IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

[ORIGINATING SUMMONS NO. WA-24NCC-93-03/2016]

In the matter of THE VIVEKANANDA ASHRAMA, KUALA LUMPUR (Company No. 000785-D);

And

In the matter of Section 181 of the Companies Act 1965 and other corresponding sections;

And

In the matter of Order 29 and Order 88 of the Rules of Court 2012;

And

In the matter of the Inherent Jurisdiction of the Court

BETWEEN

A. YOGESVARAN
(NRIC No. 511228-06-5463) **... PLAINTIFF**

AND

1. AMPIKAIPAKAN A / L S. KANDIAH

(NRIC No. 460920-10-5321)

2. **PASUPATHI A / L SITHAMPARAM**
(NRIC No. 571118-10-5115)

3. **THIRUSELVAM A / L MUNNIANDIE @ GANESAN**
(NRIC No. 660731-10-5097)

4. **THE VIVEKANANDA ASHRAMA, KUALA LUMPUR**
(Company No. 000785-D) **...DEFENDANTS**

BEFORE

YA KHADIJAH BINTI IDRIS

JUDICIAL COMMISSIONER

GROUNDS OF JUDGMENT

Introduction

[1] The Plaintiff filed an originating summons under section 181 of the Companies Act 1965 in his capacity as a member of The Vivekananda Ashrama Kuala Lumpur. Via the amended originating summons dated 4 April 1917 (enclosure 79) the Plaintiff sought for the following relief –

> *(1) A Declaration that the Management Committee are conducting the affairs of the 4th Defendant ("the Ashrama") and/or exercising their powers in an oppressive manner and/or unfairly prejudicial and/or complete disregard to the interests and rights of the Plaintiff;*

(2) A Declaration that the Resolutions passed authorising the Management Committee to develop the Ashrama Land, to select a suitable development proposal and to appoint a developer at the Annual General Meeting of the Ashrama held on 29 January 2014 are unlawful and of no effect;

(3) A Declaration that the Annual General Meeting held on 30 December 2015 did not validly receive the Accounts for the years ended March 2014 and 2015;

(4) A Declaration that the Management Committee of the Ashrama is improper constituted;

(5) An Order that the 1st to 3rd Defendants be restrained from holding any office in or enjoying membership of any Management Committee for5 years from the date of Order of such other period as this Honourable Court deems fit.

(6) A Declaration that the Management Committee of the Ashrama holds the property known as GRN 50406, Lot 33 Seksyen 72, Bandar Kuala Lumpur, Daerah Kuala Lumpur ("the said Land") in trust for religious, spiritual, educational and cultural purposes for the Ashrama and the Hindu community: in consequence an Order that the Management Committee and the Ashrama are not entitled to sell or develop the said Land for residential or commercial purposes;

(7) An injunction restraining the Ashrama from acting or exercising any of its functions, duties and powers through the agency of its Management Committee as constituted as at the date of this order including from entering into any transactions on behalf of the Ashrama, including but not limited to the sale, transfer, charging, mortgaging or

disposing of any property belonging to, owned, and/or held by the Ashrama;

(8) An Order appointing Dato' Anantham a / l V.S. Kasinather (or any other person(s) deemed suitable by this Court) as Interim Manager of the Ashrama pending further order of this Honourable Court, with powers set out in Schedule 1 hereto;

(9) An Order that the Interim Manager summon and chair an Extraordinary General Meeting of the members of the Ashrama within thirty (30) days from the finalisation and preparation of the Accounts for year ended 2014 and 2015 or any other period as the case may be for the purposes of, inter alia, electing a newly constituted Management Committee to carry out and exercise its powers henceforth;

(10) An Order that the Management Committee deliver up all books, records including registers, files, resolutions, accounts, receipts, minutes of meetings, bank statements and cheque-books belonging to the Ashrama, and agreements executed on behalf of the Ashrama to the Interim Manager within ten (10) days from the date of this Order;

(11) An Order that applications for membership of the Ashrama be received and processed, consistent with the intentions of the founding fathers of Ashram, and the Interim Manager be authorised in his discretion to effect such objective until further Order of this Honourable Court;

(12) The Interim Manager shall submit reports to the Court and to the parties within 3 months of his taking office, and at 6 months intervals thereafter until further Order;

(13) The costs and expenses incurred by the Interim Manager be paid out of the funds of the Ashrama;

(14) Costs of this application, on a full indemnity and/or a solicitor-client basis, be borne by the 1st to 3rd Defendants personally, and without recourse to the funds of the Ashrama; and

(15) Such further and other relief that this Honourable Court deems fair and just.

[2] For the trial of this proceedings, the parties has agreed for deponents of the affidavits filed to be cross-examined. This basically involves the Plaintiff and the 1st Defendant. Having considered the documentary and oral evidence, I dismissed the Plaintiff's originating summons.

Factual Background

[3] The Vivekananda Ashrama Kuala Lumpur (the 4th Defendant / the Ashrama) began its operations in 1904. The 4th Defendant was initially known as Vivekananda Reading Hall. It was incorporated on 28 November 1934 as a company limited by guarantee, not having share capital under the Companies Enactment 1917. Therefore, there are no shareholdings in the 4th Defendant company.

[4] The Ashrama is managed by a Management Committee. The members of the Management Committee are in fact directors of the Ashrama. The management of the Ashrama is governed by its Memorandum of Association and its Rules and Regulations. The objects of the Ashrama are set out in Article 3 of the Memorandum of Association.

[5] The Plaintiff became member of the Ashrama on 26th September 1985.

[6] The 1st Defendant has been chairman of the Management Committee for at least 20 years and a member of the MC for more than 30 years.

[7] The 2nd Defendant is the Honorary Secretary of the Management Committee of the Ashrama, as has been a member of the Management Committee since 14th September 1993.

[8] The 3rd Defendant is the Treasurer of the Management Committee of the Ashrama, and has been a part of the Management Committee since 5th October 2004 and holding this office since the resignation of the previous treasurer, one Mr. Vignesh Naidu in 2014.

[9] The 4th Defendant is set up for charitable purposes. The objects of the Ashrama are set out in Clause 3 of the Memorandum of Association. The said clause provides as follows –

"The objects for which the Association is established are:-

(a) To promote the study and practice of the Hindu Religion and its principles.

(b) To promote the study of the Arts, Sciences and Industries.

(c) To establish, maintain, carry on and assist schools, hospitals, dispensaries, houses for the infirm, the invalid and the afflicted, famine-relief works and other educational and charitable works and institutions of a like nature.

(d) To form and maintain a Library and Reading Room.

(e) To print and publish and to sell or distribute gratuitously or otherwise journals, periodicals, books or leaflets that the Association may think it desirable for the promotion of its objects.

(f) To carry on any other works which may seem to the Association capable of being conveniently carried or in connection with and calculated directly or indirectly to promote any of the before mentioned objects.

(g) To subscribe to any fund, company or institution, and to act by delegate or otherwise upon any councils, committee, or other body whereby the objects and purposes of the Association, or any of them may be carried out or furthered.

(h) To purchase, take on lease or in exchange, hire or otherwise acquire and to hold any estates, lands, buildings, easements, or other interests in movable or immovable property and any rights or privileges which may be deemed necessary or convenient for the purposes of the Association PROVIDED that the Association shall not acquire, charge, mortgage or dispose of any land without prior written approval of the Minister charged with the responsibility for companies and the Director General of Inland Revenue, Malaysia.

(i) To construct, maintain or alter any house, buildings or works necessary or convenient for the purposes of the Association.

(j) To accept any gift of property whether subject or not, to any special trusts or conditions in favour or furtherance of any of the objects of the Association.

(k) To take such steps by personal or written appeals, public meetings or otherwise as may from time to time be deemed expedient for the purpose of procuring contributions to the funds of the Association in the shape of donation, subscriptions or otherwise.

(l) To borrow or raise money by the issue of or upon promissory notes or other obligations and securities of the Association, or by mortgage or by charge of all or any part of the property of the Association, or in such manner as the Association shall think fit.

(m) To invest the funds of the Association not immediately required for the general purposes thereof in such stocks, shares, securities or investments as are authorised by law for the investment of trust funds, or to place the same on deposit with the Association's Bankers as may from time to time be determined by the Committee of the Association.

(n) To incorporate any institutions, societies or Associations having objects wholly or in part similar to any of those of the Association and to co- operate with any person or persons in aid of such objects.

(o) To do all or any of the matters or things aforesaid either alone or in connection with others or through trustees, agents or otherwise; and general to do all such other things as the Association may deem incidental or conducive to the attainment of any of the aforesaid objectives of the Association.

(p) To serve and benefit the Country irrespective of race, creed and religion."

[10] In line with the objects of the Ashrama, the Ashrama is involved in youth development and assisting students who come from economically challenged backgrounds by providing for the support and funding of the following 4 schools:

(a) Sekolah Jenis Kebangsaan (T) Vivekananda, Brickfields;

(b) Sekolah Jenis Kebangsaan (T) Vivekananda, Petaling Jaya;

(c) Sekolah Jenis Kebangsaan (T) Tamboosamy Pillay, Sentul; and

(d) Sekolah Menengah Kebangsaan Vivekananda, Brickfields.

The above schools are collectively referred to as "the Ashrama Schools".

[11] The Ashrama is the registered proprietor of that piece of land held under GRN 50406, Lot 33, Seksyen 72, Bandar Kuala Lumpur. The title contains the following conditions:

> *This Grant is subject to the condition that the Grantee shall within one year... build upon the land herein described a substantial house for the value at the least of $500.00 and that the default performance of this condition by the grantee it shall be lawful for The Resident to revoke this grant and to resume possession on behalf of the Government of Selangor of the land herein described.*

And the following record of the grant:-

Tarikh mula diberimilik : 28 Disember 1895 Hakmilik
Asal (Tetap atau Sementara) : Bandar Kuala Lumpur

GRT 1216

[12] As early as 1913, the Ashrama had a membership of 219. As at 2016 it had 83 members. On 3 April 2004 the Management Committee admitted 40 members in one day. Vignesh Naidu and the 1st Defendant's 23 year old son were among the 40 members admitted. No new members have been admitted since, except 4 new members in 2014.

[13] At its meeting on 4 November 2014 the Management Committee agreed all new membership to be suspended indefinitely in line of the predicament with the issues regarding the heritage status of the Ashrama site. Based on the minutes of the Annual General Meeting (AGM) on 30 December 2015, the 1st Defendant informed the AGM that new membership was frozen for the time being pursuant to a decision made by the Management Committee.

[14] Between December 2014 to March 2015, the following 17 individuals applied for membership at the Ashrama –

(a) Raja Singham s. / o S. Sukumaran Singham;

(b) G. Gunasegaran a / l Gopal;

(c) Christopher Nicholas;

(d) Ramachandran Megappan;

(e) Tamilwanan a / l Palaniappan;

(f) V.G. Nehrman @ Neman a / l v. Gnanasegaran;

(g) Kalisewaran a / l Sinniah;

(h) Mohanadass Kanagasabai;

(i) Thillai Varrna Selvaratnam;

(j) Sitpah Selvaratnam;

(k) Toh Puan Umasundari Sambanthan;

(l) Tan Sri (Dr) Devaki Krishnan;

(m) Datin Paduka Mother A Mangalam;

(n) Dato' Anantham a / l V.S. Kasinather;

(o) Dato' Siva Subramaniam;

(p) Thanalakshmy Thavarajah; and

(q) Kandasamy Shankar.

[15] By letter dated 12 December 2014 (see Bundle B 2, Tab 27), the 3rd Defendant on behalf of the Management Committee informed that the 4th Defendant is not admitting new members at that point in time.

[16] The Management Committee has convened AGM for every financial year within the time prescribed except for the years 2013, 2014 and 2015 where the AGMs were held outside the requisite period but with the approval of the Companies Commission of Malaysia (CCM).

[17] The financial statement of the 4th Defendant for the years 2009 and 2010 were tabled for adoption in the 2011 AGM. The Reports of the Management Committee and Accounts for the financial years 2014 and 2015 were tabled at the 2015 AGM held on 30 December 2015.

[18] Since becoming member of the Ashrama in 1985 the Plaintiff has thus far attended the 89th AGM held on 30th March 2005, the 95th AGM held on 30th December 2015, the 96th AGM held on 18 January 2017 AGM and the EGM held on 16 May 2016.

[19] On 24 August 2015, the Ashrama applied to the CCM for an extension of time to hold its AGMs for 2014 and 2015, on 31

December 2015. The extension of time for the 2014 and 2015 statutory deadlines was initially rejected by the CCM in October 2015. The extension of time eventually obtained by the Management Committee only relates to the AGM and presentation of accounts for 2015 to be held on 31 December 2015.

[20] Via letter dated 19 November 2014, the Plaintiff requested some documents, including the Registrar of Members of the 4th Defendant, contract, minutes of meetings and resolutions relating to the proposed development Ashrama following documents from the Management. After a reminder from the Plaintiff (via letter dated 17 April 2015) the Management Committee replied on 18 July 2015 inviting the Plaintiff to attend the next AGM to raise his issues and concern.

[21] On 7 December 2015 the 4th Defendant caused to be issued a notice calling for an AGM on 30 December 2015 (the 95th AGM). The Plaintiff then wrote via letter dated 15 December 2015 to the Management Committee requesting for documents and seeking answers to questions to be raised at the AGM. Via letter dated 27 December 2015 the 2nd Defendant replied on behalf of the Management Committee rejecting the request and stating the Plaintiff's questions will be addressed at the upcoming AGM.

[22] At the AGM held on 30 December 2015 the Management Committee informed the Plaintiff that he could visit the office to inspect the documents. In response, by letter dated 12 January 2016, the Plaintiff sought inspection of the documents. By letter dated 25 January 2016 the Management Committee invited the Plaintiff to a meeting where all the documents that the Plaintiff requested will be made available for his perusal. The Plaintiff did not take up the offer for inspection of the said documents.

[23] Sometime in 2012 and 2013 the 4th Defendant received grants from the Government in the sum RM 6 million for the construction of new building blocks for the Ashrama schools.

[24] At the 96th AGM, the Plaintiff drew attention to inaccuracies in the Financial Statement in 2015 relating to the section "Property, Plant and net book value", where it read RM 5,025,562. At the 30 December 2015 AGM, it was admitted by the 3rd Defendant that it should instead read RM 3,002,984.00. One Mr. Kanesalingam had also raised the issue of the restatement in the accounts.

[25] It is the Plaintiff's position that members of the Management Committee have not been approved by the Minister as required by the constitution of the 4th Defendant. Whereas the Defendants submits that there has been no contest to the election of any of the Management Committee members since the election of the 1st, 2nd and 3rd Defendants as members of the Management Committee.

[26] At an EGM on 3 March 2004 resolutions proposed by the Management Committee authorising the sale of a portion of the Ashrama Land was defeated by a majority of members of the 4th Defendant.

[27] By notice dated 21 October 2009, the National Heritage Department notified its intention to declare the Ashrama Building and Land a heritage site pursuant to the National Heritage Act 2005 (National Heritage Act). The Management Committee objected to this.

[28] Vignesh Naidu is a director and shareholder of F3 Capital Sdn Bhd. He is a member of the Management Committee and attended its meeting on 14 January 2014 whereat conditions for the proposed development on the Ashrama land was discussed. He signed a Statutory Declaration on 16 January 2014 which became part of the Ashrama's Audited Accounts for the year 31 March 2013, which was

tabled at the Annual General Meeting on 29 January 2014. He did so in his capacity as the Treasurer of the Ashrama, and hence in charge of its financial affairs.

[29] The minutes of the 29 January 2014 AGM state that it was resolved unanimously that the Management Committee be authorised to develop the Ashrama Land and that any development undertaken must retain the present Ashrama Building in its original form and structure. It was also resolved that it is the intention of the Management Committee to seek members' approval authorizing the Management Committee to finally select a suitable development proposal and thereafter appoint the said developer. Vignesh Naidu was also present at the AGM on 29 January 2014. At the said AGM, he was re-elected into the Management Committee.

[30] On 14 February 2014, during the briefing by the 1st Defendant to the Development Advisory Committee of the Ashrama, it was proposed that the Request for Offer be delivered to 14 companies including F3 Capital Sdn Bhd. Vignesh Naidu was treasurer at that point of time and a director and shareholder of F3 Capital Sdn Bhd and he remains a member of the Ashrama.

[31] The Request for Offer was delivered to and received by F3 Capital Sdn Bhd on 26 March 2014 by way of letter dated 22 March 2015. The closing date of the offer was on 18 April 2014 and F3 Capital Sdn Bhd received the Request for Offer on the 26 March 2014.

[32] Based on the minutes of the Management Committee Meeting held on 28 April 2014 (see Bundle C 3, Tab 34 page 673), the Management Committee agreed with the Development Advisory Committee's recommendation and approved to appoint F3 Capital Sdn Bhd as the developer.

[33] MK Sen, a member of Development Advisory Committee, wrote an email dated 16 September 2014 to the 1st Defendant supporting the nomination of F3 Capital Sdn Bhd as the preferred developer based on their comprehensive proposal.

[34] A Letter of Award was issued by the Ashrama to F3 Capital Sdn Bhd on 29 September 2014. The Letter of Award states that a cash payment of 5% amounting to RM 43,560,000 is due from F3 Capital Sdn Bhd upon its acceptance of the award. F3 Capital Sdn Bhd signed and accepted the terms and conditions of the award. Accounts have not been rendered for the 5% cash payment due from F3 Capital Sdn Bhd.

[35] The Management Committee issued a letter to the members dated 30 December 2014 updating the proposed development.

[36] A Star Online article dated 16 October 2014 and a Star Metro article in November 2014 reported the issue of the proposed development of the Ashrama Land.

[37] On 15 July 2015, the National Heritage Department issued a Notice and Decision to gazette the Ashrama Land as a Heritage Site under the National Heritage Act 2005. By letter dated 6 August 2015, the Ashrama appealed to the Minister of Tourism and Culture against the National Heritage Department's decision. The appeal of the Management Committee was rejected by the Minister of Tourism and Culture via letter dated 27 October 2015.

[38] Prior to the decision of the said Minister, the 4th Defendant filed an application in the High Court at Kuala Lumpur on 13 October 2015 for leave to apply for judicial review against the National Heritage Department's decision.

[39] On 12 December 2016, the High Court dismissed the Ashrama's application for leave for judicial review. The Management Committee appealed to the Court of Appeal against the decision of the High Court. Pending the appeal, the Management Committee applied for an extension of time to commence fresh judicial review proceedings in the High Court.

[40] At an EGM held on 16 May 2016, resolutions were passed for the 4th Defendant to withdraw –

(i) its application for extension of time to review, amongst others, the decision of the Minister of Tourism and Culture dated 8 March 2016; and

(ii) its appeal against the decision of the High Court dated 12 February 2016 dismissing its judicial review application.

Issues

[41] Based on the numerous relief sought by the Plaintiff, the Plaintiff's Issues To Be Tried (see Bundle H) and the Defendants' List Of Issues (see Bundle J) the issues for determination can be divided into 4 broad areas –

(a) the status of the Ashrama Land;

(b) development of the Ashrama Land and heritage status;

(b) membership issues; and

(c) governance issues.

The law

[42] Section 181 (1) of the Companies Act 1965 (CA 1965) reads as follows:

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground –

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

[43] In the event oppression within the context of section 181(1) is proven, the remedies provided by the law are as follows:

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may –

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

[44] As stated in his amended originating summons, the Plaintiff's complaint is in respect of his interest as a member of the 4th Defendant. Thus the burden is on the Plaintiff to prove that the affairs of the 4th Defendant are being conducted or powers of the directors are being exercised in a manner which is oppressive or disregard of his interests as a member of the 4th Defendant (*Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu Kee Corp (M) Bhd & anor* [2010] 6 CLJ 721).

[45] At the outset it must be stated whether the Plaintiff's interest as a member of the 4th Defendant is being oppressed or disregarded is fundamentally a matter to be determined based on the facts. In dealing with section 181 of the CA 1965, courts have adopted the just and equitable principle in solving question of oppressive conduct where it enables the courts to subject the exercise of legal rights to equitable consideration in order to determine what is fair by taking into account the context and background of a particular case (*O'Neill v. Philips* [1999] 2 ALL ER 961; *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All ER 492, [1973] AC 360).

Findings of the court

Status of Ashrama Land

[46] Learned counsel for the Plaintiff argued that based on the history of the Ashrama Land and how the 4th Defendant became its registered owner, it is evident that the Ashrama Land is held in trust for the fulfilment of the public charitable objects of the 4th Defendant to which the members subscribe. As such the trust is two fold – the first by the directors or the Management Committee in favour of the 4th Defendant and its members and the second, is in favour of the public in fulfilment of the public charitable objects of the Ashrama.

[47] The history as narrated in the written submission on behalf of the Plaintiff (enclosure 96) is reproduced below -

> *25. In or about 1895, the Resident of Selangor granted a piece of land, then identified as Portion 33 of Mukim of Kuala Lumpur ("Land"), to the Ashrama under Grant No. 1216 in the public interest and to serve a public purpose. This was before the establishment of the Reading Hall thereon and its current form as a company limited by guarantee. The grant of the said Land was conditional on a building worth $500 being erected thereon within a year, on pain of revocation.*
>
> *26. Pursuant to a resolution by members at an AGM in 28-3-1908 a MC was appointed for the purpose of electing trustees for the Land and Reading Hall thereon, and a Deed of Appointment of Trustees made on 21-5-1908, where certain members of the Ashrama were appointed to hold the Land:-*
>
> > *"...immovable property in Kuala Lumpur to wit Portion 33 in the Mukim Kuala Lumpur comprised in Grant No. 1216 and of building thereon...*

…

IN TRUST for the said members of the Vivekananda Reading Hall for the purposes of the members of the said society only, so that the objects of the members of the said Society may be fulfilled.

…

Provided always and it is lastly declared and agreed that ***no powers of sale or mortgage shall be deemed to be vested in the Trustees*** *or any Trustees appointed in their stand under the provisions therein before contained by virtue of the "Register of Titles Regulations 1891" or any Statutory or other rule of now or at any time hereafter in force in the State of Selangor and no such power shall be exercised unless expressly empowered so do under the resolution passed at the general meeting of the members of the Vivekananda Reading Hall convened for that (illegible) purpose.*

(our emphasis)

2. Subsequent to the Ashrama's incorporation under the Companies Enactment, 1917, the ownership of the Land was transferred to the incorporated Ashrama, which is now the registered owner of the Land under the title GRN 50406 Lot 33 Seksyen 72, where the title is unencumbered. The Land's title reads:-

"Tarikh mula diberimilik : 8 Disember 1895

Hakmilik Asal (Tetap atau Sementara): Bandar Kuala Lumpur GRT 1216"

[48] It is further argued that the Ashrama Land was never intended to be capitalised by sale to generate profit for the Ashrama or the members.

[49] The Ashrama Land currently houses a building (Ashrama Building) built over 100 years ago, funded by contributions from members of the public. The Land and Building, being held by the Ashrama for public charitable purposes, are exempted from paying assessment. It is the Plaintiff's position that the Ashrama Land and Ashrama Building are entrenched aspects of the history of the 4th Defendant and they form the heart and soul of the existence and activities of the 4th Defendant. The Ashrama Building was a centre for cultural activities, including yoga and dance programmes before it virtually closed its doors to public activities in 2004, 100 years after its inception.

[50] To further support its position that the Ashrama Land is held in trust for the religious, spiritual, educational and cultural purposes of the Ashrama and the Hindu community the Plaintiff submits the 4th Defendant is open to all Hindu irrespective of nationality and caste.

[51] On the other hand in their written submission (enclosure 101) the Defendants submits –

> *7. Firstly, the Ashrama Land was not "granted" by the Resident of Selangor. The Ashrama Land was acquired by the Vivekananda Reading Hall, which was the entity of the 4th Defendant prior to the incorporation of the Ashrama as a company limited by guarantee.*
>
> *8. As the Vivekananda Reading Hall was a society, it was incapable of having the Ashrama Land registered in its name. As such, when the Ashrama Land was acquired, the Management Committee at the time, had to appoint*

trustees and a Deed of the Appointment of Trustees was then executed. The Deed provides

"And whereas the members of the said society are desirous of acquiring immovable property in Kuala Lumpur comprised in Grant No. 1216 and of building thereon.

And whereas it is important that such property and all other property of which the members of the society may become possessed should be vested in trustees for and on behalf of the members of the Society and for the appointment of new Trustees to supply the place of any Trustees who may die or desire to be discharged or refuse or become incapable to act.

...

IN TRUST for the said members of the Vivekananda Reading Hall for the purposes of the members of the said Society only, so that the objects of the members of the said Society may be fulfilled, and that in the event of the death of any or one or more of the said Trustees the trust interest in the said property shall be vested on the conditions hereinafter expressed."

9. *As such, it has been demonstrated that the Ashrama Land, even when it was first acquired was always intended to* ***benefit the members of the Ashrama****, and not the public at large, which the Plaintiff now claims. Further, the Ashrama Land was then registered in the name of the 4th Defendant and there is no Deed of Trust presently executed in relation to the Ashrama Land. Therefore, the Memorandum of Association provides for how the Ashrama Land ought to be used.*

[52] In their affidavit, the Defendants claim the Ashrama Land was owned by one AVPLRM Supramaniam Chetty at the time when the 4th Defendant was established in 1904. The Ashrama Land was then acquired by one Chan Sek Bong sometime in 1908 for a consideration of $50.00 from the acting Resident in Selangor for the purpose of the 4th Defendant.

[53] Pursuant to Article 3 of the 4th Defendant's Memorandum of Association, the 4th Defendant is a religious institution with the primary objects of promoting the study and practice of the Hindu religion and its principle. Via the Deed of Appointment of Trustees for the Vivekananda Reading Hall made on 21 May 1908 the following facts is established –

(a) the Deed of Appointment of Trustees was executed between members of the Vivekananda Reading Hall whose names (10 in numbers) and signatures appear in the First Schedule thereto and 3 other members (one Wytialingam Ponnudurai, one Nevena Veyna Visuvalingam and one Verakattipillay Ponnudurai) of the same who were appointed as members of the Management Committee on 28 March 1908.

(b) The primary purpose of the Deed of Appointment of Trustees was to appoint the said 3 members of the Management Committee to be the trustees for the said Society to hold the immovable property described as Portion 33 in the Mukim Kuala Lumpur comprised in Grant No. 1216 and the building thereon (Ashrama Land) and all other property of the said Society in trust for the members of the Vivekananda Reading Hall. Pursuant to the said deed the Ashrama Land was transferred to the names of the Trustees who are to hold the said land for and on

behalf of the members of the Vivekananda Reading Hall so as to fulfil the objects of the members of the same.

[54] After the 4th Defendant was incorporated on 28 November 1934 under section 19 of the Companies Enactment 1917, the ownership of the Ashrama Land was transferred to the 4th Defendant who is now the registered owner of the Ashrama Land. The Ashrama Land was acquired by members of the Vivekananda Reading Hall for purpose of fulfilling its objects. Based on the terms of the Deed of Appointment of Trustees, the trustees had declared and agreed that they hold the immovable property of the Vivekananda Reading Hall on behalf of the members.

[55] The Plaintiff cited several authorities where buildings / land are exempted from paying assessment because of the existence of a charitable trust over the said building / land. I am of the view the case cited can be distinguished –

(a) the Federal Court case of *Titular Roman Catholic Bishop of Kuala Lumpur v. Chairman Klang Town Council* [1972] 2 MLJ 37

(i) The appellant, the Titular Roman Catholic Bishop of Kuala Lumpur the registered proprietor of a church property appealed against the decision of the High Court affirming the decision of the Klang Town Council / respondent to levy rates on its land where a church, a parochial house

and a parish hall were built. The Federal Court found that the church is clearly a place for religious worship used for providing religious guidance and religious teachings and open to members of the public irrespective of their religious and creed and

could be exempted from assessment as it falls within the first limb of section 33 of the amended Town Board Enactment (F.M.S. Cap 137). However since it failed to prove that it is exempted by the Ruler in Council from payment of any rate which is the requirement of the second limb of the said section 33, the appellant's appeal was dismissed.

(ii) Although the property in the case of *Titular Roman Catholic Bishop of Kuala Lumpur* concerned a church for religious worship just like the 4th Defendant in the instant case, the issue in that case was not whether the property of the appellant was held in trust for the appellant or held in trust for the public at large, like in the instant case.

(iii) Whilst based on the statutory provision the court held the appellant could be exempted from paying rates on the ground that it is a place for religious worship there is no credible evidence in the instant case that the 4th Defendant was exempted from paying assessment on the ground that the Ashrama Land is held in trust for the public.

(b) *Re Shrine Habib Noh* [1957] 1 MLJ 139

(i) The Plaintiff rely on the decision of the court which held that spontaneous gifts and donations made by a fluctuating body of persons of many races and religion was intended for the preservation of the Shrine for the future and that any surplus of the donation, the donors are deemed to have intended it to be given to charitable objects.

(ii) Based on the facts of *Habib Noh's* case, the Endowment Board (appointed as trustee by the court to manage the donation / fund) was in doubt as to the objects to which the funds are applicable as there were no trust deed to govern the utilisation of donations made by the public who visit the shrine. Thus the trustee then filed petition for directions from the court. For purpose of determining the objects the court took into account the shrine was a place of pilgrimage frequented not only by Muslims but also by people of other persuasions and of many races, both local and from surrounding countries, especially those desiring to make or fulfil vows.

[56] Unlike the case of *Re Shrine Habib Noh,* in the instant case, a Deed of Appointment of Trustees was executed to govern the holding of movable and immovable property of the 4th Defendant by the trustees appointed by the 4th Defendant at the material time. As such, in determining the issue at hand the court should be guided by the terms of the said deed and the objects of the 4th Defendant.

[57] Having considered the Memorandum of Association of the 4th Defendant and the Deed of Appointment of Trustees and the facts, it is my finding that the Ashrama Land is held by the Management Committee for and on behalf of the 4th Defendant and not for the Hindu community at large. I shall state my reasons below.

[58] The Deed of Appointment of Trustees which was executed at the same time members of the Vivekananda Reading Hall / 4th Defendant purchased the Ashrama Land specifically states that the trustees were to hold the immovable property (the Ashrama Land) of the Vivekananda Reading Hall / 4th Defendant in trust for the members of the same. This can be seen from the following terms of the said deed –

Whereas the said Vivekananda Reading Hall was founded in Kuala Lumpur in April 1904 with the object of studying and practising the Hindu Religion and for the advancement of good morals and literature amongst the members

And whereas at the last general meeting of the members of the Vivekananda Reading Hall … it was resolved that a Management Committee be appointed for the purpose of electing trustees for the said Vivekananda Reading Hall, which was accordingly done … a resolution was arrived a by the members present and [illegible] hereto of the second part were duly elected to be the Trustees for the said Society to hold the immovable property of the said society in trust for the members of the Vivekananda Reading Hall …

…

IN TRUST for the said members of the Vivekananda Reading Hall for the purposes of the members of the said society only, so that the objects of the members of the said Society may be fulfilled…

AND the said Trustees do hereby consent to act as such Trustees aforesaid and agree to hold the said property hereinafter described as belonging to the members of the said Society and all other immovable property which may become vested in them in manner aforesaid upon trust for the members of the said Society…

(emphasis added)

[59] Although the phrase "*… for the members of the said society …*" prompted the suggestion that the word "society" could refer to the Hindu society / community at large, I am of the view it is not tenable

to adopt such interpretation. This is because firstly, the term of the deed is all about the Vivekananda Reading Hall which is a society. Secondly, reading the relevant terms as a whole the only reasonable conclusion that can be drawn is the phrase *"... for the members of the said society ..."* means members of the society known as Vivekananda Reading Hall. Thirdly, if it was intended for the trustees to hold the Ashrama Land for and on behalf of the Hindu community at large then words to that effect would have been incorporated in the terms of the said trust deed. Fourthly, nothing in the Deed of Appointment of Trustees (or words to that effect) which states that the Ashrama Land, being granted by the Resident of Selangor, is to be held in trust by the trustees for the benefit of the members as well as for the Hindu community at large. Fifthly, reading the terms of the said deed in its entirety, it is reasonable to infer that the express intention was for the trustees to hold the Ashrama Land for the members of the Vivekananda Reading Hall / 4th Defendant for the purpose of fulfilling the objectives of the same, which is essentially a religious and charitable organisation for the benefit of all irrespective of race, creed and religion which necessarily mean the members and the public. However, for all intent and purposes the Ashrama Land is intended to be the property of the 4th Defendant.

[60] From a close scrutiny of the land title at Bundle C 1 Tab 1, the name "Chan Sek Bong" seems to appear on the land title whereas the name "AVPLRM Supramaniam Chetty" can hardly be figured out although there are names written on the title which resembles "Supramaniam Chetty". However it is clear the entries made on the land title suggest that there were dealings (transfer and charge) carried out in respect of the land. Although that the Ashrama Land was granted by the Resident of Selangor and that there were articles which allegedly suggest the Ashrama Land is for public purpose, it could not be gathered from the land title that the said land was

alienated by the Resident of Selangor directly to the Vivekananda Reading Hall for public purpose. As such, I am of the view there is no sufficient credible evidence to support the Plaintiff's contentions.

[61] The fact that donations were received and / or sought from the public and well wishers and that the 4th Defendant is recognised for the charitable works it carried out does not necessarily create a charitable trust over the Ashrama Land and the Ashrama Building. The various charitable works and activities carried out and the donations / contributions received by the 4th Defendant is consistent with its objects. Proposed development of the Ashrama Land and heritage status

[62] Based on the minutes of the 4th Defendant's 94th AGM held on 29 January 2014, the following resolutions were passed –

The Meeting unanimously RESOLVE THAT:

(1) The Management Committee be authorized as deemed fit and in the interest of The Vivekananda Ashrama to develop a property at No. 220, Jalan Tun Sambanthan to enable the Ashrama generate income to support its objectives and activities. Any development undertaken at the said premises must retain the present Ashrama Building in its original form and structure.

(2) Authorise the architects, Veritas Architects to conduct a tender exercise on behalf of the Ashrama by calling suitable developers to submit development proposals. The architects will subsequently, evaluate and recommend the most suitable proposal to the Management Committee which should maximize returns to the Ashrama with minimal financial and development risks to be assumed by the Ashrama.

(3) It is the intention of the Management Committee to seek members' approval authorizing the Management Committee to finally select a suitable development proposal and thereafter appoint the said Developer.

The Chairman then declared the motion carried.

[63] Thus, the authority given to the Management Committee was specific –

(a) to develop the Ashrama Land solely for the purpose of generating income for the 4th Defendant to carry out its objectives as stated in clause 3 of its Memorandum of Association;

(b) any development undertaken at the said premises must retain the present Ashrama Building in its original form and structure;

(c) Veritas Architects to conduct a tender exercise on behalf of the Ashrama and to evaluate and recommend the most suitable proposal to the Management Committee;

(d) the Management Committee to seek members' approval authorizing the Management Committee to finally select a suitable development proposal and thereafter appoint the said Developer.

[64] Amongst the 4th Defendant's crucial activities which is specifically mentioned in the Memorandum of Association and the Rules and Regulations of the 4th Defendant is the running and management of the Ashrama Schools. Article 3 (c) provides –

To establish, maintain, carry on and assist schools, hospitals, dispensaries, houses for the infirm, the invalid and the afflicted,

famine-relief works and other educational and charitable works and institutions of a like nature.

[65] Based on bulletin of the Asrama Schools (see Bundle C1 Tab 9 page 116 - 136) various initiatives were carried out by the 4 schools to provide educational, spiritual and cultural activities for the benefits of the students. About 60% of the students are from the economically challenged environment where 40% of the students came from the lower income group where parents are not able to afford the opportunities available and the remaining 20% come from poverty-stricken families where the schools provides basic requirements such as nutrition, books, fees and transport fare. In fact the 1st Defendant was a student of one of the school, Vivekananda Tamil School. The Ashrama Schools which were established in 1914, 1958, 1958 and 1965 was successfully ran and managed by the 4th Defendant. Over the years the 4th Defendant has overcome financial challenges and has develop the infrastructure and improve the quality of education of the Ashrama Schools. As aptly pointed out by the Defendants, there was no complaint whatsoever about the 4th Defendant's management and handling of the Ashrama Schools.

[66] It is the responsibility of the 4th Defendant to fund the objects of the 4th Defendant. This is pursuant to Article 3 (k) of the Memorandum of Association which provides –

(k) To take such steps by personal or written appeals, public meetings or otherwise as may from time to time be deemed expedient for the purpose of procuring contributions to the funds of the Association in the shape of donation, subscriptions or otherwise.

[67] It is undisputed the Ashrama Schools which are categorised as Government Assisted School (Sekolah Bantuan Kerajaan) where the Government supports the schools in relation to payment of salaries for

the school teachers, administrative staff and support for students. From time to time on appeal by the Management Committee the Government has funded infrastructure of the 4th Defendant. In 2012 / 2013 the Government had provided RM 6 million which was utilised for the infrastructure of the Ashrama Schools. In his testimony, the 1st Defendant agreed that by far it was the highest sum received by the 4th Defendant. However it was not sufficient for purpose of taking care of the welfare of about 2,500 students in the Ashrama Schools in relation to tuition, food, transport, religious and cultural activities, computer lab and books (see Notes of Proceedings Day 3 pages 62 – 63 and Bundle A 1 Tab 5 paragraph 12.3). For all other funding in furtherance of the 4th Defendant's objectives, the 4th Defendant and members of the Management Committee receives donations from well wishers and from corporate body through their corporate social responsibility initiatives where for the last 5 years the Management Committee has raised RM 10 million (see Bundle A 1 Tab 5 paragraph 12.2). Thus contrary to the Plaintiff's contentions, the grant received from the Government and donations from well-wishers is not sufficient.

[68] Based on the evidence, it is my finding that the act of the Management Committee in embarking on plan to develop the Ashrama Land is for the purpose of securing a steady income to enable the 4th Defendant to carry out its objectives as stated in the Memorandum of Association, especially to finance the activities of the Ashrama Schools. It is not for the 1st Defendant's cause as alleged by the Plaintiff.

[69] The 4th Defendant is not a company limited by shares where members subscribed to it. It is not a commercial entity which is motivated by profit in order to make it afloat to carry out its objectives. It is simply a religious and charitable organisation managed by volunteers who are not paid and gain nothing from

running the organisation. It is the obligation of the Management Committee to ensure the 4th Defendant is financially capable to run its religious and charitable activities and the maintenance of the Ashrama Schools for the benefit and welfare of the students. Based on the 4th Defendant's Financial Statement, its income is derived from donations and contributions from well wishers and grants from the Government. However the income is not sufficient and there is a need to generate a steady income for purpose of the 4th Defendant survival.

[70] Thus the proposed development was mooted. The potential income generated from the proposed development would mean the 4th Defendant would be less dependent on contributions or donations from well wishers and / or grant from the Government and this will make it self-sustainable.

[71] The concept or method of the development proposed by the Management Committee may not be suitable and / or appropriate but the Management Committee conduct to embark on an exercise to develop the Ashrama Land cannot be said to be oppressive. In fact the Plaintiff himself testified that he is supportive of the development of the Ashrama Land provided it does not involve disposal of the Ashrama Land (see Notes of Proceedings Day 1, page 21, Q & A 44 and Q & A 55). It is also to be noted that the Save the Vivekananda Ashrama Action Committee is not opposing the Ashrama Land to be developed but it had proposed what it called an "alternative solutions" by building a 5 or 6 storey cultural centre (see Bundle C 1 Tab 7).

[72] The fact that the Management Committee proposed a development plan which is not acceptable to the Plaintiff and some members of the 4th Defendant cannot be said to be oppressive in the context of s. 181 of the CA 1965 as there are bound to be differing views in a company. This is fortified by the Plaintiff's own testimony where he agreed at the suggestion of learned counsel for the

Defendants that different members can have different views on different issues (see Notes of Proceedings Day 1 page 68 Q & A 289). At the end of the day the view of the majority will have to prevail, as in the instant case where the proposed development was unanimously approved by members of the 4th Defendant at the 94th AGM.

[73] The Plaintiff failed to demonstrate how such effort on the part of the 4th Defendant and the Management Committee is in disregard of his interest or unfairly discriminates him as a member of the 4th Defendant. In any event the Management Committee was given the authority to do so via the resolutions passed at the 94th AGM of the 4th Defendant.

[74] The Plaintiff alleges that the resolutions passed at the 94th AGM to authorise development of the Ashrama Land was made without proper information presented and made available for the members to cast an informed vote (see Notes of Proceedings Day 1 Q & A 27 and Q & A 39) because what was discussed as stated in the minutes were general in nature as there were nothing specific such as monetary value for a meaningful discussion. This is the stand taken by the Plaintiff who did not attend the 94th AGM, but it was certainly not the stand of those members who were present at the said AGM who were briefed of the proposed development and voted to authorise the Management Committee to proceed with the proposed development. It is unfortunate that the Plaintiff is not happy with the purported insufficiency of information, nevertheless the Plaintiff is bound by the decision made by the members who were present and had unanimously voted in favour of the proposed development. Furthermore, there is no evidence led by the Plaintiff to show how or in what manner members who were present at the said AGM were misled or deceived into voting for the development of the Ashrama Land.

[75] Even though the Plaintiff did not attend the 94th AGM on 29 January 2014, based on the Plaintiff's affidavit (see Notes of Proceedings Day 1 Q & A 22), he was aware of the development as it was publicize in the media. Despite that, minutes of subsequent AGMs did not show the Plaintiff has voiced his dissatisfaction or objection over the authority given to the Management Committee to develop the Ashrama Land. The Plaintiff also did not requisitioned for an extraordinary general meeting (as he is entitle to do so pursuant to Rule 17 of the Rules and Regulations) to review the decision made in respect of the said development or raised his objection and / or complaint via letter as a member of the 4th Defendant to the Management Committee.

[76] Based on the agenda for the 94th AGM, the resolution for the proposal to develop the Ashrama Land was set out and the explanation for such proposal was provided –

> *"With the changing demographic transformation in Brickfields, the purpose- built buildings at No. 220 Jalan Tun Sambanthan have outlived their usefulness and have remained under-utilised for over two decades. The Vivekananda Ashrama has continued for a century to support and fund the four Vivekananda Schools in furtherance of its objectives and the philosophy of Swami Vivekananda in the development of youth, particularly from the economically challenged sector of the society. The Ashrama remains the only Hindu institution which 'manages' schools in the country and this activity will continue and finances permitting, the scope of Ashram's activities should be expanded in the development of the Malaysian Youth.*
>
> *The Vivekananda Ashrama property has to generate a steady source of income to financially sustain the Ashrama's activities*

in the development of youth and education, the Management Committee therefore recommends the following resolutions…"

[77] The Plaintiff claims members were kept in the dark about the development until the 23 storey proposed development surfaced in the media (see Bundle A 1 Tab 6 paragraph 22). However based on the minutes of the 94th AGM, a lengthy briefing was given to the members on the proposed development. This includes the component of the development consisting, among others, a proposal for a 31 storey residential building with car parks which is to be built over a void space of 3 to 5 metres (approximately 10 feet) above the roof of the Ashrama building. It was also emphasised to the members present that the form and structure of the Ashrama Building will be maintained and preserved.

[78] The 1st Defendant was questioned on the appropriateness of having a cantilever car park over the Ashrama Building as the Plaintiff and some members of the 4th Defendant view it as sacrilegious to the Hindu faith. In his response, the 1st Defendant testified that discussion was held with religious leaders who said it can be done and he pointed out that this was done at the Sri Mariamman Temple which is the oldest temple in Kuala Lumpur (see Notes of Proceedings Day 3 Q &A 882 – 885). Later on after the break, the 1st Defendant was showed photographs of the Sri Mariamman Temple which the Plaintiff obtained from the internet (during the break). It is the Plaintiff's stand that the photographs do not indicate any cantilevering. The 1st Defendant said the photographs was taken from the front view, as such it does not show a building at the back which sat above the deities. According to the 1st Defendant he had gone to the site to see it for himself (see Notes of Proceedings Day 3, Q & A 972 – 976).

[79] In this respect it is obvious there are 2 differing views in relation to the cantilevering component of the proposed development and the Plaintiff is against it for religious reasons. However there is no evidence led to support the Plaintiff's contentions that placing a cantilever over the Ashrama Building is sacrilege and in violation of the Hindu faith. It would appear this cantilevering issue is a matter of the parties' interpretation from the religious perspective. In such a situation it would not be tenable to view the Management Committee's stand in respect of the cantilever as being oppressive.

[80] Going back to the Plaintiff's claims that there were no meaningful discussion at the 94th AGM on the proposed development, it must be noted that the Plaintiff did not attend the said AGM. The Plaintiff claim he did not attend because he was not notified although he had informed the 4th Defendant of the change in his address. However his claim that the 4th Defendant was notified is not substantiated. It is therefore difficult to comprehend how the Plaintiff who did not attend the 94th AGM is in the position to insist there was no meaningful discussion at the said AGM which saw the members unanimously authorised the Management Committee to pursue the development of the Ashrama Land.

[81] It is pertinent to note that the authority given to the Management Committee was conditional in that the final selection of a suitable development proposal and the developer to carry out the said development is subject to the members' approval.

[82] For purpose of undertaking the proposed development, the Management Committee in its meeting held on 14 January 2014 established the Development Advisory Committee which was mandated to study all development proposals in detail and make recommendation to the Management Committee (see Bundle D 3 Tab

2, page 382). Members of the Development Advisory Committee consists of –

(a) Mr. MK Sen, an experienced and renowned town planner with an impeccable reputation;

(b) Mr. C. Shivanandha, an experienced accountant with an established property development company;

(c) Mr. Apputhurai, a long servicing member;

(d) Tan Sri Datuk Dr. K. Ampikaipakan;

(e) Mr. Kumar Kanagasingam; and

(f) Dato' Sri Kandan, a leading Quantity Surveryor.

[83] At the Management Committee held on 28 April 2014, the Committee was informed out of 8 companies which were invited to tender, only 3 companies submitted their proposal. The companies were Ivory Residence Sdn Bhd, F3 Capital Sdn Bhd and Bina Puri Properties Sdn Bhd. The proposals were studied by the Development Advisory Committee and the said committee took the view that the proposals submitted by F3 Capital Sdn Bhd was very comprehensive and commercially most viable than the other 2 companies and acceptable to the 4th Defendant. The said committee has agreed to unanimously recommend F3 Capital Sdn Bhd (see Bundle D 3 Tab 23 page 405).

[84] Upon the advice of the Development Advisory Committee, the Management Committee deliberated on the 3 tenders and agreed to award the development of the Ashrama Land to F3 Capital Sdn Bhd. Pursuant to that, a Letter of Award dated 29 September 2014 (Letter of Award) was issued to F3 Capital Sdn Bhd.

[85] The Plaintiff submits by issuing the Letter of Award the Management Committee has completely disregarded the Plaintiff's interest as a member of the 4th Defendant because –

(a) it is contrary to the resolution passed on 29 January 2014 at the 94th AGM as members' approval was not obtained by the Management Committee to award the proposed development to F3 Capital Sdn Bhd. Accordinglly the Management Committee is acting beyond the mandate given by members at the said AGM. Thus, F3 Capital Sdn Bhd was unilaterally awarded.

(b) the Management Committee was in breach of Article 4 of the Memorandum of Association, as Vignesh Naidu was both a member of the Ashrama and a shareholder of F3 Capital Sdn Bhd. Being a member of the Management Committee leading up to the Award, he was in conflict of interest.

(c) contrary to Article 3(h) of the 4th Defendant's Memorandum of Association which prohibits a disposal of the Land *"without prior written approval of the Minister charged with the responsibility for companies and the Director General of Inland Revenue, Malaysia."*

[86] The F3 Capital Sdn Bhd was appointed as developer of the Ashrama Land as it was the only developer who was willing to accept the mandatory terms and conditions of the 4th Defendant which may be summarised as follows (see Bundle C 2 Tab 16 pages 310 – 311 for the Summary of Tenders Received) –

(a) developer to provide an undertaking that it would not charge the Ashrama Land;

(b) developer would not undertake any demolition or structural changes to the current Ashrama Building;

(c) developer would undertake a structural integrity test on the Ashrama Building; and

(d) developer would undertake an all risk insurance policy to cover the structure of the Ashrama Building.

The above conditions were among the conditions set out in the Letter of Award.

[87] It is the Defendants' contentions that the Letter of Award is a conditional award which is subject to a formal contract being entered into by the 4th Defendant and F3 Capital Sdn Bhd. The formal contract can only be executed after approval from members of the 4th Defendant is obtained.

[88] In deciding whether the Management Committee acted beyond the mandate given, the relevant issue to be determined is the status of the Letter of Award. If the Letter of Award is of binding legal effect, this necessarily support the Plaintiff's contentions that the Management Committee has no intention of going back to the members for approval and acted beyond the authority given at the 94th AGM. Whether such letter has legal binding effect is a question of facts.

[89] Having perused the Letter of Award and the surrounding facts it is my finding that the Letter of Award is a conditional acceptance of the 4th Defendant to the proposal made by F3 Capital Sdn Bhd in respect of the development of the Ashrama Land. Thus the award is not final and not binding at that material time. I say this for the following reasons:

(a) first and foremost the Letter of Award specifically states that the said letter "*... is subject to the execution of a formal Joint Land Development Agreement within the time prescribed herein....* The time prescribed is 60 days from the date of the said letter. The Chief Operation Officer who signed for and on behalf of F3 Capital Sdn Bhd has expressly confirmed that the Letter of Award is conditional upon the execution of a formal development agreement between the parties within the time prescribed;

(b) The Letter of Award has expressly stated that the said letter is not to be construed as the 4th Defendant's permission to F3 Capital Sdn Bhd to commence construction works on site; and

(c) F3 Capital Sdn Bhd may only commence construction works upon express written permission given by the 4th Defendant to take vacant possession of the Ashrama Land.

[90] I am of the view the fact that advanced drawings and applications were submitted to Dewan Bandaraya Kuala Lumpur (DBKL) by the architect Veritas Sdn Bhd does not make the award final and binding. The documents submitted by Veritas Sdn Bhd via its letter dated 12 September 2014 (see Bundle D 3 Tab 23 pages 491 – 492) were part of the process undertook by Veritas Sdn Bhd (on behalf of the 4th Defendant) for DBKL's consideration for purpose of determining whether the requirements of the local authority / DBKL as stated in DBKL's letter dated 7 August 2014 (see Bundle D 3 Tab 23 pages 488 – 490) has been complied with. This includes the requirement of putting up the Notice of Advertisement for the proposed development outside the Ashrama Land (see Bundle B 1 Tab 14 page 363). The said notice was for purpose of inviting owners of the neighbouring lots to the Ashrama Land to submit their objections

to the proposed development, if any, to DBKL for its deliberation. Thus, at that stage, the proposed development was not finalised as it was still subject to DBKL's consideration and approval.

[91] As it turned out, by letter dated 2 March 2015 (see Bundle D 3 Tab 23 page 505) DBKL had postponed Veritas Sdn Bhd's application pending the determination of the heritage status of the Ashrama Land. Eventually the Ashrama Land was designated as a heritage site on 15 July 2015 (see Bundle C 1 Tab 6). Accordingly, there was no Joint Venture Development Agreement executed by the parties within the prescribed period. Thus the appointment of F3 Capital Sdn Bhd did not materialised as the various conditions imposed were not fulfilled particularly due to designation of the Ashrama Land as a heritage site.

[92] The conditional Letter of Award was consistent with the authorisation given by members of the 4th Defendant at the 94th AGM where the final selection of a suitable development proposal and the developer is to be approved by the members of the 4th Defendant. Considering the circumstances, the 1st Defendant's testimony that it was the intention of the Management Committee to go back to the members for approval is not something incredible. Had it been the intention to appoint F3 Capital Sdn Bhd as the developer, the Letter of Award would have expressly stated so and that the Letter of Award would have a binding effect on the parties and that it forms part of the Joint Venture Development Agreement which is to be executed in due time.

[93] The fact that the Letter of Award does not state that it is conditional upon the approval of the members of the 4th Defendant is of no significance as such words are not a prerequisite in determining the status of the letter as it boils down to the factual circumstances. The pertinent point is that, via the Letter of Award, F3 Capital Sdn Bhd was adequately informed and it has duly acknowledged that the

acceptance by the 4th Defendant is not final and binding as it is subject to the execution of a formal Joint Venture Development Agreement.

[94] It is not disputed that Vignesh Naidu became member of the 4th Defendant on 3 April 2004. At all material time he was the shareholder of F3 Capital Sdn Bhd. He was appointed as member of the Management Committee on 7 December 2007 at the meeting of the same held on even date. On 29 January 2014 at the Management Committee meeting Vignesh Naidu was appointed as treasurer of the Management Committee. It is not disputed that Vignesh Naidu attended the Management Committee meeting on 14 January 2014 where the development of the Ashrama Land was discussed.

[95] Based on paragraph 4 of the minutes (see Bundle D 3 Tab 23 page 382) the 1st Defendant being chairman of the meeting explained the following –

(a) the existing Ashrama Building will be retained and that there will be a separate strata title. The new development will consists of about 300 residential units with an area of 650 to 1000 square feet per unit;

(b) a condition is to be imposed on the developer that the Ashrama Land is not to be mortgaged;

(c) the Sabha is to be housed in the new development in area of about 3,500 to 4,000 square feet. It will be owned by the 4th Defendant and will be leased to Sangeetha Abivirthi Sabha; and

(d) m/s Jones Lang and Wooton to be appointed to value the Ashrama Land, a senior surveyor to be appointed to advise

on strata titles and a reputable firm of lawyers to be appointed.

[96] The above points were deliberated at length and agreed unanimously by the members. It was also unanimously agreed that an Advisory Committee (later referred to as Development Advisory Committee) be appointed, the members of which are as stated at paragraph 82 above.

[97] Vignesh Naidu also attended the 94th AGM on 29 January 2014 where it was unanimously resolved that the Management Committee be authorised to develop the Ashrama Land, that Veritas Architect Sdn Bhd to conduct a tender exercise on behalf of the 4th Defendant and that the Management Committee is to seek members' approval in respect of selection of a suitable development and developer. At the said AGM, he was re-elected into the Management Committee.

[98] Vignesh Naidu subsequently resigned as member and treasurer of the Management Committee on 15 March 2014. In respond to Veritas Sdn Bhd, Invitation To Request For Offer dated 22 March 2014, Vignesh Naidu on behalf of F3 Capital Sdn Bhd submitted a proposal on 17 April 2014. Besides F3 Capital Sdn Bhd, 2 other companies Ivory Residence Sdn Bhd and Bina Puri Properties Sdn Bhd submitted their proposals. On 19 April 2014 all the 3 tenders submitted were opened by the Development Advisory Committee in the presence of the 1st Defendant and 2 other members. Mr MK Sen, chairman of the Development Advisory Committee was not present. The Development Advisory Committee studied and deliberated at length the 3 proposals and as stated above, the said committee unanimously recommended F3 Capital Sdn Bhd as their proposal was very comprehensive and commercially most viable and acceptable to the 4th Defendant. Via email dated 16 September 2014 (see Bundle C

2 Tab 15), Mr MK Sen confirmed his support for F3 Capital Sdn Bhd as the preferred developer.

[99] It is to be noted that Vignesh Naidu was no longer a member of the Management Committee when the decision was made to accept the proposal submitted by F3 Capital Sdn Bhd. Although he was present at the Management Committee held on 14 January 2014 where the development of the Ashrama Land was discussed and the 94th AGM on 29 January 2014 when the Management Committee was authorised to undertake the development of the Ashrama Land, in so far as the Invitation to Request for Offer sent to tenderers / developers inviting proposals, Veritas Sdn Bhd had provided details of the development and the mandatory criteria to be complied by the tenderers. The said details and criteria were made known to all the companies who were invited to propose.

[100] Vignesh Naidu may have attended discussions in respect of the proposed development but there is no evidence that Vignesh Naidu was in an advantage or superior position in so far as the information in relation to the proposed development is concerned. All the 3 proposals were analysed based on the offer made by the respective tenderers and the requirements of the 4th Defendant in the proposed development which was made known to the tenderers.

[101] The Plaintiff questioned the opening of the tenders which were carried out without the presence of Mr MK Sen who was the chairman of the Development Advisory Committee and suggested that the decision to select F3 Capital Sdn Bhd was flawed. The 1st Defendant's explanation that Mr MK Sen had, via email, provided his confirmation that F3 Capital Sdn Bhd as the preferred developer is not acceptable to the Plaintiff because the said email was sent on 16 September 2014, about 5 months after the Management Committee decision on 28 April 2014. It is a fact that the MK Sen's email was sent 5 months after the

decision of the Management Committee. However it must be noted the 4th Defendant's Letter of Award accepting F3 Capital Sdn Bhd's proposal was issued on 29 September 2014 which was well after Mr MK Sen's email. This necessarily means when the Management Committee issued the Letter of Award after Mr MK Sen's email, his views in relation to the proposal submitted by F3 Capital Sdn Bhd had been taken into consideration. In any event the decision to appoint F3 Capital Sdn Bhd was a commercial decision after evaluating all the proposals received. Thus nothing turns on this issue raised by Plaintiff.

[102] On 15 July 2015, the National Heritage Department issued a Notice and Decision to gazette the Ashrama Land as a heritage site under the National Heritage Act 2005. Via letter dated 6 August 2015 the Management Committee appealed to the Minister of Tourism and Culture against the National Heritage Department's decision (see Bundle C 1 Tab 6). The said appeal was subsequently rejected by the said Minister via letter dated 27 October 2015. However before the appeal was rejected, on 13 October 2015 the Management Committee filed judicial review proceedings to quash the decision to gazette the Ashrama Land as a Heritage Site.

[103] However it is to be noted that pursuant to the resolutions passed at the EGM held on 16 May 2016 authorising that the 4th Defendant to withdraw the application for extension of time (to review the decision against the designation of the Ashrama as a heritage site) and the notice of appeal against the decision of the High Court dismissing the 4th Defendant's judicial review, the 4th Defendant had accordingly done so. It therefore follows that the source of Plaintiff's complaint which is the 4th Defendant's challenge against the heritage status of the Ashrama Land is now no longer valid.

[104] Under the National Heritage Act, a site which is designated as national heritage or natural heritage within the context of the said Act is protected. As a heritage site, the said land the Ashrama Land is subject to the provisions of the National Heritage Act, in particular section 41 of the said Act where it become a conservation area which is to be conserved and preserved according to a conservation management plan prepared by the Commissioner of Heritage in consultation with the National Heritage Council for the purpose of, *inter alia*, promoting the conservation, preservation and proper management of a heritage site. Section 114 of the National Heritage Act provides it shall be an offence for any person to, *inter alia*, demolish, remove, erect any building or structure abutting upon a monument in any heritage site. Thus the proposed development intended to be carried out on the Ashrama Land is no longer feasible. Accordingly there is no issue the rights of the Plaintiff, who strongly support the Ashrama Land being declared as heritage site, is being oppressed or disregarded.

[105] In *Mascon Rinota Sdn Bhd & Ors v. Rinota Construction Sdn Bhd* - [2016] 4 MLJ 400 the petitioner (minority shareholder) complained, among others, that the second respondent (majority shareholder) and the other respondents (who were related to the second respondent) had left the 1st respondent company (a joint venture company between the petitioner and the 2nd respondent) 'to die' by not securing the promised projects for the 1st respondent company. Based on the facts, the 1st respondent company has ceased business in 1997 and the Plaintiff filed the oppressive action under section 181(1)(a) of the CA 1965 in 2006. The Court of Appeal in allowing the 2nd respondent's appeal said this –

> ***[2]*** *After having heard respective counsel we had unanimously allowed the appeal. There were two basic reasons underlying our decision. They were:*

> *the petition here (commenced in 2006) had not been filed with necessary expedition or promptitude and the complaints raised by the petitioner no longer related to an ongoing state of affairs of the company such as would meet the requirements of s. 181(1)(a) of the CA, namely that, the 'affairs of the company are being conducted or the powers of directors are being exercised...' in an oppressive manner or in disregard to the interests of the shareholders...*
>
> (emphasis added)

Accordingly the Plaintiff's complaint no longer exist as it does not relate to an on-going state of affairs of the 4th Defendant.

[106] When it was put to him that his complaint about the development of the Ashrama Land has come to an end, the Plaintiff seriously doubt it as he said even at the AGM held in January 2017 there were still members who raised issues about the development (see Notes of Proceedings Day 1 page 32 Q & A 106). Based on the minutes of the said AGM, there were in fact members who had raised about the heritage status of the Ashrama Land and the consequences to the said land in particular the value of the Land which is said to be diminished as a result of the heritage status accorded to it (see Bundle D 2 page 35 Tab 19). It was also suggested that the Management Committee should try to reverse the heritage status.

[107] When asked why the 1st Defendant, who chaired the said AGM allowed the question to be raised again when the appeal against the decision of the judicial review has been withdrawn and the Management Committee has accepted the heritage status, the 1st Defendant said as members they are entitle to their opinion to ventilate their frustrations.

[108] I am of the view there is nothing oppressive about allowing members present to raise the topic on the heritage status of the Ashrama Land. It was an AGM, and it stands to reason that members are free to speak, even though there may be other members who are not happy with it. Furthermore the members who raised the heritage status are ordinary members and not members of the Management Committee. It is to be noted, based on the minutes, the Plaintiff who attended the said EGM did not indicate his discontentment back then. The Plaintiff's concern is thus unfounded.

[109] The 1st Defendant was referred to an undated article (see Bundle C 1 Tab 10 page 180) and a brochure issued in 1988 (see Bundle B2 Tab 29 pages 560 and 566) which narrated the history of the 4th Defendant, where the Ashrama Building is referred to as "heritage building". On this, the 1st Defendant was asked to reconcile the fact that, back then the 1st Defendant accepted that the Ashrama Building is a heritage building (see Notes of Proceedings Day 2 page 101 Q & A 528, 541) yet the 1st Defendant objected to the Ashrama Building being gazetted as a heritage site by the authority.

[110] The 1st Defendant explained that at that point in time the National Heritage Act is not yet in place and the Ashrama Building was referred to as heritage building due to the history of the said building. The 1st Defendant also said due to the historical reason, the Ashrama Building will be preserved in the proposed development which is not for profit but to get sustainable income for the Ashrama Schools and the poor children (see Notes of Proceedings Day 2 page 104 – 105 Q & A 544 - 545).

[111] The National Heritage Act 2005 [Act 645] came into force on 1 March 2006 (see PUB 53 / 2006). Thus it is a fact that at the time the article / brochure was published, the said Act which provides for conservation and preservation of cultural heritage (which includes,

among others, tangible or intangible form of cultural property, structure or artefact) and natural heritage was not yet legislated. It is therefore reasonable to infer that the word "heritage building" used in the said article / brochure was never intended to mean as "heritage" in the context of the National Heritage Act (or even the Antiquities Act 1976 and Treasure Trove Act 1957 both repealed by the National Heritage Act), but used in the general and common sense.

Membership issues

[112] Rules 5, 6 and 7 of the 4th Defendant's Rules and Regulations (see Bundle C 1 Tab 2 pages 13 – 21) provides, among others, that –

(a) application for membership shall be in writing in a specific form set out thereto and is to be submitted to the Management Committee through the secretary. Every application shall be recommended by 2 members of the 4th Defendant.

(b) every application shall be considered by the Management Committee whose decision shall be final.

[113] During cross-examination the 1st Defendant testified all applications will be vetted where the applicant's background, education, professional status, services of the applicant to the community and the objectives of the 4th Defendant as stated in its Memorandum and Article of Association and also the Rules and Regulations are considered (see Notes of Proceedings Day 2 page 33 Q & A 128 – 129).

[114] It is the Plaintiff's complaint that the admission of 40 members on 3 April 2004 was in breach of the Rule and Regulations of the 4th Defendant and that it was done in bad faith. According to the Plaintiff the 40 members who were admitted by the Management Committee in

one day on 3 April 2004 was for the purpose of bolstering its support and marginalise the voice of reason of the majority that opposed the sale of the Ashrama Land. It is the Plaintiff's contentions that at that time (in 2004) the Management Committee knew if the proposed development had been tabled it would not be approved because the numbers are not enough. Thus the 40 new members were brought in within the next few months on the same day and the whole equation changed (majority became minority). Among the members admitted was the 1st Defendant's son, Umapaan a / l Ampikaipakan, and Vignesh Naidu.

[115] In cross-examination the Plaintiff admitted that the proposal in 2004 to develop / sell the Ashrama Land was never tabled to the AGM in 2004 and 2005 for members to consider. The Plaintiff also admitted that he do not know the membership of the 4th Defendant in 2004. Despite all that, the Plaintiff said based on dialogue of members he sensed that the majority is against the development.

[116] Taking into account the evidence, it is my finding that there is no cogent evidence to support the Plaintiff's claim that the 40 members were admitted as members for the purpose of garnering support to the sale of the Ashrama Land as there is no way of knowing how the 40 new members would vote because the proposal was never put to vote. In fact the 1st Defendant testified there was no AGM held to discuss the proposal to sell the said land as the Management Committee cancelled the said proposal after taking into account the sentiment of the members and the public (see Notes of Proceedings Day 2 page 61 Q & A 290). There is also no credible evidence to support the Plaintiff's "sense" that the majority of the 4th Defendant's members are against the proposed development as there is possibility some of the members do not object to the proposed development *per se* but to the sale element in the proposed development, just like the Plaintiff's position. The fact that the Plaintiff himself is not able to

tell the number of members in 2004 makes the Plaintiff's claim "changing majority to minority" implausible. I am also of the view there is no credible evidence to show that, had the proposed development been tabled at that point in time, it will be rejected by members.

[117] It is also contended that the admission of the 40 members were made without any known, open or transparent process because –

(a) Plaintiff only came to know about the admission of the said 40 members only in 2015 when a search was conducted on the members' list;

(b) the admission of the new members were not mentioned in any reports as it was done subtly;

(c) there were many other who wants to become member. There were no circular given to existing members seeking their assistance to recruit new members;

(d) the new 40 members are probably known to the people in power, presumably the Management Committee to support the talk about the sale of the Ashrama Land so as to convert the majority (members in favour of the sale) into minority (members opposing the sale).

[118] I find the claims is without basis as the Plaintiff admitted in his testimony that the process applicable when he was admitted as member in 1985 was the same process applicable to the 40 members. He also confirmed that on his part he has not done anything to recruit new members for the 4th Defendant in 2004. The Plaintiff admitted he has not asked the 40 members in respect of their stand in relation to the sale of the Ashrama Land. In respect of the 1st Defendant's son being admitted among the 40 members, besides the fact that Umapaan

a / l Ampikaipakan is the 1st Defendant's son and was admitted in 2004, the Plaintiff did not demonstrate how such admission and the admission of the 40 members has disregarded his interest as a member of the 4th Defendant or unfairly prejudicial to him.

[119] It is also pertinent to note between 1985 when Plaintiff became a member of the 4th Defendant up to 2004, there is no evidence of the Plaintiff's involvement and interest in the 4th Defendant which reasonably explain the reason why he only became aware of the admission of the 40 members in 2015, almost 11 years thereafter. Even then there is no evidence he had made known his concern about his interest being disregarded to the Management Committee. It is not disputed that the Plaintiff did not attend the 88th AGM held on 15 October 2004 where members were informed about a proposal for the purchase of the Ashrama Land even though in his testimony he said he has been following the issue since 2003 (see Notes of Proceedings Day 1 page 14 Q & A 9). With such background the Plaintiff's interest as a member of the 4th Defendant could not be possibly oppressed as the Plaintiff himself did not show interest in the 4th Defendant.

[120] The Plaintiff also pointed out at the 96th AGM held on 18 January 2017, there were 39 members present. Out of the 39 members, 15 of them were among the 40 members admitted in 2004, 4 of them were admitted in 2014 and 6 were from among the members of the Management Committee (see Bundle D 2 Tab 20). The Plaintiff claim this group of 25 members (15 + 4 + 6) belongs to the 1st Defendant's "faction" as they are loyal to the 1st Defendant and support the "1st Defendant's cause". I find the Plaintiff's claim unfounded. Crucially, there is no credible evidence adduced by the Plaintiff to show that the 40 members and the 25 members who attended the said AGM belongs to the 1st Defendant's "faction".

[121] It is to be noted based on the 1st Defendant's testimony and membership list of the 4th Defendant (see Bundle C 1 Tab 4), at the time the AGM was held on 18 January 2017, the 4th Defendant has 80 members. Out of the 80, 39 members attended the said AGM. Assuming for a moment what the Plaintiff said is true (that the 25 members out of 39 who attended the said AGM were indeed the 1st Defendant's supporters and form the majority) such a situation cannot be helped as the rest of the members (41 in numbers) did not attend though duly notified of the said AGM (there is no complaint about notice of meeting issued not in accordance with the law).

[122] There may be irregularities in the manner how the application forms were managed but that is not a reason to conclude that the 40 new members are the 1st Defendant's supporters.

[123] In respect of application forms (see Bundle D 3 pages 253 – 301) which were not signed by him as the approving authority and the date of application and date of admission were not filled up, the 1st Defendant said it was an oversight on his part that the application forms were not signed. He testified that the application forms and minutes of meeting would normally be submitted to him by the secretary after every meeting for his signature as can be seen in the forms approved in 1999 (see Bundle D 3, pages 302 – 311).

[124] To a question, he confirmed that name of the proposer and seconder should be stated in the application forms. The absence of such names in some of the application forms (see Bundle D 3 pages 302 – 304) was a technical error. In all cases the names of proposer and seconder will be mentioned at the Management Committee meeting where the applications are discussed.

[125] Then the issue of 2 application forms which bore the same name (see Bundle D 3 pages 276 and 301; pages 286 and 287) was raised. The 1st Defendant could not explain for sure why there were 2 forms,

he said it could be that the form was misplaced and another form was prepared and signed.

[126] The 1st Defendant was also queried on some applications where the approval was given 1 or 2 day after the application (see Bundle D 3 pages 302, 303, 305). In reply, the 1st Defendant said the time taken to vet an application would depend on the applicant. In cases where members of the Management Committee are able to vouched for the applicant's background, the process would take a shorter time compared to members who are not known to any members of the Management Committee. In the latter cases, the proposer and seconder stated in the application form would be called by the Management Committee to check on the applicant's background. The other possible explanation according to the 1st Defendant is that the applications may have been made a few days before the Management Committee Meeting.

[127] As to the reason behind the decision of the Management Committee not to accept any more new member after the 40 new members were admitted on 3 April 2004, the 1st Defendant could not provide an explanation as he cannot remember.

[128] The 1st Defendant was also queried on the decision made by the Management Committee on 3 April 2004 that membership of those not in benefit who have complained to the Registrar of Companies (RoC) about the 4th Defendant without sufficient basis must be considered for termination. However this issue was not raised by the Plaintiff in his affidavit and learned counsel for the Defendants objected to the question, which is rightly so. In any event nothing comes of this as the 1st Defendant said the Management Committee has not carried out the said decision. In this respect I am compelled to agree with the Defendants that the Plaintiff is mounting his case on any and all possible issues.

[129] The various and numerous issues raised by the Plaintiff essentially relate to managing and administering applications for membership which is essentially the internal affairs of the 4th Defendant. Obviously there were mistakes made but inefficiency or carelessness cannot amount to oppressive conduct (*Yap Yong Huat & Anor v. Yap Yoke Beng* [2015] 1 LNS 1184; *See Hua Realty v. Se Hua News Holding Sdn Bhd & Ors* [2007] 7 MLJ 525). I see no reason why this court should doubt the 1st Defendant's explanation or the lacking of it with regard to how the application forms were managed and the process in relation to admitting members. The 4th Defendant being a charitable organisation and being run by volunteers who have their own job, in such a situation it is inevitable that mistakes happened. The applications were discussed in the respective Management Committee meeting and the applicants were vetted and it was decided that the applicants fulfilled the conditions under Rules 5 and 6 of the Rules and Regulations of the 4th Defendant. There is no evidence to suggest that the mistakes were *mala fide*.

[130] Most of the issues raised by the Plaintiff in this proceedings relate to transactions that took place about more than 10 years ago. The 1st Defendant's memory was tested in relation to events that transpired more than 10 years ago and it is not something exceptionable that he cannot remember some of it. Thus there is also no reason to label the 1st Defendant as being untruthful just because he could not remember and could not provide explanation to the said events / transactions. From the 1st Defendant's demeanour there is nothing to suggest that he is "wholly untruthful". The 1st Defendant may be firm and stood his grounds (he has even conceded some mistakes were due to an oversight on his part) but that does not make him an untruthful witness.

[131] The Plaintiff became member in 1985. Since then he had attended the 4th Defendant's AGM 3 times, namely, in 2005 (89th

AGM), 2015 (95th AGM), 96th AGM (2017) and an EGM in 2017. Between 2005 and 2015 there were AGMs conducted in 2006, 2008, 2011, 2012 and 2014 which the Plaintiff did not attend. At the AGMs, Reports of the Management Committee pertaining to the 4th Defendant in relation to its religious and charitable activities, its achievements, in particular the educational, spiritual and cultural activities carried out for the Ashrama Schools were tabled, discussed and various resolutions passed to enable the Management Committee to run the 4th Defendant in pursuit of its objects. The Financial Statement for the respective financial year end were also tabled and adopted by the members. Crucially he did not attend the 94th AGM in 2014 whereat resolutions were unanimously passed to authorise the development of the Ashrama Land, which he said was passed without proper information presented and made available for the members. Yet, he chose not to promptly made his grievances known to the Management Committee about it. The Plaintiff was not in the picture between 2006 and 2014. There appear to be lack of interest on the part of the Plaintiff in relation to the 4th Defendant's welfare as a religious and charitable institution. This to my mind led to the irresistible conclusion that he was content with the 4th Defendant's position which was managed by members of the Management Committee. Under the circumstances, the Plaintiff cannot now be allowed to raise issues in relation to the manner the Management Committee run the 4th Defendant. To do so would be unfair to the members of Management Committee who were not questioned and queried in respect of their conduct years ago and had carried on managing the affairs of the 4th Defendant diligently.

[132] In the case *Mascon Rinota Sdn Bhd,* the Court of Appeal held the issue of delay in filing an oppressive action is a paramount importance in any consideration of the exercise of the court's discretion under section 181 of the CA 1965. The court said –

[29] *Acting without expediency to protect or further one's rights when an alleged breach or violation of such right arose amounted to acquiescence, meaning acceptance of or consent to that situation. We found merits therefore in the submission of counsel for the respondents that the court should deny relief to an interested party who had sat on his rights and accepted tacitly such practices or decisions adopted by a company in its business affairs over time, but, who now wished to advance matters related to or arising therefrom as a grievance for relief under s. 181 of the CA (see Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors [1994] 1 MLJ 520).*

[30] *The observation of the Court of Appeal in Re Jermyn Street Turkish Baths germane to this point is reproduced below:*

> *We are concerned only to consider whether the affairs of the company were, when the petition was presented, being conducted in a manner oppressive to some part of the members of the company.... Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor. If a director of a company were to draw remuneration to which he was not legally entitled or in excess of the remuneration to which he was legally entitled, this might no doubt found misfeasance proceedings or proceedings for some kind of relief, but it would not of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers to procure or retain the remuneration of to stifle proceedings by the company or other shareholders in relation to it.*

[133] In another case, in *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 the court held delay would amount to acquiescence –

> *Secondly, I noted that the major matters complained about by the petitioners appear to have been spread out over a considerable period of time. It is settled law that delay by petitioners in initiating proceedings after they have realised that they have been victims of a scheme of oppression will induce the court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complaints are not therefore made in good faith (see Re Jermyn Street Turkish Baths Ltd [1971] 3 All ER 184).*

[134] The Plaintiff relies on the case *Leo Leslie Armstrong v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur* [2015] 1 MLJ where the Court of Appeal held laches and acquiescence was not applicable. That case is however distinguishable. The appellant in *Leo Leslie Armstrong's* case sought for declaratory relief for, among others, that the decision of the respondent converting the tenure of the appellant's freehold land to leasehold was *ultra vires* the National Land Code. The appellant filed its originating summons for declaratory relief 45 years after the decision was made. The decision to convert the status of the plaintiff's land was a condition imposed by the respondent upon the respondent's approval to the appellant's application to sub- divide its land into 2 lots. The appellant agreed to the condition imposed. The Court of Appeal rejected the respondent's argument that the appellant should be denied of any relief as it was guilty of laches after having acquiesced to the change in the land tenure because the appellant was not seeking for equitable relief. That case which dealt with the legality of a decision made by a public authority in the exercise of its public duties is different from the instant case where the relief to be allowed under section 181 of the CA 1965 is discretionary to be determined by the court upon equitable

principles which includes the conduct of the parties (*Mascon Rinota Sdn Bhd* case).

[135] The Plaintiff submits that the conduct of the Plaintiff, who is not a member of the Management Committee, is not the cause of the 4th Defendant's problem. The Plaintiff conduct is therefore irrelevant. In support of the Plaintiff's contentions the case *Vujnovich and another v. Vujnovich* [1990] BCLC 227 was referred to. That case relate to an oppressive action filed by a minority shareholder against the other 2 shareholders who, jointly, were the majority shareholders. There are brothers and the only 3 directors of the company. The plaintiff alleged oppressive conduct by the majority shareholders and sought for an order that the majority shareholders sell their shares to him. Alternatively he sought for an order that the company be wound up on just and equitable ground. The majority shareholders counter claimed, alleging unfairly prejudicial conduct on the part of the minority shareholder and sought for an order that he sell his shares to them. The court of first instance found there had been no unfair prejudice in the manner both parties conducted the affairs of the company. However it was found that there had been a breakdown in the relationship between the parties and it was just and equitable that the company should be wound up. The Court of Appeal held that although both sides had conducted themselves in a way that was unfairly prejudicial, it was appropriate for a winding up order to be made. On appeal it was held that although the minority shareholder was partly responsible for the breakdown in the relationship between the parties, his conduct was not causative of the breakdown and therefore this did not disbar him from obtaining a winding up on order just and equitable ground.

[136] The facts of *Vujnovich* case shows that the complainant and the alleged oppressor are directors and they were all involved in the running of the affairs of the company. In the instant case it is a

complaint by a member of a company who was not and is not involved in the running / management of the company and / or show lack of interest in the company against members who are director of the company who has been managing the day to day affairs of the company. Under the circumstances and understandably the Plaintiff can never ever be faulted for all the complaints he made against the Defendants. As such I am of the view in so far as the conduct of the complainant is concerned, it ought to be looked in the context of each particular case. To apply strictly the principle in *Vujnovich* case to the instant case would not be fair especially so when the 4th Defendant is not a profit oriented company which strives on donations and contributions and an institution run by volunteers who are not professional managers. Thus the Plaintiff's conduct is relevant and ought to be taken into account especially when he had taken a long time to come forward to air his grievances which indicate that he has acquiesced to conduct against which he is complaining.

[137] At its meeting held on 14 January 2014 the Management Committee approved 4 applications for membership (see Bundle C 3 Tab 36). Subsequently at its meeting held on 4 November 2014, the Management Committee decided to suspend new membership indefinitely until the issues regarding the heritage status of the Ashrama Land and the proposed development is settled (see Bundle C 3 Tab 37). Via letter dated 12 December 2014 the Management Committee informed Ms Sitpah Selvaratnam that the 4th Defendant will not be admitting new members and that the 3 applications for membership submitted via her letter dated 9 December 2014 will be considered at the next Management Committee meeting. Subsequently via letter dated 24 March 2015 Ms Sitpah Selvaratnam sent 19 applications for membership. The applications was not considered by the Management Committee due to the decision to suspend new membership.

[138] It was suggested to the 1st Defendant that the suspension was done in bad faith as the 1st Defendant knew the 19 applicants were independent persons who think for themselves and would not blindly support the 1st Defendant. In his testimony the 1st Defendant said the Management Committee agreed for the suspension because the 4th Defendant was going through a lot of turmoil as it was facing threats and demonstrations because of issues arising out of the proposed development. The suspension was intended to enable the Management Committee an interrupted platform to focus on matters. On being queried what the threat has got to do with the 19 applicants (including 4 prominent women and one whom the 1st Defendant knew as his patient of 40 years) the 1st Defendant testified that he has nothing against the applicants but because of the threat, membership was temporarily suspended as the Management Committee could not make any exception for anybody by admitting one but rejecting another (see Notes of Proceedings Day 2 Q & A 447 – 481).

[139] As to the suggestion that the threat was actually to his future as chairman of the 4th Defendant, the 1st Defendant insisted the threat is to the institution and the threat were real as he received phone calls threatening him and that he had lodged police report as there were hooligans trying to break the door and that the police had to come in for the AGM (see Notes of Proceedings Day 2 Q & A 470).

[140] The 1st Defendant admitted that the Management Committee did not reply to the 19 applications for membership as during that period members of the Management Committee who are voluntary workers were not able to go to the Ashrama as they are threatened and followed by employed thugs, coupled with the fact that the 4th Defendant is short staffed (see Notes of Proceedings Day 2 page 98 – 99 Q & A 515).

[141] Although the Rules and Regulations of the 4th Defendant does not expressly provide for powers to suspend, I am of the view by implication, the Management Committee is vested with such power. I find support from rule 7 which states application for membership shall be considered by the Management Committee and any decision made thereto shall be final. Such power is necessary and incidental to the powers of the Management Committee to struck off, reinstate (rule 10 (b)) and expel (rule 13 (c)) members in order to enable the Management Committee to duly carry out the affairs of the 4th Defendant. In any event, as pointed out by learned counsel for the Defendants, pursuant to rule 64, the Management Committee has the power to decide on any question or matter arising on any point that is not provided for by the Rules and Regulations and their decision on all such points shall be binding on all members until and unless reversed at a General Meeting.

[142] Taking into account the factual circumstances at that point in time, it is my finding that the reason for the suspension of membership is reasonable and acceptable. The 1st Defendant's testimony that the 4th Defendant was under threat and that police had to intervened, that the 1st Defendant was threatened and that he had lodged a police report was not challenged. I find the 1st Defendant's explanation that the members were not able to go to the Ashrama Building is supported by the fact that the Management Committee's meeting around that time, on 4 November 2014, was held at the 1st Defendant's house. Thus the threat to the 1st Defendant and other members of the Management Committee was real.

[143] In this respect it is pertinent to again note, that the Plaintiff who was present at the 95th AGM where members were informed that membership was frozen, did not voice his objection or question the decision of the Management Committee to suspend or freeze membership temporarily.

Governance issues

[144] In what appears to be a personal attack on the 1st Defendant, the Plaintiff takes exception to the 1st Defendant who has been in the Management Committee for 30 years. The Plaintiff also claim that the Management Committee is under the dominance and control of the 1st Defendant. The following instances is said to prove the 1st Defendant's control and dominance –

(a) at the Management Committee held on 13 August 2012, resolution was passed for the 4th Defendant to open a third banking account and that cheques must be signed by the 1st Defendant being the sole signatory in Group A and 2 other signatories from Group B. Thus the 1st Defendant is in a position to veto all cheques (see Notes of Proceedings Day 3 page 65 Q & A 849);

(b) the Plaintiff could not find any decision made by the Management Committee which is against the wishes of the 1st Defendant. The 1st Defendant was even asked to identified such a decision to which the 1st Defendant said there were occasions where he disagreed but eventually agreed with the Management Committee (see Notes of Proceedings Day 3 page 65 Q & A 852) but it was not in the minutes as the minutes of the Management Committee is not detailed;

(c) of the Ashrama Schools, the 1st Defendant is chairman of 3 School Board and a member of 1 School Board.

[145] I do not see how the above situation is in disregard or has unfairly prejudice the Plaintiff's interest as a member. As the 1st Defendant said, the determination of the signatories in both Group A and B was made by the Management Committee collectively. It is

indeed possible for the 1st Defendant, being the sole signatory in Group A to veto issuance of cheque of the 4th Defendant. However this is hypothetical and merely speculative, especially so where there is no evidence that the decision to made the 1st Defendant as the sole signatory was made *mala fide* or that there has been instances where the 1st Defendant deliberately and / or unreasonably refused to sign cheques of the 4th Defendant.

[146] The issue of members of the Management Committee has not acted against the 1st Defendant's wishes is a non-issue. The Plaintiff pointed out there is nothing in the minutes which shows instances where decision made by members of Management Committee were against the wishes of the 1st Defendant. I do not see any relevance and significance in this. There is no such indication in the minutes does not mean the 1st Defendant impose his wishes on the members. At the same time it is pertinent to note there is nothing in the minutes to indicate that the decision of the Management Committee was in fact the unilateral decision of the 1st Defendant. It is a wild shot in the dark and Plaintiff is merely clutching at straws to show the 1st Defendant is an authoritarian when in fact it is a collective decision of the Management Committee.

[147] With regards to the 1st Defendant as chairman and member of the respective School Board, besides merely stating what is obvious (that the 1st Defendant is chairman and member of the respective School Boards) the Plaintiff failed to demonstrate the purported control and dominance of the 1st Defendant over the Management Committee and the Ashrama Schools. Assuming it is proven, the Plaintiff failed to prove how or in what manner the purported control and dominance disregard the Plaintiff's interest or prejudicial to him. I find the Plaintiff's allegation untenable especially so when documentary evidence in relation to the financial and infrastructure requirements of the Ashrama Schools indicate clearly that the said

schools were well taken care of and the educational, cultural, spiritual and youth development of the school children were adequately addressed. There were no evidence of complaints against the management and development of the Ashrama Schools by the Plaintiff or any other member of the 4th Defendant.

[148] With regards to the 1st Defendant's chairmanship, the documentary evidence does not indicate that the 1st Defendant was ever challenged. The fact that the 1st Defendant was voted again as chairman at the 96th AGM held on 18 January 2017 which was well after the filing of this oppressive action in March 2016 and after all the allegations, protest, criticism against the Defendants, particularly the 1st Defendant undermine the Plaintiff's complaint and objection of the 1st Defendant's chairmanship.

[149] It must be noted that minutes of the said AGM (see Bundle D 2 Tab 19 item 6) recorded that out of the 39 members who were present, 34 members voted for the 1st Defendant and 2 members, the Plaintiff and Mr. Kanesalingam, abstained from voting. It is also pertinent to note that Mr. Perampalam who was amongst the 3 senior members who complained against the Defendants had chose to vote for the 1st Defendant as well. The list of members in attendance can be found at Bundle D 2, Tab 20. The fact that Mr Perampalan voted for the 1st Defendant, speak volumes about the Plaintiff's allegations that the members who voted for the 1st Defendant were those who were loyal to the 1st Defendant and / or his factions.

[150] In his affidavit in support of the originating summons the Plaintiff claims following the January 2014 AGM, there has not been any AGM held for 2 years (see Bundle A 1, Tab 1, paragraph 53) and as such there has been no retirement of the existing Management Committee members from holding office. Thus the current

Management Committee was unlawfully constituted under Rules 26 of the 4th Defendant's Rules and Regulations.

[151] Rule 26 of the Rules and Regulations provides as follows –

> *(a) Only members of the Ashrama are eligible to be members of the Management Committee. At every annual general meeting one- number nearest one-fifth of the members of the Committee for time being or the number nearest one-fifth shall retire from office. A retiring member of the Committee shall be eligible for re- election at the annual general meeting.*
>
> *(b) The members to retire every year shall be those who have been longest in the office since their last election, but as between persons who become members of the Committee on the same day, those to retire (unless they otherwise agree amongst themselves) be determined by lot.*

Article 7 of the 4th Defendant's Memorandum of Association states as follows –

> *"No person shall be appointed as a Member of the Committee of the Association unless his appointment has been approved by the Minister."*

[152] The 94th AGM was held on 29 January 2014 for purpose of presenting the Management Report and the audited financial statement for the year ended 31 March 2013. Based on the minutes of the 94th AGM (see Bundle D 3 Tab 23 pages 385 item 4 and 5) Vignesh Naidu and Sugumaran a / l Vairavapillai retired by rotation and were re-elected, which satisfied the requirement under Clause 26 (a) of the Memorandum of Association which requires one-number nearest to one-fifth (that is, 2 out of the 12 members on the Management

Committee as testified by the 1st Defendant) shall retire from office and a retiring member of the Committee shall be eligible for re-election. Subsequently at the 95th AGM was held in December 2015, Mr Sri Skanda Rajah and Mr Kathirgamananthan a / l Karthigesu retired by rotation and was re- elected (see Bundle C 2, Tab 22, page item 4 and 5).

[153] It was explained that Article 7 which requires appointment of members of the Management Committee to be approved by the Minister was amended on 22 July 2011. The CCM had not requested for the 4th Defendant to seek approval in respect of members who were appointed prior to the amendment. It was further explained when Mr Sugumaran a / l Vairavapillai was elected as a member, the relevant documents which were submitted to CCM including seeking approval of the Minister was rejected by CCM as at that material time (13 May 2011) the 4th Defendant's Memorandum has yet to be amended.

[154] It is noted no documents were produced by the Defendants to support the above explanation. At the same time it is also noted that the explanation by the Defendants were not challenged by the Plaintiff. As such there is no adequate evidence that there has been no retirement of the members of the Management Committee in violation of Rule 26 of the Rules and Regulations.

[155] In his affidavit in support of the originating summons the Plaintiff raise the issue of the failure of the Management Committee to hold the 94th AGM of the 4th Defendant within the prescribed period. Besides that it was alleged that no AGM was held for the year 2014 and 2015 until the Plaintiff raised the issue in the Judicial Review Suit No: R2-25-269- 10/2015 (Judicial Review Suit) filed by the Management Committee on 13 October 2015. The AGM for the year 2015 was only held on 30 December 2015.

[156] Rule 16 of the Rules and Regulations of the 4th Defendant, provides that AGM shall be held within 6 months of completion of the Ashrama financial year ending 31st March to receive the report of the Management Committee and other affairs of the 4th Defendant.

[157] The AGM for the year 2013 (the 94th AGM) was convened on 29 January 2014 which was beyond the time prescribed in the said Rule 16. Be that as it may, the 94th AGM was held after the 4th Defendant had obtained an extension of time from the CCM to hold its 2013 AGM until 31 January 2014 (see Bundle C 2 Tab 24 page 436). The extension of time was granted pursuant to section 143 (2) of the CA 1965 which empowers the CCM to grant extension of time for any special reason it thinks fit. In its application for extension of time, the reason stated for seeking extension of time was that the 1st Defendant had to undergo surgery overseas immediately and that he needs a few months to recuperate (see Bundle C 2 Tab 24 page 438). Since the regulatory authority had granted an extension of time, the 94th AGM was lawfully held and therefore the issue of resolutions or accounts passed at the said AGM is void does not arise. It appears the regulatory accepted the reasons provided by the 1st Defendant when it allowed the extension of time. I do not see why this court should view otherwise. Moreover the Plaintiff did not challenged the reasons for the delay.

[158] For the year 2015, the 4th Management Committee was unable to convene its AGM within the prescribed time. Defendant then applied for extension of time from the CCM to hold its AGM by 31 December 2015. In its application, 4th Defendant stated the reason for the delay convening the AGM was due to damage to the administrative and accounting documents caused by rain water leakage from the old roof of the Ashrama and that as the 4th Defendant is a charitable organisation the Management Committee needed to raise funds to repair the roof and hire additional staff to prepare the damaged

documents such as requesting statements from banks, invoices and receipts. CCM granted an extension until 31 December 2015 and the AGM was accordingly held on 30th December 2015 being the 95th AGM of the 4th Defendant. In his affidavit, the 1st Defendant cited 2 additional grounds, which to my mind is not improbable considering the issues faced by the 4th Defendant in 2014 and 2015 –

(a) the Management Committee was occupied with the issues pertaining to the heritage status of the Ashrama Land and the "public outcry" in respect of the same;

(b) the Management Committee had to deal with the new building constructions for the schools as a result of the RM6 million grant from the Government.

[159] It is not disputed that in so far as the 4th Defendant's AGM for year 2014 and presentation of its accounts is concerned, although the same reasons were given for extension of time for year 2015, there was no extension of time given by CCM. In this respect the Management Committee appears to have failed to discharged its statutory duty s. 165 but a one time failure should not, considering the factual circumstances, be considered as oppressive. In *Re A Company exp Shooter* [1990] BCLC 384 (discussed below) it was held that breach of statutory duty such as failure to file accounts and to prepare and file annual returns is a matter of far less seriousness and although it could be prejudicial to members and unfairly prejudicial to members it is not conduct of a considerable weight of gravity. The Plaintiff in the instant case however failed to demonstrate how the failure to conduct the said AGM is unfairly prejudicial to him. In any event the Reports of the Management Committee and the Accounts of the 4th Defendant for the year 2014 was presented and was unanimously adopted at the 95th AGM held on 30 Dec 2015 which was attended by the Plaintiff who did not raise any issue in respect of the

delay to hold the said AGM (see Minutes of the 95th AGM, Bundle C 2 Tab 22 and Notes of Proceedings Day 1 pages 36 – 37 Q & A 130 – 134).

[160] With regards to the Plaintiff's allegation that the 95th AGM was only convened after he raised it in the Judicial Review Suit, I find no merit in such claim. The Plaintiff filed his application for leave to intervene in the said suit on 24 November 2015 (see Bundle B 2, Tab 18, page 411). The Management Committee's request for extension of time (to hold the 95th AGM) was initially made under the CA 1965 via Form 51 A dated 24 August 2015 (see Bundle C 2, Tab 25, page 441 (d)). The initial request was rejected by CCM (see Bundle C 2, Tab 25, page 441(a)). Subsequently the Management Committee submitted a new Form 15 A dated 6 November 2015 seeking for extension of time (see Bundle C 2, Tab 25, page 441) which was approved by CCM on 24 November 2015 (see Bundle C 2, Tab 25, page 439). It is interesting to note that in both the applications for extension (as stated in both Form 15 A) the proposed date for the 95th AGM was 31 December 2015 which is indeed after the Plaintiff had intervened in the Judicial Review Suit. However the chronology shows that, way before the Plaintiff intervened in the Judicial Review Suit, the Management Committee had already taken steps towards preparing for the 4th Defendant's AGM albeit outside the prescribed period. Therefore the Plaintiff's claim that the 95th AGM was prompted by the Plaintiff's action in the Judicial Review Suit is misconceived.

[161] As stated above the Plaintiff in his affidavit in support of the originating summons the Plaintiff claim following the January 2014 AGM, there has not been any AGM held for 2 years (see Bundle A 1 Tab 1 paragraph 53). However in the Plaintiff's submission it was argued that no AGM were held for the year 1998 – 2002, 2007, 2009, 2010. The Defendant objected to this as it was are not pleaded in the Plaintiff's affidavit. It is to be noted that the transactions raised by

the Plaintiff took place dating back to 1998 and the Plaintiff relied on the documents without having personal knowledge of what really transpired. As such I am of the view no considerable weight could be attached to the complaints made by the Plaintiff in relation thereto. Moreover for events and / or matters where Plaintiff merely relies on document without having personal knowledge due to the fact that he was not involved in the said events and / or matters, it is doubtful that the said events can possibly be unfairly prejudicial to the Plaintiff as a member.

[162] The Plaintiff contends the repeated failures by the 4th Defendant to hold AGM within the time prescribed amount to oppressive conduct. The Plaintiff relied on the case *Re a company ex parte Shooter* where it was held that repeated failure to hold annual general meetings and lay accounts before the members was oppressive.

[163] Based on the facts of the case in *Re a company ex parte Shooter*, the court found the failure by the controlling shareholder who was also the chairman and secretary of a football club company who ran the company without regards to formalities (where annual general meetings were not held year over year, no *de jure* directors, annual accounts were not prepared and tabled therefore depriving members of their right to consider and to raise questions on the accounts) amount to conduct unfairly prejudicial to the interest of all members equally since all the members are deprived of any remedy. Nevertheless it was held conduct unfairly prejudicial to all members equally is not conduct unfairly prejudicial to the interest of some part of the members. The relevant judgment of the court is reproduced below –

> *The result is that there are plainly serious irregularities which, in my judgment, do amount to conduct unfairly prejudicial to the interests of members. One difficulty is that* ***the conduct unfortunately affects all members equally since they are all***

> ***deprived of any remedy***, *and my own decision in the petition cited as Re a company (No. 00370 of 1987), ex p Glossop [1988] BCLC 570, [1988] 1 WLR 1068* ***holds that conduct which affects all members equally is not conduct prejudicial to the interests of some part of the members because one cannot, I thought, read the phrase in the statute 'some part of the members' as being 'some part, including all of the members'*** *(see Re a company (No. 00370 of 1987), ex p Glossop [1988] BCLC 570 at 575, [1988] 1 WLR 1068 at 1074. It is not good English and I do not believe at the time that Parliament so intended.*
>
> (emphasis added)

[164] However the court held the holding of the extraordinary meeting done without sufficient notice resulting in the ineffective of creation of new shares amount to unfairly prejudicial particularly to the personal interest of the petitioner. This is because the petitioner had paid substantial sum for shares which did not exist and he was further led to pay money to others on the faith of the company's representation made by the issue of share certificates to them for shares which did not exist.

[165] Under section 181(1) of the CA 1965, the Plaintiff is required to prove that –

(a) the affairs of the company or the powers of the directors are being exercised in an oppressive to one or more of the members including himself; or

(b) some act of the company or resolution passed or is proposed unfairly discriminates or otherwise prejudicial to one or more of the members including himself.

[166] In the instant case the evidence led did not demonstrate how, by the delay of the Management Committee in holding the AGM, the Plaintiff's right (financially or otherwise) as a member has been unfairly prejudiced. This is particularly so when the AGMs were eventually convened (even though beyond the prescribed time, it was with the CCM's approval) and the Financial Statement for 2014 and 2015 were circulated, laid and tabled for members consideration and ultimately adopted. Whereas in *Re a company ex parte Shooter* the conduct of the extraordinary ordinary general meeting was unfairly prejudicial to the petitioner as he was being misled to believe there were valid shares (created via resolution passed at the extraordinary general meeting) in the football club company for which he had subscribed and purchased from the existing shareholders.

[167] In the case *Khoo Peng Lai v. Tan Ah Hin & Ors* [2013] 10 CLJ 347, the court held the respondent's failure to call for annual general meetings and filing of audited accounts of the eighth respondent company (which is an investment holding company where the petitioner was held to be the registered holder of 20% of the paid up capital of the eighth respondent company) for five years to be oppressive as there were no reasonable explanation given. Contrary to the instant case, the AGM of the 4th Defendant for the year 2013 and 2015 was eventually held although beyond the prescribed time, as approved by the regulatory authority based on the reasons submitted by the Management Committee.

[168] The 4th Defendant issued a Notice of the 96th AGM to be held on 30 December 2015 together with the annual audited accounts for the financial years ending 31st March 2014 and 31st March 2015. Via letter dated 15 December 2015 (see Bundle B 2, Tab 20) the Plaintiff wrote to the 4th Defendant raising queries, among others, on the following –

(a) issues pertaining to F3 Capital Sdn Bhd and the tenders received by the 4th Defendant pertaining to the proposed development;

(b) minutes and resolutions of Management Committee pertaining to the proposed development; and

(c) issues relating to the account of the 4th Defendant.

The 4th Defendant responded via letter dated 27 December 2015, informing the queries will be dealt with at the incoming 95th AGM on 30 December 2015.

[169] According to minutes of the 95th AGM (see Bundle Bundle C 2 Tab 22, page 425), the 3rd Defendant being the treasurer of the 4th Defendant, answered the questions raised in the Plaintiff's letter dated 15 December 2015. It was stated in the minutes that the Plaintiff's letter was attached as Annexure A and the Management Committee's reply as Annexure B. However both the said annexures are not to be found in Tab 22.

[170] In his affidavit the Plaintiff referred to the Presentation Slide of 2014 and 2015 Financial Statements which were used during the 95th AGM. The said presentation slide contain response of the Management Committee to the Plaintiff's queries on the Financial Statement (see Bundle C 3 Tab 34 page 669 – 670) in particular queries at paragraph 3 (g) to 3 (m) of his letter dated 15 December 2015. Among the response was to the difference in value on "Property, Plant and Equipment" and that reflected in the corresponding Notes to the Financial Statement 2015 specifically Note 3 where it was clarified that the amount stated at page 6 of the Financial Statement under item 3 "Property, Plant and Equipment net book value" as RM 5,025,562.00 was wrong and the correct figure is RM 3,002,984.00 which actually appears at page 9 of the said

statement under the heading Statement Financial Position as at 31 March 2015.

[171] It was recorded in the minutes of the 95th AGM that the Plaintiff was satisfied with the answer given and thanked the 1st Defendant. However the Plaintiff disputed the accuracy of the said minutes recorded and alleges that the matters that transpired at the said AGM were not accurately captured. However there is nothing to show that the Plaintiff has notified the Management Committee of the purported inaccuracy, in particular to expressly deny that he was satisfied with the explanation given at the 95th AGM, which the Plaintiff ought to have done so if he strongly feels the various issues were not addressed. This are internal matters which ought to be sorted out within the 4th Defendant. However the Plaintiff raised it in his affidavit to intervene in the Judicial Review Suit.

[172] In this respect it is to be noted that the senior auditor at Kumpulan Naga Chartered Accountants which audited the accounts of the 4th Defendant averred via affidavit that the issue in respect of the value of the Property, Plant and Equipment raised by the Plaintiff was due to clerical / typographical error and / or casting error and that the amendments made to rectify it do not have an impact on the overall financial statement. According to him, the amendments to the disclosure and the correction made was highlighted by their firm representative at the 95th AGM of the 4th Defendant. He further confirmed the Statement of Accounts for the 2014 and 2015 are a true and accurate reflection of the financial position of the 4th Defendant and that the said statements are in order for its intended use and fit for receipt by all members of the 4th Defendant. The Financial Statements for 2014 and 2015 was unanimously resolved to be adopted at the 95th AGM. Nothing in the minutes of the 95th AGM to show that the Plaintiff objected to the Statement of Accounts for the year 2014 and 2015 (which was laid and deliberated by the floor) from being

adopted. As such there is no evidence of impropriety or mismanagement of funds which may be considered as oppressing or disregarding the Plaintiff's interest as a member of the 4th Defendant.

[173] The Plaintiff complained that the RM 6 million grant received from the Government although accounted for in the Audited Accounts for the year ended 31st March 2013, there was no account given as to how the RM 6 million was spent. With the grant of RM 6 million the finances of the 4th Defendant was substantially enhanced. The RM 6 million grant was not disclosed at the 93rd AGM held on 29 December 2012 which was after the 4th Defendant was promised the said grant and by then RM 3 million had been received. Instead the 1st Defendant had voiced concern that funds were not enough to sustain the schools. The Plaintiff claim this is a deliberate act on the part of the 1st Defendant so as to show the 4th Defendant was in desperate need of fund.

[174] The minutes of the 93rd AGM (see Bundle D 3 Tab 2 pages 361 – 366) shows the RM 6 million was in fact not reported at the said AGM. However I am of the view to say that it was intended to misled members as to the 4th Defendant's financial need is misconceived. It is evidently clear from the letter of Kementerian Pelajaran Malaysia dated 8 August 2012 and 18 January 2013 (see Bundle C 3, Tab 28) the grant RM 6 million was for the purpose of construction additional building for the Sekolah Jenis Kebangsaan (T) Vivekananda, Brickfields, Sekolah Jenis Kebangsaan (T) Vivekananda, Petaling Jaya and Sekolah Menengah Kebangsaan Vivekananda, Brickfields. Thus although the 4th Defendant's account benefitted by a large infusion of RM 6 million it is not for the 4th Defendant to utilised. The 1st Defendant's testimony that more fund is needed for the tuition, food, transport and books for the school children is not challenged by the Plaintiff (see Notes of Proceedings Day 3, page 66 – 67, Q & A 858).

[175] The 1st Defendant testified that the said grant was received by the 4th Defendant in 2 tranches of RM 3 million each, that is, in August 2012 and January 2013. Accordingly the said grant was captured in the 4th Defendant's Financial Statement for the year ending 31st March 2013 (see Bundle C 3, Tab 26), the RM 6 million was stated in the Report of The Management Committee where it was stated that the RM 6 million grant has been credited to "Schools Building Grant from Government" account. The RM 6 million grant was captured in the Balance Sheet and Cash Flow Statement (see Bundle C 3, Tab 26, pages 467 and 469).

[176] The Financial Statements for the year ending 31st March 2013 was tabled at the 4th Defendant's 94th AGM held on 29 January 2014 and was adopted by the floor. Therefore there is no issue of the RM 6 million was not accounted for. There is no evidence of *mala fide* and mismanagement or impropriety by members of the Management Committee in their handling of the RM 6 million grant.

Conclusion

[177] Having considered the evidence in totality it is my considered opinion that the conduct of the Management Committee view in the context and background of what had transpired cannot be construed as being oppressive or disregard of his interests as a member of the 4th Defendant as to justify this court to grant the discretionary remedy as in the extensive relief sought in the originating summons.

[178] The proposal to develop the Ashrama Land by the Management Committee was done in good faith for the interest and benefit of the Ashrama Schools which is of paramount importance to the 4th Defendant in achieving its objectives. The Management Committee had obtained the unanimous approval to proceed with the development at the 94th AGM in 2014. Since the Ashrama Land is designated as a

heritage site such proposal is no longer feasible and this put an end to the Plaintiff's complaint about the Management Committee's proposal to develop the Ashrama Land which is held in trust by the Management Committee for the benefit of members of the 4th Defendant.

[179] The delays in holding the AGMs was substantiated as CCM had given approval to conduct the AGMs beyond the period prescribed. In relation to membership issues, this are internal matters of the 4th Defendant which court ought not to interfere. The decision to admit or suspend members is provided for in the Rules and Regulations of the 4th Defendant. There may be irregularities, mistakes and omission on the part of the Management Committee in managing the applications for membership but there is no evidence of *mala fide* in the admission of the members in 2004, 2014 and suspension in 2014 as there is no evidence to support the Plaintiff's allegations of faction and loyalist of the 1st Defendant. The admission and suspension of membership was not oppressive or unfairly prejudicial to the Plaintiff especially so when it relate to events that happened years ago which does not concern the Plaintiff who show little interest in the 4th Defendant back then.

[180] Based on the aforesaid the Plaintiff's originating summons was accordingly dismissed.

(KHADIJAH IDRIS)
JUDICIAL COMMISSIONER
HIGH COURT
(COMMERCIAL DIVISION)

Dated: 31 DECEMBER 2018

COUNSEL:

For the plaintiff/appellant - Tommy Thomas, Sitpah Selvaratnam & Mervyn Lai; M/s Tommy Thomas

For the 1st to 4th defendants - Robert Lazar, David Gurupatham & Aarthi Jeyarajah; M/s David Gurupatham & Koay

Case(s) referred to:

Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu Kee Corp (M) Bhd & anor [2010] 6 CLJ 721

O'Neill v. Philips [1999] 2 ALL ER 961

Ebrahimi v. Westbourne Galleries Ltd [1972] 2 All ER 492, [1973] AC 360

Mascon Rinota Sdn Bhd & Ors v. Rinota Construction Sdn Bhd - [2016] 4 MLJ 400

Yap Yong Huat & Anor v. Yap Yoke Beng [2015] 1 LNS 1184

See Hua Realty v. Se Hua News Holding Sdn Bhd & Ors [2007] 7 MLJ 525

Re Senson Auto Supplies Sdn Bhd [1988] 1 MLJ 326

Leo Leslie Armstrong v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur [2015] 1 MLJ

Vujnovich and another v. Vujnovich [1990] BCLC 227

Re A Company exp Shooter [1990] BCLC 384

Khoo Peng Lai v. Tan Ah Hin & Ors [2013] 10 CLJ 347

Legislation referred to:

Companies Act 1965, ss. 143 (2), 165, 181 (1) (a)

National Heritage Act 2005, ss. 41, 114