settlement Agreement is RM63,269,795.34. As such, it is the Plaintiff's contention that this is not the case where Maybank has no alternative means of receiving what is owed to it, unless it presents a winding up petition.

[78] The Plaintiff submits that given the ready pool of Sale Assets available to the Defendants (and the other FI Holders) under the Settlement Agreement, it makes no sense for Maybank to issue the Statutory Demand, and/or proceed with winding up proceedings, unless Maybank is doing so for an ulterior or collateral purpose. According to the Plaintiff, after all, the Independent Agent has been given a Power of Attorney to allow them to do just that - sell the Sale Assets and pay the FI Holders (including Maybank) under the Settlement Agreement and there is no limit as to how many tender exercise will be conducted to ensure the Sale Assets are sold.

[79] The Plaintiff further argued that if it is wound up, a fire sale of its assets as opposed to a controlled sale by the company as a going concern will not be in the interest of its creditors. It will result in the Sale Assets being disposed of at a distress selling or price well below the forced sale value. As a consequence, the Plaintiff will be unable to realize its assets to its potential or near market value. This, according to the Plaintiff will lead to minimum or low recovery for all the creditors including the

Defendants as well as the unsecured creditor who are holder of Irredeemable Convertible Unsecured Loan Stock ("ICULS"). As at 19.12.2013, the Plaintiff has 662 ICULS holders whom are public.

[80] **Fifthly**, the Plaintiff argued that any presentation of a winding-up will cause irreparable harm to it and tantamount to an abuse of process as the Settlement Agreement is still valid and binding.

[81] The Plaintiff submits that presently it has sufficient assets to meet its obligations to the Trustee and FI Holders under the Settlement Agreement. However, should the Settlement Agreement be terminated as a result of an event of default caused by Maybank's wrongful presentation of a winding up petition, the Plaintiff may then be obliged to satisfy the Consent Judgment under Clause 15.1 of the Settlement Agreement. The quantum of the Consent Judgment presently stands at RM79,020,699.01 according to the Notice of Termination issued by the FI Holders and the Trustee. This would exceed the market value of the Sale Assets, as set out above, and render the Plaintiff impecunious. In other words, unless Maybank is restrained from presenting a winding up petition, it is likely that such conduct will cause the Plaintiff irreparable harm that cannot be adequately compensated by an award of damages.

[82] According to the Plaintiff, its' goodwill as an ongoing concern will be damaged by any presentation of a winding up petition as Maybank had expressly admitted in its' Affidavit to Oppose the Injunction Application and Affidavit in Reply that the Settlement Agreement is valid and subsisting but only the settlement arrangement is terminated and the banks with whom the Plaintiff has opened current accounts for the conduct of its day-to-day business affairs are likely to freeze the said accounts upon having notice of an advertisement of any winding up petition against the Plaintiff. The Plaintiff will not be able to conduct its day-to-day business affairs in the absence of an operating bank account.

The damage to its future business prospects as a consequence, cannot be adequately compensated by an award of damages.

[83] Lastly, the Plaintiff submits that no prejudice will be caused to the Defendants if the Plaintiff's Application in Enclosure 3 is allowed because the Plaintiff is willing and able to fortify its undertaking as to damages in favour of Maybank by depositing such reasonable amount that this Court deem fit as sufficient to compensate any losses or damages sustained by Maybank into a joint stake holding account to be opened under the name of the Plaintiff's solicitors and the Defendant's solicitors if the Court is subsequently of the view that injunction ought not be granted.

[84] As to the Defendant's application in Enclosure 19, the Plaintiff argued that it has a valid sustainable claim against the Defendants and does not fall into the category of plain and obvious cases that ought to be struck out as alluded in *Bandar Builder Sdn Bhd & 2 ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 and *Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd* [2013] 3 MLJ 511

[85] In regard to the *res judicata* point raised by the Defendants, the Plaintiff argued that its' contentions in the present suit arise in relation to the Settlement Agreement which was not the subject of any of the previous suits and that each of the above mentioned issues have not been previously ventilated and/or raised and/or adjudicated by any Court of competent jurisdiction between the parties. According to the Plaintiff what was decided in the prior suits before the Settlement Agreement was entered between the parties does not deal, and could not have dealt with the terms of the Settlement Agreement as they arose before the Settlement Agreement. In the premises, those suits have no application to the factual matrix of the present case and thus *res judicata* does not apply against the Plaintiff.

The Defendant's Contentions

[86] In applying to strike out the Plaintiff's action herein, the Defendants state *inter alia* that:

a) there have already been earlier actions and injunctions taken by the Plaintiff to restrain and impede the Defendants (and the FI Holders) from recovering the outstanding RCSLS and the Plaintiff's action herein is yet another and lacks *bona fides*;

b) with the termination of the settlement arrangement under the Settlement Agreement, it is expressly provided in the Settlement Agreement that the FI Holders, including Maybank would be entitled to recover the original total judgment full Judgment Sum owing to them, under the Consent Judgment of 11.7.2013 together with interest thereon and all costs and expenses;

c) the Notices of Default are valid and binding on the Plaintiff;

d) Maybank was fully entitled to issue the section 218 Notice of 27.4.2016 to recover their portion of the Consent Judgment Sum which is still due and owing to them.

[87] In this regard, it is the Defendants' case that the Plaintiff's action is merely yet another attempt to avoid its obligations to pay monies due to the Defendants and as such the Plaintiff's action is plainly and obviously unsustainable and ought to be struck out.

[88] The Defendants further contend that the Plaintiff's action lacks *bona fides* whereby in obtaining the *ex-parte* injunction Order, it had failed to disclose to this Court numerous matters, including, *inter alia*, that the Plaintiff had deliberately misrepresented to the Court that "no application of similar nature was ever filed with this Court or any Court before, pertaining to section 218 statutory notice issued by the 1st

Defendant" as stated in its' Affidavit affirmed on 16.5.2016 at paragraph 85.

[89] Contrary to the Plaintiff's averment, the Defendants revealed that the Plaintiff had in fact filed a similar application before in the Plaintiff's 3rd Suit and the said 3rd Suit was withdrawn by the Plaintiff without liberty to file afresh. Consequently, the Defendants argued that the Plaintiff is barred from being granted any injunction herein.

[90] The Defendants further highlighted to this court that the relevant facts pertaining to the Plaintiff's 1st, 2nd, 3rd, 4th and Allure Gold's Suits (as described above) were all within the Plaintiff's knowledge and that the Plaintiff is bound to state and keep the Court apprised of all material facts.

[91] The Defendants argued that the extensive failed actions and injunction applications taken by the Plaintiff previously to restrain and impede the Defendants and the FI Holders from recovering the outstanding RCSLS clearly show the history of the frivolous and litigious conduct of the Plaintiff in constantly thwarting the attempts of the FI Holders, including Maybank and the Trustee from recovering monies due. The Defendants state that the Plaintiff's action herein, instituted to similarly attempt to forestall such recovery action, is no exception and in this regard, the Injunction Application ought to be dismissed by the Court and the Plaintiff's action struck out outright.

[92] The Defendants further averred that there are no serious issues to be tried in the suit. According to the Defendants the Plaintiff's contention that the debt owed by the Plaintiff has been "extinguished" or that Maybank's claim based on the Consent Judgment has been "compromised" by way of the Settlement Agreement, is preposterous and baseless.

[93] According to the Defendants, the Plaintiff's stands as appeared from paragraph 56 of the Statement of Claim that it (the Plaintiff) no longer owes any money to the Defendants/FI Holders as "the means of satisfying the Settlement Sum would not come from the Plaintiff or other Obligors, but rather the sale proceeds of the Sale Assets" is completely untrue. In this regard, the Defendants contend that the Plaintiff appears to be relying on clause 2.1 of the Settlement Agreement to say that the Consent Judgment debt is completely settled by the Settlement Agreement. The Plaintiff also contends the Settlement Agreement provides for the debt to be paid by the proceeds of sale of the Tranche Sale Properties and redemption of the Redemption Properties (see paragraphs 56 of the Statement of Claim). The Plaintiff then alleges the Independent Agent should have been the party to sell the properties with approval of the FI Holders (see paragraphs 50.3 and 52.2 of the Statement of Claim). But according to the Defendants, what the Plaintiff ignores, and is not candid about, is that the Settlement Agreement was entered into between the Plaintiff, the Trustee and the FI Holders (including Maybank) to settle the amounts due and owing under the Consent Judgment, subject to the terms and conditions therein. According to the Defendants, in all the Plaintiff's averments, it is selectively relying on certain clauses in the Settlement Agreement and ignoring others. The Defendants argued that it is important to look at the salient terms in the Settlement Agreement and not selectively, as the Plaintiff would like to.

[94] The Defendants brought the Court's attention to the fact that in relation to the Tranche Sale Properties, the Independent Agent appointed to sell the properties is the Plaintiff's agent and is not an agent of the Defendant or the FI Holders, as alleged by the Plaintiff. This can be seen from Clauses 4.1 and 4.2 of the Settlement Agreement which state as follows:

Clause 4.1 of the Settlement Agreement

> *"Forthwith upon execution of this Agreement,* ***the Obligors shall*** *if they have not already done so,* ***appoint KPMG Deal Advisory Sdn Bhd...to be the independent agent ("the Independent Agent") to undertake the sale of the Sale Assets in accordance with and subject to the terms and conditions of this Agreement****..."*

Clause 4.2 of the Settlement Agreement

> *"...each of the* ***Obligors shall simultaneously with the execution of this Agreement, execute an irrevocable power of attorney...in favour of the Independent Agent*** *the power to inter alia, accept any suitable offer to purchase the Sale assets..."*

[95] According to the Defendants, the effect of these clauses is that irrevocable Powers of Attorney were executed by the Plaintiff and the Other Obligors on 25.2.2015 to appoint the Independent Agent as their agent to sell the properties.

[96] The Defendants further state that they accept that there was a necessity for the Trustee and the FI Holders to have a final say in respect of all the offers received in respect of the Tranche Sale Properties. This is because the Trustee is the chargee of these properties holding them on trust for all the RCSLS Holders. Any offer received pertaining to Tranche Sale Properties would require these properties to be redeemed from the Trustee. According to the Defendants it is for this reason the FI Holders would have the final say whether an offer to purchase a Sale Asset is to be accepted, as the FI Holders would have to agree with the redemption figures for any of the Tranche Sale Properties, before the Trustee can do so and discharge its security. The Defendants argued that there is nothing unusual or wrong with this.

[97] The Defendants highlighted that the Plaintiff would be entitled to nominate a person ("the Nominated Party") to be offered the ROFR to purchase any of the Tranche Sale Properties if there is an acceptable offer to purchase them which is acceptable to the majority of the FI Holders and which the Independent Agent intends to accept, the Nominated Party will be given the ROFR to at a price no less than the highest Offered Price. If there is no acceptable offer after two attempts at disposing of a Tranche Sale Property by the Independent Agent, the Nominated Party will be given the ROFR to purchase the Tranche Sale Property at a price no less than the forced sale value of the said property (Clause 8.1 of the Settlement Agreement).

[98] The Defendants then brings to the Court's attention Clauses 8.2 and 8.3 of the Settlement Agreement which *inter alia* provide that:

> Clause 8.2 - When the Nominated Party chooses to exercise the ROFR, the Nominated Party would be required to submit its offer in writing to the Independent Agent together with its payment of an earnest deposit of 2% of the price offered by it.
>
> Clause 8.3 - In the event no writing from the Nominated Party together with its payment of the requisite earnest deposit is received by the Independent Agent within the timeline prescribed, the Nominated Party shall be deemed to have rejected the ROFR to purchase and the Independent Agent shall be entitled to sell the Tranche Sale Property.

[99] The Defendants further highlighted that by virtue of Clause 8.3 the Independent Agent shall be entitled to sell and not it must sell the property concerned.

[100] It is the Defendants' case that as there were no offers after two tender exercises for the Casa Vista and No.1 Glenmarie Properties, the Plaintiff had nominated Persepsi to purchase the same. Thus, pursuant to

clause 8.1(b) of the Settlement Agreement, the Independent Agent served a ROFR notice dated 3.7.2015 to the Nominated Party giving it the ROFR inviting an offer to purchase the Casa Vista and the No. 1 Glenmarie Properties at a price no less than the Forced Sale Value of the said properties. By clause 8.2 of the Settlement Agreement, the Nominated Party was supposed to, within 7 days from the date of service of the ROFR notice submit its offer in writing to the Independent Agent to purchase Casa Vista Properties and the No. 1 Glenmarie together with its payment of an earnest deposit of 2% of the price offered by it.

[101] However, that did not transpire. Instead, the Plaintiff itself made the offer and did not comply with clause 8.2 of the Settlement Agreement and what the Plaintiff did was to make an offer itself and nominated its related companies, namely Persepsi and Aspen for the sale of the Casa Vista Properties and No. 1 Glenmarie Property and gave names of its connected companies to undertake the purchase. The Plaintiff also purportedly offered to pay 2% deposit for the Casa Vista Properties and No. 1 Glenmarie Property.

[102] According to the Defendants, it is undisputed that the 2% earnest deposits for the No.1 Glenmarie Property and the Casa Vista Properties were never received by the Independent Agent nor the Trustee or its solicitors, Messrs Shook Lin & Bok. The Defendants further argued that it is an undisputed fact that the applications made by the Plaintiff to Bank Negara for Bank Negara's approval to allow payment of the deposits to be made to the Trustee in foreign currency have been rejected by Bank Negara. This is reflected in the letter dated 26.1.2016 issued by the Trustee's solicitors and the Plaintiff's solicitors.

[103] Subsequently it was discovered that instead of executing sale agreements with the Independent Agent, the Nominated Parties (who are related companies to the Plaintiff) entered into sale agreements directly with the Plaintiff and the Other chargors. According to the Defendants,

the sale agreements were entered into without any deposit paid. Again, no monies were received by the Independent Agent nor by the Trustee. Further, the Defendants state that the Plaintiff and the Other Obligors had purportedly given an extension of time for the balance purchase prices to be paid. The consent of the Trustee, as chargee of these properties, for such sale was never sought. Also, under the terms of the Settlement Agreement, the form and contents of the sale and purchase agreements had been finalized, standardized and advertised by the Independent Agent. (Clauses 10.2 and 10.3 of the Settlement Agreement)

[104] The Defendants further highlighted that by clause 10.4 of the Settlement Agreement, it is expressly stated that "*No amendments may be made to the approved form of the...SPA without the prior written approval of the Majority FI Holders*."

[105] In the upshot, the Defendants contend that it is obvious that the Plaintiff's and the Other Obligors' had unilaterally entered into purported sale agreements (not in the approved form) with their related companies, received no deposits, unilaterally granted extensions of time for payment for the Nominated Parties to pay the purchase price, all without the consent of the Trustee and the FI Holders. The Defendants argued that such conduct was clearly contrary to the terms of the Settlement Agreement and that the aforesaid was reflected in paragraphs 6 and 7 of the letter of 26.1.2016 issued by the Trustee's solicitors to the Plaintiff's solicitors.

[106] Accordingly, there was an ultimatum given by the Trustee to the Plaintiff to pay the earnest deposit and purchase price for the No.1 Glenmarie Property and the Casa Vista Properties within 7 days, failing which the Trustee shall exercise all such rights and remedies under the Settlement Agreement. The Plaintiff and Other Obligors failed to pay the earnest deposit and purchase price for the No.1 Glenmarie Property and

the Casa Vista Properties and as such there is a clear default under the Settlement Agreement.

[107] Pursuant to clause 15.1(d) of the Settlement Agreement which expressly states that if the Nominated Party fails to pay the deposit or any part thereof on due date, the Trustee shall issue a Notice of Default to the Obligors, including the Plaintiff declaring an Event of Default, giving the Obligors including the Plaintiff a prescribed timeline to remedy the said default. Further by virtue of clause 15.1, in the event the Obligors, including the Plaintiff, fails to remedy such default as described in the Notice of Default, the Trustee shall forthwith terminate the settlement arrangement by notice in writing whereupon the Defendants and the FI Holders are entitled to continue with all recovery action, to recover the original total full Judgment sum. This according to the Defendants is clear and unambiguous.

[108] This led to the issuance of the Notices of Default which stated that the Nominated Parties had failed to fulfill its obligations in respect of the relevant Tranche Sale Property within the stipulated time frame as provided for in Messrs Shook Lin and Bok's letter of 26.1.2016 and that by reason of such failure, Event of Default under Clause 15 of the Settlement Agreement has occurred. Details of the default were stated in the Notices of Default. Similarly Notices of Default were also issued to the Other chargors, Awal Kelana and Dual Vest in respect of the default relating to various Casa Vista Properties. It is the Defendants' contention that in this regard, there was nothing wrong with the Notices of Default and no merit in the Plaintiff's challenge concerning the same.

The Court's Findings

[109] Obviously this is a case where the background essentially reflects the huge difficulties in which the financial institutions or the FI Holders are facing in trying to recover the moneys granted to the Plaintiff even before the issuance of the loan stocks, all of it under the Redeemable

Convertible Secured Loan Stocks (RCSLS) which were taken up by the FI Holders and payment was then due by 2008. The Plaintiff and its two subsidiaries Awal Kelana and Dual Vest were supposed to orderly dispose of the assets and pay the lenders but failed to do so from 2005 up to this date. Eleven years have gone by and the loans are stuck and the FI Holders are still unable to recover the debts.

[110] After the various suits filed by the Plaintiff and one Allure Gold were struck off and disposed of, the injunctions applied not granted, the Trustee embarked on the recovery action and there was a Consent Judgment entered. By virtue of the Consent Judgment, again the Plaintiff is supposed to pay the debt owing by a certain date and yet again they defaulted. At that point of time, the bankers were completely in a position to execute the Consent Judgment but the Plaintiff filed the 4th suit to stop the bankers from doing so. Then, the Plaintiff withdrew the suit and entered into the Settlement Agreement. The Plaintiff again requested the FI Holders including Maybank to enter into negotiations to resolve the amount due and owing under the Consent Judgment.

[111] So here, we have the history of non-payments of debts and the history of litigious nature of the Plaintiff and its' cohorts in their attempts to restrain the bankers from recovering what is due to them.

The Settlement Agreement

[112] Reading the Settlement Agreement, it is indeed to provide the Plaintiff an opportunity to settle its debts to the FI Holders under the Consent Judgment, failing which the FI Holders were expressly given the right to enforce the Consent Judgment against the Plaintiff to recover the original Judgment sums due thereunder.

[113] The Plaintiff has forwarded many authorities to show that the Settlement Agreement determines the right of the parties and that from the execution of that agreement the rights and obligations of all parties in

relation to the company's shares must be governed by that agreement. This Court has no qualms about those authorities. As such, this Court looked into the rights of the parties in the Settlement Agreement.

[114] The Plaintiff focused on Clause 2 of the Settlement Agreement to justify that the Defendants have compromised the claim under the Consent Judgment by entering into the Settlement Agreement. The Plaintiff argued that essentially Clauses 2.1 and 2.2 provides that the settlement of the Consent Judgment would be the payment of the lesser sum. Clauses 2.1 and 2.2 also state that the full and final settlement of the outstanding sum due and payable to the FI Holders under the Consent Judgment are subject to terms and conditions. The said Clauses state:

> *"2. SETTLEMENT SUM*
>
> *2.1 At the request of the Company, the FI Holders hereby agree to accept the payment by the Company of the following as full and final settlement of the outstanding sums due and payable to the FI Holders* ***under the Consent Judgment upon the terms and subject to the conditions hereinafter contained:***
>
> > *(a) the sum of Ringgit Malaysia Sixty Three Million Two Hundred Sixty Nine Thousand Seven Hundred Ninety Five and Sen Thirty Four (RM63,269,795.34) (the "RCSLS Settlement Sum"); and*
> >
> > *(b) a further sum of Ringgit Malaysia One Million Three Hundred Forty Seven Thousand Five Hundred Sixty Eight and Sen Twelve (RM1,347,568.12) (the "Outstanding Fees and Expenses") being the outstanding Trustee's fees of RM947,568.12 and the outstanding legal fees and expenses incurred by the FI Holders of RM400,000.00 in each case as at the date of the Consent Judgment;*

(collectively, the "Settlement Sum")

2.2 ***Subject to the terms and conditions herein*** *contained and the provision of Clause 2.5, the Settlement Sum shall be repaid and/or paid from the proceeds of the sale and/or redemption of the Sale Assets at the times and in the manner set out in this Agreement."*

(Emphasis added)

[115] One of the pertinent terms in the Settlement Agreement is the appointment of the Independent Agent embodied in Clauses 4.1 and 4.2.

a) Clause 4.1 of the Settlement Agreement *inter alia* states:

"Forthwith upon execution of this Agreement, ***the Obligors shall if they have not already done so, appoint KPMG Deal Advisory Sdn Bhd...to be the independent agent ("the Independent Agent") to undertake the sale of the Sale Assets in accordance with and subject to the terms and conditions of this Agreement..."***

b) Clause 4.2 of the Settlement Agreement *inter alia* states:

"...each of the Obligors shall simultaneously with the execution of this Agreement, execute an irrevocable power of attorney...in favour of the Independent Agent the power to inter alia, accept any suitable offer to purchase the Sale assets..."

[116] Upon reading the two Clauses, this Court agrees with the Defendants' submission that the Independent Agent is not an agent of the Defendants and/ or the FI Holders as alleged by the Plaintiff and Clause 4.2 further affirmed such position.

[117] Pursuant to Clause 4.2 of the Settlement Agreement, a Power of Attorney were executed by the Plaintiff and the Other Obligors on

25.2.2015 to appoint the Independent Agent as their agent to sell the properties. In the Power of Attorney of 25.2.2015, the Plaintiff and its' subsidiaries as the Donor ie, the registered owner of the properties, irrevocably and unconditionally appoints the Independent Agent and its directors and/or managers jointly and each one of them severally to be the Donor's attorney or attorneys for and in the name of the Donor or otherwise in the name of the Attorney and with full power of substitution to put up the properties for sale by tender or otherwise to sell or dispose of the properties in any way as the Attorney may deem fit in accordance with and subject to the provisions of the Settlement Agreement.

[118] The Power of Attorney further indemnify the Independent Agent. The Power of Attorney states:

> *"AND the Donor hereby further declares that the Attorney shall not be held responsible or liable to the Donor for any loss or damage howsoever or whatsoever arising as a result of any act, neglect, omission or negligence or the Attorney in the execution of this instrument and any matter or thing in relation thereto and the Donor shall keep the Attorney indemnified against all costs expenses and charges which the Attorney may incur in the exercise of the powers aforesaid and the provisions of this paragraph shall continue in force for so long as may be necessary to give effect thereto."*

[119] Therefore, it cannot be disputed that KPMG is the Plaintiff's agent and the owners of the properties are still the Plaintiff and its' subsidiaries. If KPMG as the Independent Agent is unable to sell the properties, the Plaintiff or its' subsidiaries will be able to sell the properties. The FI Holders are not the owners of the properties and they can only rely on the owners of the properties and its' agent to sell. As such, the Plaintiff's contention that the onus is on the FI Holders to sell is misleading. The only way is for the Trustee to foreclose the properties. In

this case, the Plaintiff and its' agent are given the time to execute the sale which they failed to do.

[120] This court also found that the monthly requirement of report to be given to the FI Holders is to allow the FI Holders to monitor the Plaintiff and its' agent in that they are doing what they are supposed to do, which is to sell the properties. This Court agrees with the Defendants' submission that there is nothing unusual or wrong for the Trustee and the FI Holders to have a final say in respect of all the offers received in respect of the Tranche Sale Properties. An offer made has a certain price and the Trustee as the chargee has the right to decide whether the purchase price can be accepted to enable the redemption of the properties and that is also the reason why the bankers have the right to say whether the offer is acceptable as they are going to discharge the charge. But the Trustee cannot tell the Independent Agent to sell because the properties are in the name of the owners ie, the Plaintiff and its' subsidiary.

[121] The Plaintiff argued that in the event of default the Independent Agent should still sell the Tranche Sale Properties and the Trustee /FI Holders source of payment can only be from the sale proceeds and not from the Plaintiff. The Plaintiff relies on Clause 8.3 of the Settlement Agreement. But Clause 8.3 merely says that the "*Nominated Party shall be deemed to have rejected the ROFR to purchase such Tranche Sale Property and the Independent Agent shall immediately thereafter be entitled thereafter to and shall sell the Tranche Sale Property to the Successful Offeror...*"

[122] Clause 8.3 provides that the Independent Agent shall be entitled to sell, not that it must sell the property concerned. Further, there is nothing in the Settlement Agreement that says the FI Holders must instruct the Independent Agent to sell. As stated earlier, the Independent Agent is the agent of the Plaintiff and not the Defendants. In this instance, it is undisputed that there were no offers for any of the unsold

properties and there was certainly no 'Successful Offeror" which has been defined in the Settlement Agreement to mean "*the Offeror whose offer to purchase a Tranche Sale Property is accepted by the Independent Agent and approved by the Majority FI Holders*."

[123] Further, Clause 8.3 did not say that the Independent Agent must sell or take steps to find a buyer and it does not say that the sale proceeds from these properties would be the sole source of payment of the debt owing by the Plaintiff.

[124] The Plaintiff therefore cannot avoid liability by relying on allegations against the Independent Agent who is not a party to this action and who is its' agent and not of that the Trustee or the FI Holders. The FI Holders and the Trustee have allowed the Plaintiff to appoint Independent Agent to get them to sell but there is a time frame ie, 19.12.2015 and the redemption is by June 2015. Some event took place in between in the sense that there were the Nominated Parties with the Sale and Purchase still pending. The Bankers were willing to let them sell but they did not. The Nominated Parties paid nothing. The Notices were then sent out and the Defendants have every right to a winding up petition.

[125] Indeed, the rights and liabilities of the parties including the Plaintiff are to be ascertained from the four corners of the Settlement Agreement and the Plaintiff is bound by both the Consent Judgment and the Settlement Agreement as it has been expressly agreed by the Plaintiff that in the event the settlement arrangement under the Settlement Agreement is terminated, the Defendants and the FI Holders are entitled to continue with all recovery action, to recover the original total full Judgment sum. Upon reading the Settlement Agreement, this Court found that the execution of the Settlement Agreement cannot be construed as the Defendants and the FI Holders having agreed to discharge or release the Plaintiff from its liabilities and obligations under, arising from or in

connection with the Consent Judgment, or that the Plaintiff's liability under the Consent Judgment has been "compromised" or "extinguished".

[126] The above finding is based on the fact that the execution of the Settlement Agreement did not affect and/or alter the Plaintiff's obligations and liabilities to repay the outstanding amounts due to the Trustee and the FI Holders under the Consent Judgment and this is clear from Clause 18.1 of the Settlement Agreement which states:

> *"SAVING OF TRUSTEE OR ANY OF THE FI HOLDERS RIGHTS*
>
> *Save as expressly provided herein, nothing herein contained shall under any circumstances be construed as:*
>
> *(a) releasing or discharging the Obligors from any or all of their liabilities and obligations to the Trustee or any of the FI Holders under, arising from or in connection with the Consent Judgment or the Security Documents nor shall anything herein contained prejudice or affect the rights and remedies to which the Trustee or any of the FI Holders shall be entitled against the Obligors...in connection with the Consent Judgment;*
>
> *(b) releasing or discharging the Obligors or any of them or any other party from any or all of their respective liabilities, ... under arising from or in connection with the Consent Judgment or any of the Security Documents;*
>
> *(c) waiver of the FI Holders' requirement for prompt and immediate payment*
>
> *nor shall anything herein contained prejudice or affect or all of the rights and remedies to which the Trustee and the FI Holders shall be entitled against the Obligors or any of them or any other person*

in respect of any or all sums due and payable by any of them to the Trustee and the FI Holders."

[127] Obviously, the Plaintiff has obtained and derived benefit from the Settlement Agreement in the sense that it has obtained time indulgence and this Court is of the considered view that it cannot now draw back from the terms of the said Agreement. The Plaintiff is therefore estopped from denying the express default terms of the Settlement Agreement.

[128] Consequently, and as revealed by the Defendants, that instead of executing the sale agreements which the Plaintiff entered unilaterally with its' Nominated Parties namely Persepsi and Aspen with the Independent Agent, the Nominated Parties entered into sale agreements directly with the Plaintiff and the Other chargors without any deposits paid. This arrangement runs contrary to the terms of the Settlement Agreement as Clause 10.4 expressly states that *"No amendments may be made to the approved form of the.... SPA without the prior written approval of the Majority FI Holders*"

[129] Obviously, no deposits were received, the Plaintiff unilaterally granted extensions of time for payment to the Nominated Parties (and the Nominated Parties are the Plaintiff's related parties) to pay the purchase price, all without the consent of the Trustee and the FI Holders; a conduct which is contrary to the terms of the Settlement Agreement.

[130] Clause 15 clearly contemplates the consequences of any default under the Settlement Agreement. Clause 15 of the Settlement Agreement states clearly that:

"If at any time:

...

(d) the Nominated Party fails to execute the SPA or pay the Deposit or any part thereof on due date; or

(e) the Nominated Party fails to pay the Balance Purchase Price or any part thereof on due date or otherwise fails to complete the purchase of any of the Tranche Sale Properties in respect of which it has exercised the Right of First Refusal offered to it; or

(f) the Company fails to pay the Redemption Sum or any part thereof by the due date stipulated in Clause 7.1; or

...

then and in any such event or at any time thereafter, the Trustee shall (on the instructions of the Majority FI Holders) issue a written notice ("Notice of Default") to the Obligors or to the Obligors' Solicitors (on behalf of the Company) declaring an Event of Default and where applicable, giving the Obligors:-

(1) in the case of a default under paragraph (c) above, thirty (30) days from the date of the Notice of Default to remedy such default; or

(2) in any other case (other than paragraph (d) and (j) above, fourteen (14) days from the date of the Notice of Default to remedy such default.

In the event the Obligors or any of them fails to remedy such default as aforesaid within the respective period stipulated above or as the case may be, in the event of the declaration of an Event of Default under paragraph (d) and (j) above, the Trustee shall (on the instructions of the Majority FI Holders) forthwith terminate the settlement arrangement herein by notice in writing to the Obligors whereupon the FI Holders and the Trustee shall continue will all recovery action, including the realization of the security under the Security Documents, to recover the original total full Judgment Sum together with interest thereon and all costs and expenses due

to the FI Holders and the Trustee less any payments received by the FI Holders hereunder."

[131] The Plaintiff and the Other chargors had failed to remedy the defaults under the Notices of Default. In such circumstances, as expressly provided by clause 15 of the Settlement Agreement, in the event of default which is not remedied, the Trustee shall forthwith terminate the settlement arrangement and the Defendants and the Trustee are entitled to continue with all recovery action, including the realization of the security, to recover the original Judgment sums due under the Consent Judgment.

[132] Therefore, this led to the issuance of the letters dated 22.3.2016 (as clarified by letter dated 25.4.2016) to the Plaintiff and the Other chargors whereby the arrangement under the Settlement Agreement was terminated by the Trustee pursuant to the terms of the Settlement Agreement. This Court found that Maybank is entitled as of right to enforce the judgment debt under the Consent Judgment in its favour. There was nothing wrong or untoward for Maybank to issue the Statutory 218 Notice dated 27.4.2016 based on the Consent Judgment.

[133] It is also the Plaintiff's contention that Maybank cannot unilaterally take action against the Plaintiff but must do it through the Trustee. It was further contended that there was no special resolution passed under the Trust Deed to compel the Trustee to enforce the rights of the FI Holders including Maybank. In this regard, it is the Plaintiff's case that the issuance of the section 218 Notice by Maybank is allegedly contrary to the terms of the Trust Deed.

[134] This court found that at the outset, it is to be noted that the section 218 Notice dated 27.4.2016 was issued by Maybank *vis-à-vis* its claim for the debt which is due and owing by the Plaintiff under the Consent Judgment to Maybank. The Consent Judgment was granted in Maybank's favour. The Consent Judgment states:

"(1) Final Judgment be entered against the Defendant in respect of the outstanding Redeemable Convertible Secured Loan Stocks ("RCSLS") issued by the Defendant to the 2nd to 13th Plaintiffs, as follows:-

...

(f) Hong Leong Bank Berhad

RM3,101,194.88 with interest thereon at the rate of 5% per annum from 27.3.2010 to date of full payment;

(g) HSBC Bank Malaysia Berhad

RM575,144.39 with interest thereon at the rate of 5% per annum from 27.3.2010 to date of full payment;

(h) Malayan Banking Berhad

RM22,009,707.71 with interest thereon at the rate of 5% per annum from 27.3.2010 to date of full payment;"

[135] It is found that the Consent Judgment clearly sets out what is owed to each individual FI Holders including Maybank and was recorded in the presence and with the consent of the Plaintiff's representatives, Madam Pang Sor Tin and Mr Ong Kok Keng (Plaintiff's internal counsel) and the Plaintiff's own solicitors. As such, the terms of the Consent Judgment are binding on the Plaintiff. In *Tan Geok Lan v. La Kuan @ Lian Kuan* [2004] 3 MLJ 465 at 472, the Federal Court states:

"...a consent judgment or order is not the less a contract, and subject to the incidents of a contract, because there is a superadded the command of the court, and its force and effect derives from the contract between the parties leading to, or evidences by, or incorporated in, the consent judgment or order. A consent order must be given its full contractual effect..."

[136] In *Gai Hin Refigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd* [2005] 1 MLJ 57 **at pages 63-64**, the Court of Appeal overturned the decision of the High Court Judge to vary the consent judgment entered into between parties who were represented by solicitors. The Court of Appeal held that:

> *"The respondent was not under any misapprehension or confusion as to any of the terms agreed upon which were embodied in the consent judgment. The respondent, represented by its director, Puan Khaltom bt. Jaffar, was present on 20 September 1996 throughout the negotiations for settlement and the draft judgment was explained to her by her solicitor and she admitted its correctness. Furthermore, she was present in the learned judge's chambers whereupon the learned judge ascertained with the respondent on the terms that were agreed upon with the plaintiff.*
>
> *It is to be noted that an order by consent is evidence of the contract between the parties and is binding on all the parties to the order...the appellant and the respondent in this case are bound by 20 September 1996 consent judgment."*

[137] This Court further found that it was expressly agreed thereafter by the Plaintiff that in the event the settlement arrangement under the Settlement Agreement is terminated, the Defendants and the FI Holders are entitled to continue with all recovery action, to recover the original total full Judgment sum. Therefore, there is no merit in the Plaintiff's contention that the Defendants and the FI Holders cannot do so.

[138] It must also not be forgotten that in the KL Action, the Court Order of 27.10.2010 compelled the Trustee to exercise its discretion and take all necessary steps and actions to recover the amounts due and owing under the RCSLS, for the benefit of the RCSLS holders. The Trustee has already been ordered by the Court to take steps to recover the monies due. Such steps thus included the filing of the Trustee's Recovery Action,

entering the Consent Judgment and entering into the Settlement Agreement. Further thereto and as expressly provided in clause 15 thereof, in the event of a default, the Trustee shall forthwith terminate the settlement arrangement and the Defendants and the FI Holders are entitled to continue with all recovery action, to recover the original total full Judgment sum. Thus, there is no longer the necessity for any special resolution under the Trust Deed to be obtained before any of the FI Holders or the Trustee may act.

[139] The Plaintiff also contended that it will be prejudicial to wind up a company which has properties. The Plaintiff argued that what the Defendants ought to do is to wait for the properties to be sold. To tell the bankers to wait and that they can be compensated with interest after more than ten years lacks usefulness. It is of the considered view that when you have properties but there is no attempt to realize them, there is no more justification in letting the Plaintiff to take their own sweet time to sell after more than ten years and no winding up can be made against it. As submitted by the learned counsel for the Defendants, to the Plaintiff, the interest is a pie in the sky but until the bankers see money, it is just a paper entry. The bankers can earn interest but that is besides the point as there is no money in the kitty. In this case, this Court found that the Plaintiff has no money to pay as they have shown consistently for the past ten years. There is nothing prejudicial anymore for the Defendants to wind up the Plaintiff as the liquidator can come in to realize the assets for there is no point of having those assets and not realizing them as nobody is going to benefit it in the process.

[140] In line with the above findings, this Court is of the further considered view that the Plaintiff's allegation that the winding up would result in the assets being disposed of at a "distress selling price" or below the forced sale value is completely baseless and unsubstantiated. For all these years, there has been no payment made and the Plaintiff is putting the blame on the FI Holders/Bankers for not doing anything about it. The

properties belong to the Plaintiff, Awal Kelana and Dual Vest. They have an Independent Agent whom they promised in the Settlement Agreement that they will fully indemnified the said agent. There is no reason available before this Court as to why the KPMG being the Independent Agent of the Plaintiff and its' subsidiaries are not moving. The Defendants and the bankers are in no position to asks them to move. Nevertheless, this does not stop the Plaintiff as the borrower to take steps to sell the properties to settle its' debts. When the bankers took action to foreclose, the Plaintiff is contending that the assets will be sold at a forced sale value. If the Plaintiff is indeed ordered to be wound up on Maybank's Petition, a Court appointed liquidator would be appointed over the Plaintiff and the Liquidator would be empowered under the law to manage the administration and the affairs of the Plaintiff, including realizing the Plaintiff's assets. The Liquidator himself would have his own obligations to procure a proper price for the Plaintiff's assets. This Court is of the considered view that the Plaintiff cannot complain of the consequences of a winding up petition if the Plaintiff itself has done nothing to repay the bankers. Maybank is entitled to petition for a winding-up order against the Plaintiff due to the Plaintiff's own inability to pay its debts.

[141] It is worthy to note the forceful statement made by Abdul Hamid Mohamad CJ (as he then was) in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 at 70:

> *"The grounds relied on by the appellant are nothing more than 'fear of losing'; dear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt."* [Emphasis added].

[142] The Defendants and the bankers are definitely hitting their heads to the wall so to speak, to get the repayment of the loan granted to the Plaintiff and they are getting nowhere. The Bankers have the rights and that rights are preserved under the Settlement Agreement.

[143] This Court is of the view that there are obviously no serious issues to be tried herein which would warrant an injunction to be granted against Maybank or a trial of the matter. Obviously, the long overdue debts are not disputed and the Court should not allow a trial to go on just to hear when is the appropriate time for the properties to be sold. A trial will not unearth any further facts than as set out above. The Plaintiff's Action herein is plainly and obviously unsustainable and is an abuse of the Court's process.

[144] There is no dispute that the Plaintiff has failed to pay the debt owed to the FI Holders of the RCSLS including Maybank under the Consent Judgment dated 11.7.2013. It is also undisputed that the Plaintiff has been unable to pay the amount due under the RCSLS to all the Holders, and that the present outstanding sum due to all the RCSLS Holders is RM107,699,114.81 as at 27.4.2016.

[145] Further, it is undisputed that the Plaintiff is also unable to pay the monies due under the ICULS and shares which it issued to settle its unsecured creditor' debts. This Court found that it is glaring that the Plaintiff is clearly insolvent and is unable to pay its debts when due.

[146] As to the Plaintiff's application for injunction to restrain the winding up proceedings against it, this Court is reminded that it is trite that the right of the would be petitioner to apply for winding up is a statute-conferred right and can only be restrained in certain circumstances. For an injunction to restrain winding-up proceedings, the Plaintiff must establish that the presentation of a winding up petition would be an abuse of process. The Defendants proffered some authorities to support this point.

[147] In *Westfrom Far East Sdn bhd v. Connaught Heights Sdn Bhd and other appeals* [2010] 3 MLJ 459 the Court of Appeal states:

> *"To rehash on the issue before us, it is the right of a would-be petitioner to apply for a winding up order in appropriate circumstances, as that is a statute conferred right. It may be restrained only in certain circumstances. To succeed, an injunction applicant must establish that the presentation of a winding up petition would be an abuse of process of Court. From the point of view of the presiding judge, before granting the injunction, he must address the issue whether he is satisfied that the evidence adduced before him has established a prima facie case of an abuse of the process of the court eg, The debt is disputed...If the applicant of the injunction fails to establish that prima facie then no injunction is granted."*

[148] In *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355 the Court of Appeal states:

> *"When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds...It is not enough that there is a serious question to be tried."*

[149] As such, the test to be applied for an injunction to restrain a winding up petition is even more stringent than the consideration of whether there is serious issue to be tried in the injunction requirements of *American Cynamid Co v. Ethicon Ltd* [1975] AC 396 and *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 MLJ 193.

[150] On the facts herein, it cannot be disputed that there is a debt due and owing by the Plaintiff to Maybank under the RCSLS and the Consent Judgment and Settlement Agreement had been entered for such

outstanding sum. There is an unequivocal admission of debt due and owing by the Plaintiff to the FI Holders including Maybank as evidenced by the Consent Judgment and the Settlement Agreement. The Plaintiff has failed to pay the outstanding sums to date.

[151] In considering an Injunction application, the issue of the solvency of the Plaintiff is not to be considered at this stage of the proceedings and the fact that the Plaintiff's averment that it has sufficient assets to meet its obligations to the Defendants and the FI Holders under the Settlement Agreement is irrelevant. This is clearly stated by the Court of Appeal in *Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd* [2011] 9 CLJ 705 at 710 that states:

> *"...the issue in relation to solvency of a debtor was not supposed to be weighed at the stage of an injunction application..."*

[152] Earlier, the Supreme Court in *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 at 448 held:

> *"The only other ground of the respondent company to support its application for an injunction is to be found in its effort to show that it is solvent. It produced the balance sheet, the trading, contract, profit and loss account, a list of debtors and the amounts of their debts, and a list of creditors and the amounts due from them. All of these documents show the positions as at 30 November 1986 and on the basis of these documents it was contended that the balance after the amount of debts owing to the respondent company is reduced by the debts owed by it was $451,690.15 in favour of the respondent company. In our judgment this matter, if relevant at all, is a matter properly to be considered at the hearing of the petition, and it is premature to consider it at this stage."*

[153] The Plaintiff has failed to show that any winding up proceedings commenced by Maybank, or any of the other FI Holders or Trustee, is an abuse of process and an injunction herein ought not be granted.

[154] The balance of convenience lies with Maybank. It is not disputed that the Plaintiff has not paid the monies due and owing by the Plaintiff under the RCSLS since 2008. The Defendants and the FI Holders have been and are still prejudiced by the Plaintiff's continued default in failing to repay the Defendants and the FI Holders for 8 years after the RCLS were issued and more than 10 years, since the initial loans were granted to and defaulted on, by the Plaintiff.

[155] This Court is further highlighted with the fact that the Plaintiff is not a public-listed company, as it has been delisted on 14.1.2010. It had difficulties in settling its debts since before 2006 which was why it had to restructure its debts in 2006. Any financial problems faced by the company is a result of the Plaintiff's own doing. The Defendants and the FI Holders have been impeded time and time again by the Plaintiff from taking action to recover the outstanding RCSLS. Now that the Plaintiff has defaulted yet again under the Settlement Agreement, the Defendants and the FI Holders will be severely prejudiced if it is prevented from enforcing the Consent Judgment to recover the monies due. As such, the balance of convenience clearly lies with Maybank and not with the Plaintiff, as a serial defaulter under its obligations to pay.

[156] The Plaintiff in its submission suggested that it could give an undertaking for any damages. This Court agrees with the Defendants that any undertaking given by the Plaintiff is in serious doubt as the Plaintiff is already indebted to the FI Holders alone in the total sum of RM79,020,699.01 as at 17.3.2016. If the Plaintiff cannot even pay its existing debt, the Plaintiff certainly cannot pay for any damage suffered as a result of an injunction granted.

[157] The *status quo* of the matter which ought to be preserved would be that the terms in the Settlement Agreement be given its full force and meaning. In this regard, pursuant to the Settlement Agreement, the Defendants and the FI Holders ought to be allowed to take the necessary steps to recover the monies due under the Consent Judgment.

The Striking Out Application

[158] Under Order 18 rule 19 of the Rules of Court 2012 the Court must evaluate the evidence and the merits of the case to determine whether the action was bound to fail as stated by the Privy Council in *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1 which is adopted by the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 16**.** The Supreme Court states:

> *"In Tractors, the defendants applied to set aside the pleadings there on the grounds that they were frivolous and vexatious. The High Court allowed the application holding that the action was bound to fail. The Privy Council held that the Federal Court was in error for not examining the evidence and deciding as to whether the action there was bound to fail, though the power to dismiss an action summarily was a drastic power. The Privy Council went through the evidence with a fine-toothed comb and decided to agree with the learned judge at the first instance and restored the High Court's decision.*
>
> *In conclusion, with great respect, the learned judge could have avoided the pitfall as described by the Privy Council in Tractor. The lower court should have scrutinised the evidence in order to decide whether the action was bound to fail. If so, it would have been found otiose to send the case back to its starting point to start its long and expensive court albeit such a conclusion was reached on an application filed under O. 18 r. 19"*

[159] On examining the evidence, background and circumstances in this matter, this Court found that the action filed by the Plaintiff herein is bound to fail.

Conclusion

[160] In the upshot, this Court is of the considered view that the Plaintiff's action herein is frivolous and/or vexatious and is an abuse of process of Court. This Court found that the action filed by the Plaintiff is a further attempt to delay repaying its debt to the Defendants and the other FI Holders. There are no serious issues to be tried. The Consent Judgment debt owed by the Plaintiff has not been 'compromised' and 'extinguished' by way of the Settlement Agreement and the Notices of Demand issued by the Trustee were lawfully issued to the Plaintiff. The settlement arrangement under the Settlement Agreement dated 5.3.2015 was lawfully terminated by the Trustee. Maybank is entitled to take steps to enforce its rights under the Consent Judgment even if an event of default under the Settlement Agreement has occurred. There is no dispute that the Plaintiff has failed and unable to pay its debts owing to the FI Holders.

[161] Premised on the above, this Court dismissed the application in Enclosure 3 and allowed the Defendants' application in Enclosure 19 with costs to the Defendants.

Dated: 28 NOVEMBER 2016

(NOORIN BADARUDDIN)
Judicial Commissioner
High Court of Malaya
Kuala Lumpur

Counsel:

For the plaintiff - Liza Chan, Frank Wong & Leong Pui Mun; M/s Rahman Rohaida

For the defendants - SM Yoong & Marianne Loh; M/s Shook Lin & Bok

Case(s) referred to:

Tong Lee Hwa & Anor v. Chin Ah Kwi [1971] 2 MLJ 75

Bandar Builder Sdn Bhd & 2 ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7

Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd [2013] 3 MLJ 511

Tan Geok Lan v. La Kuan @ Lian Kuan [2004] 3 MLJ 465

Gai Hin Refigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd [2005] 1 MLJ 57

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 MLJ 49

Westfrom Far East Sdn bhd v. Connaught Heights Sdn Bhd and other appeals [2010] 3 MLJ 459

Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 4 MLJ 355

American Cynamid Co v. Ethicon Ltd [1975] AC 396

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Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd [2011] 9 CLJ 705

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447

Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1

Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 MLJ 16

Legislation referred to:

Rules of Court 2012, O. 18 r. 19(a), (b), (d), O. 29 r. 1, O. 92 r. 4

Companies Act 1965, s. 176