Pelaburan Mara Berhad v Johany bin Jaafar [2019] MLJU 1588

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

NOORIN BINTI BADARUDDIN, J

SUIT NO: WA-22NCC-220-06/2016

10 February 2019

Shahir Ab Razak with (Wan Zafran), (Afiq Akmal), (Attiyah Yusoff) and (Abdullah Khubayb) bin Awaluddin (Shahir Khubayb & Co) for the Plaintiff in the main claim and the 1st Defendant in the counterclaim.
Dato' David Gurupatham with (Atan Mustaffa) (Ainul Azam & Co) for the Defendant in the main claim and the Plaintiff in the counterclaim.
Mohd Iskandar Ismail and (Nur Syahirah) binti Mohd Sani (Basharuddin Iskandar) for the 2nd Defendant in the counterclaim.

Noorin binti Badaruddin J:

JUDGMENT

[1]This is an action brought by the Plaintiff, Pelaburan Mara Berhad ("**PMB**") against the Defendant, Johany bin Jaafar ("**Johany**") for breach of contract. PMB is claiming for a judgment sum of RM2,400,000.00 being part payment of the purchase of Johany's shares in a company by the name of Efogen Sdn Bhd ("**Efogen"**) and the agreed liquidated damages.

[2]Johany on the other hand filed a Counterclaim against PMB and the 2nd Defendant in the Counterclaim, PDZ Holdings Bhd ("**PDZ**") claiming inter alia a sum of RM166,508,00.00 being losses suffered by him for the sale of his shares by Amanah International Finance ("**AIF**") to a third party.

Brief Background

[3]On 2.12.2014, PMB and Johany entered into a Shares Sale Agreement ("**SSA**") wherein PMB agreed to purchase and Johany agreed to sell his 6,000,000 ordinary shares in Efogen which in aggregate represents 30% of the shares issued by Efogen for the total price of RM9,000,000.00 subject to the terms and conditions of the SSA.

[4]The SSA contains clauses for Condition Precedent ("**CP**") which must be fulfilled by Johany within a period of sixty (60) days from the date of the SSA or within any other period as may be mutually agreed upon by the parties.

[5]Through a letter dated 24.2.2015, Johany requested for an extension of time of 30 days for the fulfilment of the CP under clause 3.1 of the Agreement. On 25.2.2015, Johany further requested for early payment from PMB. PMB via their letter of 2.3.2015 acceded to Johany's request and agreed to make an early part payment of the purchase price amounting to RM1,500,000.00 only subject to the CP and further conditions stated in the letter of 2.3.2015.

[6]The conditions laid down by PMB in its letter of 2.3.2015 inter alia are as follows:

(a) That within 7 business days from 2.3.2015, Johany is required to execute a shareholders' agreement with the shareholders of Efogen based on the terms and conditions determined and accepted by PMB;

(b) That within 7 days from 2.3.2015, Johany is required to execute an irrevocable and unconditional profit guarantee agreement in favour of PMB based on the terms and conditions determined and accepted by PMB;

(c) That on or before the expiry of the extended period of the CP, Johany is required to perform and complete all of his obligations to satisfy/fulfill the relevant CP under clause 3.1 of the SSA;

(d) That in the event that all the CP are not satisfied in accordance with clause 3.1 before 30.4.2015 for any reason whatsoever, Johany shall forthwith repay the monies of RM1,500,000.00 due to PMB, failing which, such amount shall become due and payable by Johany.

[7]On 27.3.2015, Johany requested for further extension of time of 60 days to fulfil the CP. On 28.4.2015 a further request of extension of time for two (2) months was forwarded by Johany to PMB.

[8]In the end, Johany failed to fulfill the conditions stated in the letter of PMB of 2.3.2015 and all the CP stipulated in the SSA.

[9]On 6.8.2015 and 14.8.2015, PMB issued a demand to Johany for the repayment of the RM1,500,000.00. On 22.9.2015, Notice of Termination and demand for the sum of RM2,400,000.00 (being the sum of RM1,500,000.00 for the part payment of the shares purchase and RM900,000.00 being 10% of the purchase price agreed liquidated damages) was issued by PMB to Johany.

[10]PDZ, a subsidiary to PMB on the other hand had earlier entered into a Shares Sales Agreement with Johany on 14.5.2014 ("**JJ-PDZ agreement"**). PDZ has agreed to purchase Johany's 4,000,000.00 shares in Efogen at the price of RM18,000,000.00. PDZ had made the payment of RM5,000,000.00 being the deposit of the purchase price to the solicitors for Johany as the stakeholder on 21.5.2014.

[11]However, the JJ-PDZ agreement was mutually terminated on 25.9.2014. It was also agreed that the deposit of RM5,000,000.00 held by Messrs. Shamsudduha Ho & Partners as the stakeholder is to be returned to PDZ. Nevertheless, Johany and/or his solicitors being the stakeholder failed to return the said deposit which resulted in PDZ suing Johany and the

solicitors in Suit No 22NCVC-564-10/2015 in the Shah Alam High Court ("**SAHC suit"**). In the SAHC suit, the High Court ordered Messrs. Shamsuddhuha Ho & Partners to return the payment /refund the deposit of RM5,000,000.00 to PDZ pursuant to the JJ-PDZ agreement.

[12]Johany has represented to PMB that he had pledged his shares in Efogen as security to AIF for a facility granted by AIF to him and as such one of the CP in the SSA states that Johany is to obtain AIF's approval or consent for the sale of his shares pledged to AIF.

Johany's Defence/Contentions.

[13]According to Johany, the purchase of the 4,000,000 Efogen shares by PDZ was actually an indirect investment by PMB who has effective control of PDZ. Johany stated that when he and PDZ entered into the JJ- PDZ Agreement, the main shareholder of PDZ is PMB who holds the equity of 29.46% in PDZ. Dato' Ahmad Nazim bin Abdul Rahman (**PW1**) the then Chairman of PDZ was also the Chief Executive Officer of PMB and according to Johany, at all material times any action taken by PDZ with respect to the JJ-PDZ agreement was within PMB's control as he had also dealt with PMB's officers in matters relating to the JJ-PDZ agreement.

[14]It is Johany's contention that before PDZ and him could enter into the JJ-PDZ agreement to sell his shares in Efogen to PDZ, he needed to get the consent of the other Efogen shareholder, one Tan Sri Abdul Rashid bin Abdul Manaf ("**Tan Sri Rashid**"). Tan Sri Rashid's consent is required pursuant to another Sale and Purchase Agreement dated 1.4.2012 entered into between Johany and Tan Sri Rashid. According to the Sale and Purchase Agreement of 1.4.2012, any shareholders of Efogen who intends to sell his shares must make an offer to the other shareholders and if the other shareholders do not intend to purchase the offered shares, the offering shareholder shall obtain the consent to sell the shares from the other shareholders.

[15]According to Johany, he had offered his shares to Tan Sri Rashid but was refused by Tan Sri Rashid. When Tan Sri Rashid's consent was requested to sell the shares to PDZ, Tan Sri Rashid was said to have imposed condition that he would only give Johany his consent if Johany bought his shares at the price of RM21,000,000.00. Tan Sri Rashid was said to have requested for RM5,000,000.00 to be paid to him in advance as part payment of the sale price of his shares.

[16]Johany stated that he had informed PDZ and PMB of the conditions imposed by Tan Sri Rashid and that he was unable to make the part payment imposed by Tan Sri Rashid. Johany stated that he then proposed to PDZ and PMB that the amount of RM5,000,000.00 is to be paid by PDZ as a deposit to the stakeholder and this amount is to be released to Tan Sri Rashid for the purpose of the part payment as requested by the latter. According to Johany PDZ and PMB agreed to the proposal to ensure that the sale shares pursuant to the JJ-PDZ agreement could be executed. PDZ then deposited the RM5,000,000.00 to the stakeholder, Messrs. Shamsuddhuha Ho & Partners.

[17]On 15.5.2014 Tan Sri Rashid and Johany entered into a sale and purchase agreement whereby Johany agreed to purchase the shares of Tan Sri Rashid for RM21,000,000.00. To finance the purchase, Johany obtained a facility of RM16,000,000.00 ("**the AIF facility"**) from AIF and a Facility Agreement dated 1.7.2014 was entered into between Johany and AIF wherein Johany's shares in Efogen was pledged as security to AIF for the AIF facility. As stated earlier, Clause 3.1 (i) of the SSA then provides that it shall be a CP that the approval or consent of the AIF in accordance with terms of any banking facilities or funding granted to Efogen or Johany, should be obtained.

[18]PMB then made the payment for the deposit amount on 21.5.2014 and pursuant to a letter of 19.5.2014, Johany instructed the stakeholder, Messrs. Shamshuddhuha Ho & Partners to release the deposit amount to Tan Sri Rashid.

[19]Johany contends that PMB is all aware that due to the JJ-PDZ agreement he had entered into the facility agreement of RM16,000,000.00 to pay Tan Sri Rashid and pledged his shares to AIF as collateral. Johany asserts that he is unable to obtain the consent of AIF because PMB had reduced the original purchase price from RM18,000,000.00 to RM9,000,000.00.

[20]Johany highlighted that PMB and PDZ refused to accept the valuation report conducted by Grant Thornton on his shares. According to Johany, that was the reason why the JJ-PDZ agreement was terminated. Johany asserts that the valuation report was obtained in compliance with Clause 3.1 (vi) of the JJ-PDZ Agreement and that after he had complied with the conditions of the JJ-PDZ Agreement and Messrs Shamsuddhuha Ho & Partners released the deposit sum to Tan Sri Rashid, PDZ and PMB raised trivial issue relating to the Grant Thornton's Valuation Report dated 19.6.2014 ("**GTR**").

[21]Grant Thornton was the financial consultant appointed to value the shares of Efogen. Johany stated that according to PDZ and PMB, the report did not conform to the format and content as set forth by the JJ-PDZ agreement although Grant Thornton in the report valued Efogen shares at an enterprise value of RM251,136,000.00 which exceeded the value of RM90 million required by PDZ as set out in the JJ-PDZ agreement. According the Johany, in rejecting the GTR issued which was a one-paged report despite the undisputed valuation of RM251,136,000.00 made by Grant Thornton, in a meeting between him, Grant Thornton, PDZ and PMB, PDZ and PMB requested for Grant Thornton to extend the report to three to four pages. Grant Thornton requested an additional fee of RM30,000.00 to do so. According to Johany, PDZ and PMB refused to pay the fee. As such, PMB and PDZ claimed that he has yet to comply with clause 3.1 (vi) of the JJ-PDZ agreement.

[22]It is Johany's contention that PMB and PDZ are fully aware that his shares in Efogen was pledged as security to AIF for the AIF facility and there was a risk that the consent of AIF might not be obtained that would result to the CP in the SSA could not be fulfilled.

[23]Johany states that PMB is estopped from claiming the refund or repayment of the sum demanded upon the termination of the SSA as it is PMB's action that have caused him to enter into the SSA. Johany states that the SSA is not viable and had further resulted in him not being able to fulfil his obligations pursuant to the SSA. Johany explained that he did not make any payment to PMB as demanded based on the fact that the SSA between him and PMB is invalid and unlawful as he was forced to enter into the SSA. Johany contends that PMB and PDZ have unduly induced him to enter into the SSA by promising him that PMB would invest directly in Efogen rather than indirectly through PDZ. It is contended that the termination was particularly due to the refusal of PMB and PDZ in accepting the GTR. According to Johany, the fact that the valuation was conducted by Grant Thornton, he has therefore complied with clause 3.1.

(vi) of the JJ-PDZ agreement.

[24]Johany further contends that although the repayment to AIF was his obligation, PMB's actions together with PDZ had caused him to be unable to pay back the sum owed and in consequence, he suffered severe loss when his beneficial right to the Efogen shares was sold to a third party. As a result, he had lost all of his rights over the Efogen shares in which the equity

value of the shares is said to be in the sum of RM166,508,000.00 which is the amount now claimed by Johany in the Counterclaim.

[25]Johany further added that pursuant to paragraph 4(f) of the PMB's letter of 2.3.2015, in the event that the SSA is terminated and the amount of RM1,500,000.00 becomes due and payable, he is to procure Efogen to sell its 3 units of office building at Megan Avenue One, Jalan Tun Razak in Kuala Lumpur at the price equivalent to 80% of the present market value by entering into a sale and purchase agreement with PMB on terms and conditions determined and accepted by PMB. However, he was not given any notice for him to procure the sale. It is submitted that Johany has consented and never at any point of time in writing or orally refuse to transfer the 3 units of the office building. Therefore Johany argues that there is no issue of failure on his part as there is nothing to procure.

PMB's Contentions

[26]Summarily, PMB's contentions are as follows:

i. Johany has failed to fulfill the terms of the SSA and as such there is a clear breach of the CP in the SSA on the part of Johany and Johany himself has admitted to the breach;

ii. Johany has in fact admitted to the viability of the SSA when the SSA was entered into between him and PMB;

iii. It is Johany's obligation to procure the sales of the 3 buildings of Efogen and not PMB;

iv. The defence filed by Johany is res judicata as it was raised in the SAHC suit;

v. Johany's defence is an afterthought;

vi. The Counterclaim should be dismissed based on the principle of res judicata

vii. PMB is not a party to the agreement between AIF and Johany; and

viii. Johany has failed to prove any losses

PDZ's Contentions

[27]Summarily, PDZ's contentions are as follows:

i. The issue revolving the JJ-PDZ's agreement has been ventilated in the SAHC suit and as such Johany is estopped from raising the same defence as it is res judicata;

ii. The JJ-PDZ agreement was mutually terminated;

iii. The GTR on the valuation is not an issue to be raised as the JJ-PDZ agreement was terminated by mutual agreement between PDZ and Johany

Evaluation and Findings

[28]It is undisputed that the sale of Johany's shares in Efogen to PMB has been formed and formulated in the SSA dated 2.12.2014. Johany in his evidence had agreed that he is bound by the terms and conditions of the SSA. It is further undisputed that Johany had failed to fulfil the CP in the SSA as well as the conditions stipulated in the PMB's letter of 2.3.2015. It is further uncontested that prior to the termination of the SSA, Johany had been asking for several extensions of time for the fulfilment of the CP in the SSA. Johany has then received the notice of demand on 6.8.2015 and 14.8.2015 and Notice of Termination from PMB on 29.9.2015 and did not respond to the said notice issued against him until the present suit was filed on 8.6.2016.

Johany had failed to execute the transfer of the Efogen shares within the time expressly stipulated in the SSA and PMB's letter of 2.3.2015 which had brought about the termination of the SSA.

[29]It is necessary at this point to reproduce Clause 3.1 of the SSA as follows:

> *—Clause 3.1*
>
> *Notwithstanding anything to the contrary herein contained, completion of the sale and purchase of the Sale Shares is conditional upon the following conditions being satisfied within a period of sixty (60) days from the date of this Agreement or within such further period as may be mutually agreed upon by the parties hereto in writing namely:*
>
> i. *the approval or consent of any third party to the sale and purchase of the Sale Shares (if required) in accordance with the terms of any contract or agreement entered into between the Company and such third party or between the Vendor and such third party;*
>
> ii. *the approval or consent of any authorities to the sale and purchase of the Sale Shares (if required) in accordance with the terms or conditions of any license or permits of a material nature granted to the Company by such authorities;*
>
> iii. *the approval or consent of any financier (if required) in accordance with the terms of any banking or financing facilities granted to the Company or the Vendor, in particular AIF;*
>
> iv. *the approval or consent of the other shareholder (if applicable) in, and the board of directors of the Company for the sale of the Sale Shares by the Vendor to the Purchaser, and for the appointment of one person named by the Purchaser to become a director of the Company immediately on the Completion Date;*
>
> v. *the approval or waiver of any regulatory requirement by any other relevant authorities, if required;*
>
> vi. *the valuation report undertaken and issued by Grant Thornton on 20 May 2014 supporting the Company's equity value to be between RM83,300,000.00 to RM116,600,000.00;*
>
> vii. *the written irrevocable pledge of the Vendor and the other shareholder (if applicable) not to issue new shares of the Company beyond the Issued Shares by whatever means without prior approval of the Purchaser being obtained pending the completion of this Agreement;*
>
> viii. *the written undertaking of the Vendor and the other shareholder (if applicable) not to dispose their shares in the Company or any part thereof (save and except for transfer of share(s) pursuant to the earlier mentioned financing arrangement between the Vendor and AIF) howsoever pending the completion of this Agreement without the prior written approval of the Purchaser being obtained;*
>
> ix. *the Purchaser having conducted a legal and due diligence review on the affairs of the Company and its Subsidiaries and being reasonably satisfied with the due diligence findings and the valuation of the Company thereof;*
>
> x. *resolution of any material issues arising from the said due diligence findings to the satisfaction of the Purchaser; and*
>
> xi. *the finalization and execution in escrow of a new shareholders' agreement among the shareholders of the Company in such form and substance acceptable to the Purchaser.*‖

[30]Clauses 3.2 and 3.3 further state as follows:

> *—3.2 The vendor hereby further undertakes to provide all the information necessary for the conduct of the due diligence by the Purchaser and its advisers, and the Purchaser shall use its best endeavours to complete the due diligence as soon as practicable. The Vendor shall fully cooperate with the Purchaser to facilitate a smooth due diligence process.*
>
> *3.3 The Vendor shall apply for or procure all the approvals and/or consents as stipulated in Clause 3.1 of this Agreement (—Approvals‖) unless where the Approval shall relate to the Purchaser. Each party shall within a reasonable time after the date of receipt of the information required to be furnished by the other party hereto to the relevant parties, bodies or authorities (—Approving Parties‖) make the necessary applications to the Approving Parties and each party shall take all*

reasonable steps to ensure that the Approvals of the Approving Parties are obtained with as little delay as possible.‖

[31]In addition, clause 10.5 clearly states that PMB as the purchaser shall be entitled to terminate the SSA in the event of failure or breach on the part of Johany as the vendor to fulfill the terms and conditions stated in the SSA. Clause 10.5 of the SSA is reproduced:

—Clause 10.5

Notwithstanding any provisions contained herein, in the event the Vendor fails or refuses to complete the sale of the Sale Shares in accordance with the terms and conditions stipulated in this Agreement or is in breach of any of the terms and conditions of this Agreement, the Purchaser shall be entitled to terminate this Agreement whereupon a sum equivalent to 10% of Purchase Price shall be paid to the Purchaser as agreed liquidated damages and the Vendor shall forthwith refund or cause to be refunded to the Purchaser free of interest, the Purchase Price and any other monies paid by the Purchaser (if already paid) hereunder and the Stakeholder Documents shall be returned to the Vendor and thereupon this Agreement shall be rendered null and void and the parties hereto shall have no further claim or claims against the other save for antecedent breach.‖

[32]In his submission, Johany's learned counsel contends that in their Statement of Claim, PMB has failed to plead the particulars of the breach of the CP that Johany is said to have committed. According to the learned counsel the breach being the substratum of PMB's claim ought to be pleaded and particularized under O. 18 r.12 of Rules Court 2012 ("**ROC**").

[33]O.18 r.12 ROC states:

—Particulars of pleading (O. 18, r. 12)

12. (1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words—

(a) *particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and*

(b) *where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies*‖

[34]In their Statement of Claim, PMB has pleaded the breach on the part of Johany inter alia in the following fashion:

—3. KEMUNGKIRAN DEFENDAN

3.1. Lanjutan kepada perkara di atas dan selaras dengan Surat tersebut, Plaintiff telah membuat bayaran berjumlah RM1,500,000.00 yang merupakan bayaran sebahagian daripada jumlah pembelian Saham tersebut.

3.2. Walaupun Plaintiff telah membuat bayaran selaras dengan Surat tersebut, Plaintiff menegaskan dan akan menegaskan bahawa Defendan telah gagal dan/atau cuai dan/atau enggan mematuhi dan menyempurnakan terma- terma di dalam Surat tersebut dan di dalam Shares Sale Agreement.

3.3. Plaintiff menegaskan dan akan menegaskan bahawa kegagalan Defendan untuk melaksanakan terma-terma di dalam Surat tersebut dan di dalam Shares Sale Agreement adalah satu kemungkiran kontrak oleh Defendan.

3.4. Lanjutan kepada perkara di atas, Plaintiff melalui surat peguamcaranya, Tetuan Shahir Khubayb & Co bertarikh 06.08.2015 dan 14.08.2015 menuntut daripada Defendan antara lainnya supaya jumlah RM1.500,000.00 dipulangkan kepada Plaintiff

3.5.

3.6.

3.7.‖ [Emphasis added]

[35]None of the CP in the SSA has been fulfilled by Johany. In fact, Johany himself admits that he has breached the CP stipulated in the SSA and further conditions in the letter of 2.3.2015. Johany's admission during cross examination is as follows:

—SAR: Ok alright I will say despite the fact that you have given, you have received RM1.5 million ok I put it to you that you have failed to fulfill the condition precedent in the Share Sale Agreement

Johany: Ok if that is the question correct, yes‖

[36]Johany's admission can also be extracted from an affidavit that he filed in response to PMB's summary judgment and striking out applications (Enclosure 20) wherein Johany has stated at paragraph 16 of his affidavit as follows:

—16. Sebagai menjawab perenggan 15 Afidavit Sokongan Plaintif saya menyatakan bahawa surat-surat di dalam Eksibit A-4 Afidavit Sokongan Plaintif adalah berkenaan permintaan saya untuk lanjutan masa untuk

memenuhi Syarat-syarat Terdahulu tersebut dan bukannya pengakuan saya terhadap apa-apa liabliti saya kepada Plaintif yang dinafikan. ***Saya seterusnya mengulangi bahawa saya telah gagal dan/atau cuai dan/atau enggan untuk menyempurnakan dan/atau melaksanakan tanggungjawab saya di bawah Shares Sale Agreement dan Surat tersebut seperti yang didakwa oleh Plaintif***‖ [Emphasis added]

[37]When his statement in enclosure 20 was referred to him during the trial, Johany affirmed:

—SAR: So based on your statement, you have agreed that you have failed to fulfill the obligations of the Shares Sale Agreement and also the letter, isn't it?‖

Johany: Yes ok, in this context, it's correct, yes.‖

[38]On the evidential value of admissions in pleadings, Ramly Ali JC (as his Lordship then was) in *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 stated:

—[20] The foregoing in law amounts to judicial admissions which had been made by the respondent. In this regard, we are in agreement with the decision in the case of Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing [1999] 3 MLJ 402 *(subsequently affirmed by the Court of Appeal in Tan*

Sri Datuk Paduka (Dr) Ting Pek Khiing v Hu Chang Pee (also known as Hii Chang Pee) [2011] 6 MLJ 193; ; [2010] 1 LNS 1269) *as follows:*

(2) The plaintiff is entitled to rely on the defendant's affidavit filed in Suit No 22-18-96 as the basis in the present suit. What was stated by the defendant in his affidavit dated 3 December 1996 was actually an admission by him. Admission in pleadings is judicial admission and can be made the foundation of rights. Admission are admissible against the party making them.

[21] *Further in YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; ; [1997] 4 CLJ 300, *Mahadev Shanker JCA held as follows:*

> *For the record, however, we must state here that it is the opinion of this court that once a party to litigation has admitted a fact in his pleadings he shall not be heard to contend the contrary in the trial or in any appeal therefrom.*‖

[39]It is the finding of this Court that the breach on the part of Johany has been clearly pleaded and admitted. Johany's failure to fulfill the CP constitutes a fundamental breach of the SSA. The provision of s 56 (1) of the Contracts Act 1950 is evident of the effect of failure by Johany to fulfil his obligations which entitled PMB to the remedy of rescission under the SSA. Section 56 (1) of the Contracts Act 1950 states:

> *—When a party to a contract promises to do a certain thing at or before a specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it has not been performed, becomes voidable at the option of the promise if the intention of the parties was that time should be of the essence of the contract.*‖

[40]As highlighted in the earlier paragraphs, Clauses 3.1 and 10.5 of the SSA have clearly stated that the completion of the sale and purchase of the shares is conditional upon the CP being satisfied within a period of 60 days from the date of the SSA or within such period as may be mutually agreed upon by the parties in writing. PMB is entitled to terminate the SSA in the event of Johany's failure to complete the sale in accordance with the terms and conditions stipulated therein. By requesting several extensions to fulfill his obligations via the correspondences between him and PMB, it is clear that Johany is fully aware of his obligations to fulfill the CP under the SSA and the conditions stated in the letter of 2.3.2015.

[41]The Supreme Court in *Koh Siak Poh v Perkayuan Oks Sdn Bhd & Ors* [1989] 3 MLJ 164 had stated that where a written contract is clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it. The duty of the court is confined to the construction of the written documents and extrinsic evidence is not admissible by virtue of sections 91 and 92 of the Evidence Act 1950. The Supreme Court states:

> *—Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it. See also Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229*. The respondents did not challenge the validity of the contract on the ground of fraud or want or failure of consideration. What they sought to do was to attempt to establish that when the demand for payment was made to them the appellant had made some fraudulent misrepresentation. In a situation like this the duty of the court is confined to the construction of the written documents and extrinsic evidence is not admissible by virtue of* ss 91 and 92 of the Evidence Act.‖

[42]Johany invites the Court to appreciate and evaluate the entire transaction from the time the JJ-PDZ's agreement was formulated. He contends that the SSA which is the subject matter before this Court cannot be read in isolation as the formation of the SSA relates to the JJ-PDZ's agreement. It is Johany's contention that the value of Efogen at the time based on the GRT commissioned by PDZ themselves was RM251,136,000.00 as stated by Mohd Nasir bin Baharum the Executive Director of Grant Thornton (**SD3**). It is contended that the valuation was the requirement of PDZ themselves and not Johany and that the valuation was valid at all times. PDZ is said to have asked for equity value instead which then brought about the purchase price of RM18,000,000.00 in the JJ-PDZ agreement. Johany then emphasized that he was required to get the consent of Tan Sri Rashid and he had to obtain the AIF facility to purchase Tan Sri Rashid's shares in Efogen at RM21,000,000.00 pursuant to the shares sale agreement he

entered with Tan Sri Rashid on 15.5.2014. PDZ then terminated the JJ-PDZ agreement on 25.9.2014.

[43]Johany now contends that although the letter terminating the JJ-PDZ agreement stated that the termination was mutual, he in actual fact had no choice but to sign the letter under duress since he would have lost his shares in Efogen and be liable to the AIF loan. In return for agreeing to the mutual termination of the JJ-PDZ agreement, PMB is said to have promised him to purchase his Efogen shares and hence, he had entered into the SSA. Johany claims that he was told to sign the mutual termination letter as soon as possible as PDZ had to make the announcement to Bursa Malaysia the next day.

[44]Johany further alleges that he entered the SSA in good faith but PMB and PDZ had acted in bad faith as they are said to have used the higher valuation of the shares acquisition of his shares to enable PMB to sell PDZ for a whopping RM60 million profit within 4 months where PDZ is said to have taken a deposit from one company by the name of Megalink Industries ("**Megalink**") a few weeks before the termination of the JJ-PDZ agreement based on the evidence of PMB's Chairman, Dato' Sohaimi bin Shahadan (**SD2**). Johany argued that the bad faith on the part of PMB and PDZ is uncovered through the minutes of meetings produced by SD2 and that both PMB and PDZ through PW1 had an ulterior motive unbeknown to him. The minute of meeting produced by SD2 and relied upon by Johany to corroborate his allegation states as follows:

> "*PMB membeli secara berperingkat pasaran equity PDZ Holdings dan pada akhir bulan Mei 2014, pegangan ekuiti PMB dalam PDZ berjumlah RM261,048.708 mewakili 30% ekuiti (PDZ)*‖

[45]Johany further relied on SD2's evidence extracted as follows:

> *DDG: Pada 10.3.2014 PMB telah menerima tawaran pembelian PDZ Holdings daripada Megalink Industries…sekiranya tawaran tersebut diterima, PMB akan meraih keuntungan sebanyak 60 juta RM iaitu 34% pulangan selepas empat bulan betul?*
>
> *Suhaimi: Betul*‖

[46]According to Johany, he was not aware that PMB Board had approved the sale of PDZ to Megalink now that PMB had received a 10% deposit from Megalink for PDZ just before he was forced to sign the mutual termination of the JJ-PDZ agreement. He now alleges that he was forced to rush and sign the mutual termination letter and informed Bursa Malaysia so that PMB could carve out the RM251,000,000.00 from the Efogen shares before it becomes part of PDZ asset. According to Johany, the new deal which PMB offered him was RM9,000,000.00, a 50% cut from the agreed sale price of RM18,000,000.00. Johany argued that logically why would he agreed to the mutual termination of the JJ-PDZ agreement when he is liable to pay back PDZ RM5,000,000.00 which has been released to Tan Sri Rashid whom he would further owe RM18,000,000.00 if not for the assurance by PMB for him to enter the SSA to purchase his shares.

[47]According to Johany, it appears that PMB entered into the SSA at half price of PDZ's offer based on Megalink's acquisition of PDZ and when Megalink failed to pay the balance purchase price for PDZ to PMB, PMB terminated the SSA on the purported ground that he has failed to meet the CP. Johany then gave his calculation that had Megalink gone through with the deal, PMB would have made RM60,000,000.00 in 4 months and acquired Efogen via the SSA at 64%

discount by forcing him to accept the purchase by PMB. That, according to Johany, is a corporate game played by both PMB and PDZ.

[48]Johany then relied on the minutes of meeting/term sheet of PMB produced by SD2 in which it is contended to have clearly stated that the SSA was not a stand-alone document. Johany asserts that the term sheet prepared by PMB is a pre-contractual agreement that determines the intention of the parties. Therefore, there is indeed a link between the SSA and JJ-PDZ agreement. Since the term sheet cropped up during the trial, it is now argued that section 91 and 92 of the Evidence Act 1950 are inapplicable and the matter herein can no longer be confined to the written terms of the SSA.

[49]Having heard Johany's evidence and contentions as stated in the above, this Court finds that upon being served with the notice of demand and termination and until his Defence was filed herein, Johany had never raised the issues he now raised before this Court. In his evidence, Johany admits that he had neither respond nor replied the contents in the notice of demand and termination. At no time before his Defence was filed herein, the validity of the SSA is disputed. If Johany is adamant that his Efogen shares is worth RM251,136,000.00 as per the GTR, he should have insisted that his shares should be purchased at that price. He should have insisted that the valuation as per the GTR is adopted in the SSA. PDZ is entitled to reject the share price according to the GTR as they have insisted for the equity value of the shares instead of the enterprise value which was the basis of the valuation done by Grant Thornton. But after having mutually terminated the JJ-PDZ agreement, he ventured into the deal said to have been offered by PMB via the SSA knowing for a fact that the price agreed by PMB is almost a 50% reduction of the purchase price in the JJ- PDZ agreement.

[50]Johany's allegation that he was forced to terminate the JJ-PDZ agreement is misplaced. He cannot be said to have been forced when it was him who wrote the letter dated 25.9.2014 to PDZ which states as follows:

> *—Dear Sirs,*
>
> *THE SHARE ACQUISITION AGREEMENT DATED 14 MAY 2014 (—SSA‖) IN RESPECT OF SALE AND PURCHASE OF 4,000,000 ORDINARY SHARES OF RM1.00 EACH REPRESENTIING 20% OF THE ISSUED AND PAID UP SHARE CAPITAL OF EFOGEN SDN BHD (—EFOGEN‖)*
>
> *VENDOR :JOHANY JAAFAR PURCHASER :PDZ HOLDINGS BERHAD*
>
> *I refer to the above matter in particular to Clause 3.1 of the SSA and your letters dated 14 July 2014, 13 August 2014 and 15 September 2014 (—The Extension Letters‖)*
>
> *By reason of the non-fulfilment of the conditions precedent in accordance with Clause 3.1 of the SAA by the Parties as well as the Parties' latest change of business direction, respectively, this letter serves to confirm and record our mutual agreement to terminate the SAA.*
>
> *Based on the foregoing, the SAA shall be of no further effect as of the date hereof whereupon the Deposit Sum shall be forthwith refunded to your good office free of interest and neither Party hereto shall have further claim against the other pursuant to the terms of the SAA or arising therefrom save for antecedent breach.*
>
> *Kindly acknowledge your agreement to the above by signing the confirmation below.*
>
> *Yours faithfully,*
>
> *Sgd*

Johany Bin Jaafar (NRIC:681101-03-5875)

CONFIRMATION

We, PDZ Holdings Berhad, hereby confirm our understanding and agreement as afore stated.

For and on behalf of PDZ Holdings Berhad

Sgd

NAZIM RAHMAN

(NRIC No:750909-02-6193)

Managing Director‖

[51]Johany's letter in the above further shows that he had admitted that the termination of the JJ-PDZ agreement is due to the CP in the JJ-PDZ agreement has not been fulfilled. In fact, the issues raised by Johany relating to the inducement to terminate the JJ-PDZ agreement, the purchase of shares from Tan Sri Rashid and the financing facility by AIF have been adjudicated in the SAHC suit. The learned High Court Judge found inter alia as follows:

*—**[a]** Sebelum menjawab kepada isu di atas, saya melihat kepada persoalan sama ada Perjanjian JJ-PDZ telah ditamatkan mengikut terma dan syarat yang diperuntukkan. Dari keterangan yang dikemukakan jelas menunjukkan bahawa Perjanjian JJ-PDZ telah ditamatkan secara persetujuan bersama. Penemuan fakta adalah seperti berikut: -*

[i] Penamatan Perjanjian JJ-PDZ dibuat oleh Defendan Pertama sendiri (Johany Jaafar) dan dipersetujui oleh Plaintif (PDZ) dan disahkan melalui surat bertarikh 25.9.2014

….

[iii] Plaintif bersetuju di atas penamatan perjanjian JJ-PDZ tanpa sebarang bantahan malah Plaintif melalui surat bertarikh 1.10.2014 memohon Jumlah Deposit dipulangkan secara serta merta kepadanya. Oleh itu jelas menunjukkan kedua-dua pihak mempunyai pengetahuan penuh dan bersetuju secara bersama ke atas penamatan perjanjian JJ-PDZ ini. Surat 1.10.14 adalah seperti di bawah.

….

[c] Dengan demikian hujahan Defendan Pertama dalam pembelaannya yang mendakwa pengaturan pelepasan deposit kepada TSR adalah dalam pengetahuan penuh dan atas kebenaran Plaintif yang mana dinafikan oleh Plaintif tidak boleh diterima.

[d] Saya juga berpendapat bahawa Defendan Pertaman pada tahap ini tidak seharusnya menimbulkan isu mengenai laporan penilaian dari Grant Thornton bertarikh 19.6.2014 yang mejadi punca penamatan Perjanjian JJ- PDZ atau isu mengenai campurtangan PMB dan perihal mekanisme pemulangan balik Jumlah Deposit mengenai perjanjian yang dimasuki antara Defendan Pertama dan PMB adalah melibatkan perkara di luar daripada apa yang termaktub di dalam Perjanjian JJ-PDZ dan surat Defendan Pertama bertarikh 25.9.2014. Malah Defendan Pertama tidak sebarang masa memplidkan apa-apa berhubung penyikiran tirai korporat (lifting of corporate veil) terhadap Plaintif mahupun PMB….‖

[52]The defence pleaded by Johany in the SAHC suit are similar with the present suit and amongst others they are as follows:

i. Termination of the JJ-PDZ Agreement allegedly due to the refusal of PMB and PDZ to accept the valuation report by Grant Thornton and inducement by PMB and PDZ to settle the return of deposit through the Agreement which would then be entered between Johany and PMB as direct investment by PMB on Efogen.

ii. That PMB had allegedly imposed a Condition Precedent requiring Johany to obtain prior consent from the relevant party to transfer the shares to PMB with the intention to ensure that Johany will eventually fail to comply with the Condition Precedent.

iii. That the termination of the Agreement was null and void and caused loss to him that affect his equity shares in Efogen.

[53]This court finds the majority of the issues raised by Johany would have and should have been ventilated in the SAHC suit and by raising the same issues before this court, Johany is attempting to re-litigate and amplifying the issues again. Such an attempt is an abuse process of the court. It is undisputed that the SAHC suit between PDZ and Johany and three others has been disposed and concluded. The Shah Alam High Court found that the liability lies on the stakeholders to pay the RM5,000,000.00 to PDZ. However, the stakeholders as the other three defendants in the SAHC suit may be indemnified by Johany under O. 16 Rule 8 of the ROC. PDZ has obtained judgment on 30.8.2016. It simply means the matter has been adjudged and its significance lies in its effect of creating an estoppel per rem judicature. Johany cannot be permitted to litigate once more the res judicata when the matter had been adjudicated by a court of competent jurisdiction. Johany's argument that the decision in the SAHC suit exempt him from any liability as only the other defendants were held liable is clearly devoid of merit. The judgment in the SAHC suit becomes the truth between PDZ and Johany and the parties should accept it as the truth.

[54]The authority on res judicata can be found in *Hartecon JV Sdn Bhd v Hartela Contractors Ltd* [1972] 2 CLJ 104 where the Court of Appeal elaborated the principle as follows:

> "*The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in* s. 11 of the Code of Civil Procedure; but even where s. 11 *does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation.*
>
> *The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.*
>
> *The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.*
>
> *A decision given by a Court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See Peareth v. Marriott* [1883] 22 Ch. D. 182, *Hook v. Administrator-General of Bengal and Others* LR 48 IA 187 *and In the Matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] MLJ 141*, 147- 151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See Louis Dreyfus v. Aruna Chalayya* LR 58 IA 381*). (Emphasis added.)*‖

[55]Returning to the present matter, Johany does not seem to find it fit to lodge any complaint or disagreement as to the SSA at the material time or even at the time when he was given the

demand letters and termination notice. This Court is of the considered view that the absent of response from Johany to the letter of termination on 29.9.2015 is due to the fact that he has no basis to challenge the PMB's claim. After having accepted the termination without any complaint, Johany's conduct and response at the material time are fortification of acceptance to the termination of the SSA without reservation. The Court of Appeal in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2014] 5 CLJ 154 had stated as follows:

> "*On evidence, we agree with the learned judge that the conduct and the immediate response by the appellant revealed that the appellant had readily accepted the termination and appeared to have been aware why the agreement was terminated.*"

[56]Apart from the extension of time given by PMB to Johany which he failed to comply, Johany further failed to bring documentary evidence to show that any of the terms and conditions in the SSA is waived or subject to any of the circumstances connecting PMB with the sale of shares by Tan Sri Rashid pursuant to the agreement that he has with Tan Sri Rashid. That deal was solely between Johany and Tan Sri Rashid. Johany was the one who took the AIF facility on his own will. The fact remains that it is his obligation to get the approval from AIF to then sell his shares to PMB. There is no evidence to the effect that PMB was prepared to purchase his shares at the price more than what is stipulated in the SSA. Even if his contention is true that PMB intends to increase PDZ's value for the purpose of Megalink's acquisition of PDZ, the fact remains that the JJ-PDZ's agreement has been terminated. Whatever deal he took up relating to his shares in Efogen is now between him and PMB alone as he has contended that PMB wants to have a direct dealing with him and no longer through PDZ. In his re-examination, Johany portrays the fact that he proceeded with the SSA since PMB was also involved with discussions with AIF relating to the latter's consent in regards to the sale of his shares. However, PMB is not privy to the contract between him and AIF or with any other agreements besides the SSA. It is clear that Johany had obtained the AIF facility on 1.7.2014 before the execution of the SSA on 2.12.2014. It was him who has pledged his shares in Efogen to AIF and it is only prudent for PMB to include the clause in the SSA for him to obtain the approval from AIF to ensure that the shares could be legally transferred to PMB.

[57]In *Messrs Roland Cheng & Co v Konkamaju Sdn Bhd* [2014] 1 MLJ 894, the Court of Appeal stated as follows:

> *—[42] Before we sign off, we would like to say something on two other related issues raised in the submission by counsels in this appeal. The first one is the issue on privity of contract between the third party and the defendant. As we have said earlier, the third party is never a party to the JV agreement or the deed of assignment between the landowner and the developer or the sales and purchase agreement between the defendant and the plaintiffs. In this regard, we think learned counsel for the third party is correct to submit that in absence of any privity of contract between the third party and the defendant, the defendant has no right to demand the production and custody of the title deed to the property. We think the defendant has no cause of action against the third party for the release and surrender of this title deed to the property. There is of course evidence to show that the landowner (ie the third party client) had instructed the third party to release the title deed. But that is between the landowner and the third party. The defendant cannot ride on the instruction by the landowner to its client to release the title in order to have a cause of action against the third party unless the landowner is also named as a party to the claim against the third party.*"

[58]Further, this Court finds that Johany could have reject or terminate the SSA. Clause 3.5 of the SSA provides that in the event the approvals stated in clause 3.1 (i) - (xi) of the SSA is not acceptable, the "Objecting Party" shall give notice in writing within seven (7) days to the other party informing that he (the "Objecting Party") does not accept the clauses and in the absence of

such notice the “Objecting Party” shall be deemed to have accepted the conditions or terms imposed in the SSA. Clause 3.5 of the SSA is reproduced:

> *—3.5 (i) If conditions or terms are imposed in connection with the granting of any Approvals and any of the said conditions or terms affect any of the parties hereto and are unacceptable to such affected party(ies), such party (ies) (—Objecting Party‖) shall give notice to that effect in writing within seven (7) days or receipt of notice by the Objecting Party of the said conditions or terms to the other party hereto and shall appeal to the relevant Approving Parties within the timeframe allowed by the relevant Approving Parties for such appeal to be made. In the absence of such notice, the Operating Party (ies) shall be deemed to have accepted the conditions or terms imposed.*
>
> *(ii) If required by the Objecting Party, the other party hereto shall forthwith upon receipt of a written request furnish or cause to be furnished to the Objecting Party such documents or information as shall be reasonably required from the other party hereto to facilitate the making of an appeal to the relevant Approving Parties by the Objecting Party in accordance with Clause 3.5 (i) above*.” [Emphasis added]

[59]In his evidence, Johany confirms that he did not issue such notice and that he has accepted the terms imposed under the SSA.

[60]There is no ambiguity found in any of the terms in the SSA. It is the finding of this court that Johany fails to show how he was induced by PMB to enter the SSA on 2.12.2014. PW1 does not act or decide alone. The term sheets from PMB’s Board of Directors Meeting produced through SD2 shows that the proposals in relation to transaction of the JJ-PDZ agreement and PDZ are made jointly by the Board members. There is nothing more in the term sheets. The term sheets are merely discussions indicative of the terms to be incorporated in the JJ-PDZ agreement earlier, the SSA and the Megalink issue.

[61]This Court finds that in regards to the Megalink issue there is no evidence to relate it with the termination of the JJ-PDZ agreement or as to the formation of the SSA for that matter. Johany fails to show or prove in what manner Megalink’s acquisition of PDZ shares owned by PMB are relevant when it is admitted that the sale of his Efogen shares to PDZ has been terminated and the sale was to be taken over by PMB. This Court finds that Johany’s attempt in illustrating the causal link of the sale of PDZ to Megalink which forced him to sign the termination letter of the JJ-PDZ agreement so that PMB could carved out RM251,000,000.00 worth of Efogen as a company before it becomes asset of PDZ, is speculative and without any supporting evidence of the so called collateral purpose of PMB and PDZ. In fact, it is of the considered view that Johany proceeded and agreed to enter into the SSA because he was at that time already encumbered with the AIF facility obtained for the purpose of purchasing Tan Sri Rashid’s shares in Efogen for RM18,000,000 for the total release of the Efogen shares. He cannot be gainsaid to have been put in the position of being in between the devil and the deep blue sea. He has the choice and he had chosen to proceed with the SSA.

[62]Johany relied strongly on the GTR for the value of his shares. As stated earlier at that material time Johany could have insisted that the Grant Thornton valuation to be adopted by PMB in the acquisition of his shares. But the Grant Thornton valuation was not followed or adopted by Johany when he agreed to sell his shares to PMB.

[63]Johany himself has agreed that at the time he signed the SSA with PMB, the SSA was in fact viable. In fact, it was he who requested for an advance payment of RM1.5 million to be made to him by PMB. In his letter of 25.2.2015 to PMB requesting for the advance of RM1.5 million and extension of time to fulfill the CP, Johany stated inter alia as follows:

"*I as a vendor hereby unconditionally and irrevocably covenant and undertakes to your company that in the event that all the conditions precedents are not satisfied in accordance with Clause 3.1 of the SSA, on or before 30.4.2015 for any reason whatsoever which the SSA is terminated and be of no further effect, I shall forthwith refund or repay the moneis RM1.5 million paid by the company to me failing which such amount shall be due and payable by me to your company.*‖

[64]In his evidence, Johany affirmed that at the time he entered into the SSA he believes that the transaction involved is viable. His affirmation can be seen from his cross examination as follows:

—SAR :So, En Johany, what do you understand from the word or maybe I can suggest to you, would you agree with me that the word _viable' would mean that something that would be potentially successful?

Johany :Yes

SAR :Alright. So at this point do you agree with me when you send this letter you ask for the RM1.5 million you believe that the transaction is viable?

Johany :Yes, is agreed on both sides that's why it was given to me

SAR :So you agree that it is viable Johany :Yes

SAR :Alright. So at the time when you entered into this contract, you do believe that the transaction is viable, isn't it, based on the terms and conditions?

Johany :Correct‖

[65]Whatever understanding between Johany and PDZ or with PMB in between the JJ-PDZ agreement earlier culminating in the SSA thereafter cannot be taken into consideration as this Court is satisfied that the JJ-PDZ agreement was terminated mutually between PDZ and Johany. As such, the SSA stands alone and in the absence of any ambiguity of the terms in the SSA and letter dated 2.3.2015 the extrinsic factor surrounding the formation of the SSA should not be taken into account. This Court should not go behind the written terms of the SSA to introduce or add new terms to it.

[66]The Federal Court in *Chase Perdana Berhad v Md Afendi bin Hamdan* [2009] 6 MLJ 783 has discussed the scope of sections 91 and 92 of the Contracts Act 1950. In the appeal before the Court, the factual question raised was whether an oral agreement entered into between the appellant and the respondent therein which varies the terms of the letter of undertaking could be recognized in law under section 91 of the Contracts Act 1950. The Federal Court elaborated and made the finding as follows:

—[24] The third question is a factual question. Could the alleged oral agreement, entered between the appellant and the respondent, which varies the terms of the letter of undertaking, be recognised in law under ss 91 and 92 of the Evidence Act 1950?

91 Evidence of terms of contracts, grants and other dispositions of property reduced to form of document

When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the

matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1 — When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2 — Wills admitted to probate in Malaysia may be proved by the probate.

Explanation 1 — This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2 — Where there are more originals than one, one original only need be proved.

Explanation 3 — The statement in any document whatever of a fact, other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

92 Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91*, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:*

Provided that —

(a) *any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;*

(b) *the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;*

(c) *the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;*

(d) *the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;*

(e) *any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and*

(f) *any fact may be proved which shows in what manner the language of a document is related to existing facts.*

[25] The alleged oral agreement has been accepted by the learned High Court judge who had the benefit of observing the demeanour of the witnesses. I find no reason to disturb his finding of the existence of an oral agreement.

[26] Counsel for the respondent relies on ss 91 and 92(b) of the Evidence Act *and submitted that* s 92 of the Evidence Act *is meant to be read together with* s 91 of the Evidence Act *as both provisions relate to the 'best evidence rule'. In essence, these two provisions require the production of the document itself for proof of its contents. It is regarded as embodying the common law rule that where a contract has been reduced to writing, it is the writing that must be looked at for the entire terms made between parties subject to the six provisos embodied in* s 92(a) -(f) of the Evidence Act.

[27] Reading s 92(b) of the Evidence Act in particular, it relates to an oral agreement as to any matter on which the original document is silent and which is not inconsistent with the terms. This is not the case in this instance case.

[28] What the respondent was supposed to have agreed to orally is in direct contradiction to the terms appearing in the

letter of undertaking and the agreement and is not a term which the original document is silent. The letter of undertaking and the agreement required that the relevant authorities' approvals be obtained whilst the so called oral agreement is supposed to have waived this condition. The proviso (b) in s 92 of the Evidence Act *therefore cannot apply in this case. When the exception does not apply then the terms appearing in the letter of undertaking continue to be applicable.*

[29] The respondent then contends that the letter of undertaking between the appellant and the respondent is independent of the sale and purchase agreement between the appellant and Madrigal Gumba. In my opinion, this cannot be so because the letter of undertaking expressly refers to the agreement by the appellant in its request that the respondent transfer all shares in Jernih Karya to Madrigal Gumba thereupon the sale and purchase agreement was executed. The letter of undertaking is therefore not independent of the sale and purchase agreement.

[30] I therefore answer the third question in the negative.‖

[Emphasis added]

[67]There is nothing more about the JJ-PDZ agreement as it had been terminated. The approval from AIF as one of the conditions in the SSA is Johany's obligation as the AIF facility is purely between him and AIF. The SSA is therefore independent. There is nothing in the SSA that refers to JJ- PDZ agreement and the agreed price has been written to be RM9 million and nothing more. There is no oral agreement to the effect that parties have agreed to any other purchase price or that PMB is the one who is to obtain the approval from AIF. Johany's contentions are therefore inconsistent with what has been stipulated in the SSA. The principle laid down in **Koh Siah Pak v Perkayuan Oks Sdn Bhd** (supra) is therefore applicable.

[68]Further in interpreting the terms of a contract, the general principles dictate that every contract is to be construed with reference to its objects and the complete terms of the particular contract read as a whole and that efforts be made to give effect to every clause in the agreement. In *Kejutaan Holdings Sdn Bhd v Magnum 4D (Perak) Sdn Bhd & Ors* [2010] 3 MLJ 827, the Court of Appeal stated:

—It is well-established principle sanctioned by the doctrine of sanctity of contract that parties who make agreements must adhere to their terms. The law does not permit excuse from performance save in very rare instances. There is no power in any court to interfere with contractual relations lawfully established or to cancel obligations voluntarily assumed.‖

[69]In *Mulpha Pacific Sdn Bhd v Paramount Corporation Bhd* [2003] 4 MLJ 357, the following views were agreed to in respect of the general principles of construction of contract: -

—..(1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made; it is not legitimate to construe it in light of what happened years or even days later; (4) the contract must be construed as a whole and also, so far as practicable, to give effect to every part of it.

…

If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.‖

[70]In the absence of any ambiguity of the terms in the SSA and PMB's letter of 2.3.2015, Johany is estopped from introducing evidence prior to the execution of the SSA.

[71]In regards to the procurement of the sales of Efogen three (3) units of office in Megan Avenue KL, clause 4(f) of the Letter dated 2.3.2015 clearly states that:

> *—In the event that such amount of RM1,500,000.00 shall become due and payable by you (Johany) to our company (PMB) pursuant to the foregoing sub-paragraph 4(f), you shall procure Efogen to sell its three (3) units of office building situated at D-3A-8, D-6-8 and D-9-9, Block D, Megan Avenue One, No.189, Jalan Tun Razak, 50400 Kuala Lumpur to our company….*‖

[72]The provision is clear. It is Johany's duty to procure the sale of the Efogen's office and not PMB. Johany's contention is therefore misplaced. He does not need to wait for PMB to give a notice for him to procure the sale of the building. He should be the one initiating or proposing the sale at the very least when the first demand was made by PMB which he did not at any point of time.

Johany's Counterclaim

[73]It is Johany's contention that he has proved his counterclaim. He asserts that he has proven that he had not breached the CP. From the GTR and evidence from SD2, the term sheets/minutes of meetings of PMB, Johany claimed that the real motive on the part of PMB and PDZ is to flog off PDZ at a huge profit of RM60,000,000.00 and get Efogen which is said to be valued at RM251,000,000 at RM9,000,000.00 by force. His loss is argued to have been computed and proved by SD3, the Grant Thornton's valuer where the enterprise value of Efogen is stated to be RM251,000,000.00.

[74]Against both PMB and PDZ, Johany claims that they are jointly and severally liable for the sum of RM166,508,000.00 which is his loss together with equity value of his Efogen's shares as he is the beneficial owner of the shares. As against PMB, Johany further claims for damages and/or indemnity based on the liability borne by him resulting from the claims made by PDZ against him for the RM5,000,000.00 deposit and held by the stakeholder for payment to Tan Sri Rashid.

[75]At the risk of repetition, the issue relating to the JJ-PDZ agreement was ventilated and concluded. The judgment obtained in the SAHC suit was regularly obtained. A final order or a judgment must therefore be vigorously protected by the doctrine of res judicata. However, notwithstanding the res judicata principle, this Court have found that there was a mutual termination of the JJ-PDZ agreement by way of his own letter of 25.9.2014.

[76]In *Pernas Construction Sdn Bhd v Syarikat Rasabina Sdn Bhd* [2004] 2 CLJ 707, the Court of Appeal held that:

> *—[2] In law where neither party has performed the whole of its obligations under a contract, the contract may be rescinded by mutual agreement. By para. 1 of the termination agreement, it was unequivocally stated that the plaintiff agreed to a mutual termination of the sub- contract subject to the terms and conditions therein. The effect of this was that the sub-contract was rescinded and the parties bound by the terms and conditions of the termination agreement. Henceforth, any claim between the parties was governed by the termination agreement and not by the sub-contract.*‖

[77]It is true that the GTR was made upon the request of PDZ during the JJ-PDZ agreement vide a letter dated 19.6.2014. SD3 in his evidence agreed that he never made the same valuation for PMB. SD3 further agreed that the GTR could not be used for purpose of future valuation.

[78]Section 74 of the Contracts Act 1950 makes it clear that compensation is not to be given for any remote or indirect loss or damage sustained by reason of a breach. Section 74 of the Contracts Act 1950 states:

> *—Compensation for loss or damage caused by breach of contract*
>
> *74. (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> *(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*‖

[79]In law where neither party has performed the whole of its obligations under a contract, the contract may be rescinded by mutual agreement. It is proven and admitted by Johany that it was him who has failed to fulfill the CP in the SSA resulting to a breach of the SSA. PMB has the right to terminate the SSA and demand for the return of the deposit inclusive of the agreed liquidated sum. To emphasis again, PMB and or PDZ are not privy to the contract between Johany and AIF.

[80]In *Malayan Cement Industries Sdn Bhd v Golden Island Shipping (L) Bhd* [2018] 1 CLJ 228, the Court of Appeal held:

> *—Section 74 makes it clear that compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle in this section is that a mere breach of contract by a defaulting party would not entitle the other side to claim damages unless the said party has in fact suffered damages because of such breach. Loss and damages which is actually suffered as a result of breach has to be proved and the plaintiff is to be compensated to the extent of actual loss or damage suffered*."

[81]The lament by Johany in this suit is that his shares is supposed to be of a certain value but PMB has offered a lower value/price (to which offer he has accepted via the SSA) and therefore he has suffered losses. The alleged losses suffered by Johany is found to be not only remote but speculative. Johany relies solely on the GTR to justify his Counterclaim and/or his losses which he never insisted on using when the SSA was formulated and entered into. This Court finds that there is in fact no actual value for the Efogen shares sale. There is no suit filed against AIF by Johany (as he claimed that there was a force sale of his shares by AIF). Likewise, AIF has not initiated any suit against Johany arising from the AIF facility. That has been confirmed by Johany in his testimony. It is also pertinent to note that there is no evidence of the actual sale value of Johany's shares by AIF to the third party. Further, there is no suit filed against Tan Sri Rashid by Johany and vice versa. This Court finds that Johany fails to proof that he has suffered actual loss and damage as a result of the force sale of shares by AIF.

Conclusion

[82]Premised on the above, this Court granted order in terms of PMB claims with costs of RM20,000 and Johany's Counterclaim against PMB and PDZ was dismissed with costs of RM10,000 to each Defendant in the Counterclaim.

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