

# GRAND ENERGY E & C SDN BHD v SHEIKH AZHAR BIN SHAIK ABDUL & ORS

CaseAnalysis  
| [2023] MLJU 2217

## Grand Energy E & C Sdn Bhd v Sheikh Azhar bin Shaik Abdul & Ors [2023] MLJU 2217

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

ROZI BAINON JC

GUAMAN CIVIL NO BA-22NCvC-49-01/2022

4 October 2023

*Jonas Lee Fook Khong (David Gurupatham & Koay) for the plaintiff.*  
*Syahrul Azwan (with Nasyitah Ruzanna bt Abdul Rahman) (Abdul Rahman Saad & Assoc) for the first, second, third, fourth, fifth, seventh, ninth, tenth and 11th defendants.*  
*Ilyani bt Noor Khuszairy (Ilyani Khuzairy & Co) for 12th defendant.*

### Rozi Bainon JC:

#### GROUND OF JUDGMENT

##### Introduction

[1] The Plaintiff's claims against all the Defendants are for –  
conspiracy to injure the Plaintiff.  
conspiracy to defraud the Plaintiff.

breach of fiduciary duty, breach of fidelity duty, breach of duty as advisor, breach of general and/or professional duty, as a result, the Plaintiff had suffered huge and tremendous amount of financial loss.

[2] The Plaintiff asks for the following reliefs:

- (a) a declaration that the loan agreement dated 19-2-2020 between the Plaintiff and the 6<sup>th</sup> Defendant (FMS Elegance Sdn Bhd); the loan agreement dated 19-2-2020 between the Plaintiff and the 8<sup>th</sup> Defendant (Grand Infra Sdn Bhd); and the loan agreement dated 15-1-2020 between the Plaintiff and the 11<sup>th</sup> Defendant (Teras Tanjung Sdn Bhd) be null and void.
- (b) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim) and the 4<sup>th</sup> Defendant (Mahadzer bin Harun) to pay the Plaintiff the sums of RM1,221,940.39 and RM738,749.97.
- (c) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 4<sup>th</sup> Defendant (Mahadzer bin Harun); and the 5<sup>th</sup> Defendant (Nur Hidayah binti Roslee) to pay the Plaintiff the sums of RM1,447,704.00 and RM631,290.06.
- (d) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 4<sup>th</sup> Defendant (Mahadzer bin Harun); the 6<sup>th</sup> Defendant (FMS Elegance Sdn Bhd); and the 7<sup>th</sup> Defendant (Fadzwin binti Mohd Sallih) to pay the Plaintiff the sums of RM104,505.80.

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- (e) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 4<sup>th</sup> Defendant (Mahadzer bin Harun); the 8<sup>th</sup> Defendant (Grand Infra Sdn Bhd); the 9<sup>th</sup> Defendant (Mimi Mawar binti Abdul Majid); and the 10<sup>th</sup> Defendant (Noorafzan binti Shaik Abdul Rahim) to pay the Plaintiff the sums of RM125,949.57.
- (f) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 4<sup>th</sup> Defendant (Mahadzer bin Harun); and/or the 12<sup>th</sup> Defendant (Abdul Karim bin Mustafa) to pay the Plaintiff the sums of RM73,386.38.
- (g) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); and/or the 4<sup>th</sup> Defendant (Mahadzer bin Harun) to pay the Plaintiff the sums of RM5,600.00.
- (h) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); and/or the 4<sup>th</sup> Defendant (Mahadzer bin Harun) to pay the Plaintiff the sums of RM12,398.20.
- (i) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 4<sup>th</sup> Defendant (Mahadzer bin Harun); the 5<sup>th</sup> Defendant (Nur Hidayah binti Roslee); the 6<sup>th</sup> Defendant (FMS Elegance Sdn Bhd); and/or the 7<sup>th</sup> Defendant (Fadzwin binti Mohd Sallih) to pay the Plaintiff the sums of RM20,000.00.
- (j) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 4<sup>th</sup> Defendant (Mahadzer bin Harun); the 5<sup>th</sup> Defendant (Nur Hidayah binti Roslee); the 8<sup>th</sup> Defendant (Grand Infra Sdn Bhd); the 9<sup>th</sup> Defendant (Mimi Mawar binti Abdul Majid); and/or the 10<sup>th</sup> Defendant (Noorafzan binti Shaik Abdul Rahim) to pay the Plaintiff the sums of RM241,855.45.
- (k) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 4<sup>th</sup> Defendant (Mahadzer bin Harun); the 5<sup>th</sup> Defendant (Nur Hidayah binti Roslee); the 11<sup>th</sup> Defendant (Teras Tanjung Sdn Bhd); and/or the 12<sup>th</sup> Defendant (Abdul Karim bin Mustafa) to pay the Plaintiff the sums of RM235,857.68.
- (l) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 4<sup>th</sup> Defendant (Mahadzer bin Harun); and the 13<sup>th</sup> Defendant (Shahrin bin Abu) to pay the Plaintiff the sums of RM687,000.00.
- (m) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 6<sup>th</sup> Defendant (FMS Elegance Sdn Bhd); and/or the 7<sup>th</sup> Defendant (Fadzwin binti Mohd Sallih) to pay the Plaintiff the sums of RM3,886,914.93.
- (n) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 8<sup>th</sup> Defendant (Grand Infra Sdn Bhd); the 9<sup>th</sup> Defendant (Mimi Mawar binti Abdul Majid); and/or the 10<sup>th</sup> Defendant (Noorafzan binti Shaik Abdul Rahim) to pay the Plaintiff the sums of RM1,768,793.39.
- (o) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim); the 4<sup>th</sup> Defendant (Mahadzer bin Harun); the 11<sup>th</sup> Defendant (Teras Tanjung Sdn Bhd); and/or the 12<sup>th</sup> Defendant (Abdul Karim bin Mustafa) to pay the Plaintiff the sums of RM880,000.00.
- (p) alternatively, an order that damages to be assessed.
- (q) an order that all the Defendants shall give a detailed account of all money disbursed from the Plaintiff's bank accounts for payment vouchers prepared by the the 4<sup>th</sup> Defendant (Mahadzer bin Harun) or the 5<sup>th</sup> Defendant (Nur Hidayah binti Roslee) and approved by the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim) and the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim), and to whom and where the money was subsequently disbursed to from 2016 to 2019. For the purpose of this order –
  - i. an order that parties to appear before the Registrar within one (1) month to take directions under Order 43 Rules of Court 2012 on the manner in which the account sought under paragraph (q) above is to be taken; and
  - ii. an order that pursuant to the account given under paragraph (q) above, the 1<sup>st</sup> to 5<sup>th</sup> Defendants shall forthwith pay all the money received to the Plaintiff.

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- (r) further and/or in the alternative, an order that an independent qualified firm of auditors be appointed by this Court, at the expense of all the Defendants, to determine the payments that were not accounted between 2016 and 2019. Further purpose of this order –
- i. the auditor shall prepare, file and serve a written report containing his or her findings on the unaccounted money within 60 days or on such period that this Court deems fit and proper; and
  - ii. all the Defendants shall jointly and severally pay the unaccounted money within 7 days from the date of service of the auditor's report.
- (s) interest of 5% p.a. calculated on the amounts stated in paragraphs (b) to (q) above from the date of Judgment until full settlement.
- (t) exemplary damages.
- (u) costs on indemnity basis.
- (v) any other relief that this Court deems fit to grant.

**[3]** On 17-7-2023, I dismissed the Plaintiff's claims with costs (subject to allocator fee) and my grounds of decision (in Bahasa) is as follows:

**KEPUTUSAN SELEPAS PERBICARAAN PENUH**

*Untuk membuktikan kesnya, Plaintiff memanggil saksi yang berikut:*

- (a) *Wang Peng (Nelson), (Dato' Sri) – SP-1*
- (b) *Che Mokhtar bin Shaari, pengarah syarikat Plaintiff –SP-2*
- (c) *Nurul Athirah binti Mohamad Rafi, junior auditor – SP-3*

*Untuk membuktikan pembelaannya, D1, D2, D3, D4, D5, D7, D9, D10 & D11 memanggil saksi yang berikut:*

- (a) *Sheikh Azhar bin Shaik Abdul Rahim – SD-1*
- (b) *Mahadzer bin Harun – SD-2*
- (c) *Sheikh Annuar bin Shaik Abdul Rahim – SD-3*
- (d) *Nur Hidayah binti Roslee – SD-4*
- (e) *Fadzwin binti Mad Sallih – SD-5*
- (f) *Noorafzan binti Shaik Abdul Rahim – SD-6*

*[3] Untuk membuktikan pembelaannya, D12 hadir sebagai saksi.*

*Ringkasan hubungan & status pihak-pihak:*

<b>Defendan-Defendan</b>	<b>Butiran</b>	<b>Perbicaraan Penuh</b>
<i>D1 – Sheikh Azhar bin Shaik Abdul Rahim D2 – Shaik Amar bin Shaik Abdul Rahim D3 – Sheikh Annuar bin Shaik Abdul Rahim</i>	<i>D1, D2, D3 &amp; D10 adalah adik beradik. D1, D2 &amp; D3 adalah pengarah, pengasas dan penasihat Plaintiff.</i>	<i>D1 &amp; D3 menjadi saksi</i>
<i>D4 – Mahadzer bin Harun D5 – Nur Hidayah binti Roslee</i>	<i>D4 &amp; D5 adalah mantan pekerja Plaintiff. D4 ialah accountant manager &amp; pengarah syarikat D11. D5 ialah eksekutif akaun.</i>	<i>D4 &amp; D5 menjadi saksi</i>
<i>D6 – FMS Elegance Sdn Bhd</i>	<i>Syarikat Sdn Bhd Tiada MoA Tiada Pembelaan</i>	
<i>D7 – Fadzwin binti Mad Sallih</i>	<i>Isteri D1 dan adalah mantan pengarah syarikat/pemegang saham dalam D6.</i>	<i>D7 menjadi saksi</i>

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<b>Defendan-Defendan</b>	<b>Butiran</b>	<b>Perbicaraan Penuh</b>
D8 – Grand Infra Sdn Bhd	Syarikat Sdn Bhd Tiada MoA Tiada Pembelaan	
D9 – Mimi Mawar binti Abdul Majid	Isteri D3 dan adalah mantan pengarah syarikat/pemegang saham dalam D8.	
D10 – Noorafzan binti Shaik Abdul Rahim	D10 ialah kakak D1 hingga D3; dan D10 adalah pengarah syarikat dalam D8.	D10 menjadi saksi
D11 – Teras Tanjung Sdn Bhd	Syarikat Sdn Bhd	
D12 – Abdul Karim bin Mustafa	Pengarah syarikat D11 dan dilantik oleh Plaintiff sebagai Pengarah Pembangunan Projek (Business Development).	D12 menjadi saksi
D13 – Shahrin bin Sabu	Tiada MoA Tiada Pembelaan	

Isu untuk Dibicarakan (Lampiran C) & Dapatan dan Keputusan Mahkamah:

[4] Sebagaimana yang disenaraikan oleh Plaintiff, isu untuk dibicarakan ialah seperti yang berikut:

- (a) sama ada D1 hingga D12 telah berpakat untuk mencederakan Plaintiff dengan menyedut wang daripada Plaintiff untuk operasi perniagaan penubuhan Defendan dan/atau untuk kepentingan peribadi Defendan secara individu?

Keterangan semua saksi Plaintiff dan Defendan 1 hingga D5, D7, D9 hingga D11 dan D12 telah didengar dan dokumen yang relevan telah dirujuk.

Tiada keterangan dan bukti bahawa Defendan 1 hingga D5, D7, D9 hingga D11 dan D12 berpakat untuk mencederakan Plaintiff dengan menyedut wang daripada Plaintiff untuk operasi perniagaan. SP/PW1 ialah orang utama yang mengawal operasi perniagaannya dan khususnya dari segi kewangan.

- (b) sama ada D1 hingga D12 telah berpakat untuk menipu Plaintiff dengan membuat representasi palsu, atau bersikap melulu, tentang ketulinan/daya maju pelbagai projek pembangunan perumahan yang dicadangkan?

Keterangan dan bukti yang dikemukakan oleh saksi Defendan 1 hingga D5, D7, D9 hingga D11 dan D12 adalah meyakinkan Mahkamah ini bahawa tiada apa-apa representasi palsu, sikap melulu, tentang ketulinan/daya maju projek pembangunan perumahan yang dinyatakan dalam tuntutan. SP/PW1 ialah orang utama yang mengawal operasi perniagaannya dan keterangan SP/PW2 gagal menangkis ketidakaturan tindakan yang dilaksanakan oleh Defendan 1 hingga 5, D7, D9 hingga D11 dan D12.

- (c) sama ada D1 hingga D5 dan D13 telah berpakat untuk mencederakan Plaintiff dengan menyedut wang daripada Plaintiff untuk keuntungan peribadi mereka?

D13 tidak memasukkan MoA dan pembelaan.

Tiada keterangan dan bukti bahawa Defendan 1 hingga D5 berpakat untuk mencederakan Plaintiff dengan menyedut wang daripada Plaintiff untuk keuntungan peribadi D1 hingga D5. Tugas D1 hingga D5 adalah dalam ruang lingkup skop kerja dan mematuhi arahan SP/PW1.

- (d) sama ada D1 hingga D5 dan D13 telah berpakat untuk menipu Plaintiff dengan membuat representasi palsu, atau bersikap melulu, tentang ketulinan/daya maju pelbagai Projek P5 yang dicadangkan?

*D13 tidak memasukkan MoA dan pembelaan.*

*Keterangan dan bukti yang dikemukakan menunjukkan bahawa Projek Presint 5 Putrajaya adalah suatu manipulasi dan penipuan oleh seseorang dan bukannya disebabkan oleh Defendan 1 hingga 5.*

- (e) dan (f): sama ada D1, D2 dan D3 mempunyai kewajipan fidusiari dan kewajipan profesional kepada Plaintiff sebagai pengarah dan penasihat Plaintiff pada masa itu? Jika “ya”, sama ada D1, D2 dan D3 telah melanggar kewajipan itu?

*Kewajipan fidusiari wujud di antara D1 dan D2 kepada Plaintiff. Sebagai pengarah, pengasas dan penasihat syarikat mereka bertanggungjawab ke atas hal ehwal syarikat Plaintiff. Tiada keterangan dibuktikan oleh*

*Plaintiff bahawa D1 dan D2 telah melanggar kewajipan fidusiari dan kewajipan profesional masing-masing.*

- (f) dan (h): sama ada D4 dan D5 berhutang kewajipan kesetiaan kepada Plaintiff, sebagai Eksekutif Akaun Plaintiff pada masa itu? Jika “ya”, sama ada D4 dan D5 telah melanggar kewajipan itu?

*Keterangan dan bukti yang dikemukakan oleh D4 dan D5 adalah meyakinkan Mahkamah ini bahawa D4 dan D5 adalah pekerja yang berjawatan Eksekutif Akaun Plaintiff pada masa itu. Kesetiaan D4 dan D5 berjaya dibuktikan mengenai pengendalian akaun Plaintiff. Tiada apa-apa kemungkiran dan pelanggaran kewajipan oleh D4 dan D5. Injunksi yang diperoleh ke atas D4 dan D5 hendaklah dipampas dengan ganti rugi oleh Plaintiff.*

- (g) sama ada Perjanjian Pinjaman yang dimasuki antara Plaintiff dan D6, D8 dan D11 masing-masing telah terbatal atas sebab penipuan?

*D6 dan D8 tidak memasukkan MoA dan pembelaan.*

*D12 ialah pengarah syarikat D11. Tiada keterangan dapat membuktikan bahawa D12 menipu Plaintiff.*

#### Keputusan Mahkamah:

[5] Mahkamah ini memutuskan untuk menolak tuntutan Plaintiff dan memerintahkan seperti yang berikut:

- i. bagi Perenggan A: ketiga-tiga Perjanjian Pinjaman adalah terbatal dan tidak sah.
- ii. bagi perenggan (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l) (Kecuali D13), (m), (n), (o), (p), (q) (Kecuali D13), (r), (s), (t), dan (u) adalah DITOLAK.
- iii. kos yang berikut hendaklah dibayar oleh Plaintiff kepada Defendan-Defendan yang berikut:
  - (a) D1, D2, D3, D7, D9 dan D10 sebanyak RM40,000.00 (tertakluk kepada fi alokatur).
  - (b) D4 sebanyak RM20,000.00 (tertakluk kepada fi alokatur).
  - (c) D5 sebanyak RM15,000.00 (tertakluk kepada fi alokatur).
  - (d) D12 sebanyak RM15,000.00 (tertakluk kepada fi alokatur).

[4] The Plaintiff appeal to the Court of Appeal.

[5] This judgment contains my grounds for dismissing the Plaintiff's claims.

#### **Background facts**

[6] The Plaintiff is a private limited company incorporated in Malaysia on 16-5-2016 under the Companies Act 1965. The nature of business is oil and gas constructions. The directors are Wang Peng/Nelson (Dato' Sri) (an Australian citizen); the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); and the 2<sup>nd</sup> Defendant (Shaik Amar bin

Shaik Abdul Rahim). The company's secretary is Ahmad Kamal bin Hamzah. The shareholders/members are the 1<sup>st</sup>, Wang Peng/Nelson (Dato' Sri) and 2<sup>nd</sup> Defendants (see page 264 to 269 of the Common Bundle of Documents/B1).

**[7]** The relationship between the parties are explained by the Plaintiff as follows:

Wang Peng/Nelson (Dato' Sri), an Australian citizen, is an investor as well as director and shareholder of the Plaintiff. Now, he remains as a director but no longer holds any shares personally.

the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim); the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim); and the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim) who are siblings and are the former key personnel and decision- makers in the management and business operations of Grand Energy E & C Sdn Bhd (the Plaintiff). The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the signatories of the Plaintiff's bank accounts. Whilst the 3<sup>rd</sup> Defendant is the advisor of the Plaintiff and actively involved in the decision-making relating to the Plaintiff's business. Now, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had resigned as directors and no longer involved in the Plaintiff's business.

the 4<sup>th</sup> Defendant (Mahadzer bin Harun) and the 5<sup>th</sup> Defendant (Nur Hidayah binti Roslee) are the employee of the Plaintiff and responsible for the finances. Now they are the former employees of the Plaintiff.

the 6<sup>th</sup> Defendant is a private limited company incorporated on 15-2-2017 under the Companies Act 2016. The 6<sup>th</sup> Defendant's director is the 7<sup>th</sup> Defendant (Fadzwin binti Mad Sallih) who is wife of the 1<sup>st</sup> Defendant. Now, the 7<sup>th</sup> Defendant has resigned as directors.

the 8<sup>th</sup> Defendant is a private limited company incorporated on 20-1-2017 under the Companies Act 2016. The 8<sup>th</sup> Defendant's directors are the 1<sup>st</sup> Defendant and the 9<sup>th</sup> Defendant (Mimi Mawar binti Abdul Majid) who is wife of the 3<sup>rd</sup> Defendant. On 10-3-2017, the 10<sup>th</sup> Defendant was appointed as the 8<sup>th</sup> Defendant's director replacing the 9<sup>th</sup> Defendant. And on 15-2-2019, the 2<sup>nd</sup> Defendant was appointed as the 8<sup>th</sup> Defendant's director replacing the 1<sup>st</sup> Defendant. Now, the 2<sup>nd</sup> and 10<sup>th</sup> Defendants had resigned as directors.

the 11<sup>th</sup> Defendant is a private limited company incorporated on 12-4-2018 under the Companies Act 2016. The 4<sup>th</sup> Defendant (Mahadzer bin Harun) and the 12<sup>th</sup> Defendant (Abdul Karim bin Mustafa) are the 11<sup>th</sup> Defendant's directors. On 10-3-2017, the 10<sup>th</sup> Defendant was appointed as the 8<sup>th</sup> Defendant's director replacing the 9<sup>th</sup> Defendant. And on 15- 2-2019, the 2<sup>nd</sup> Defendant was appointed as the 8<sup>th</sup> Defendant's director replacing the 1<sup>st</sup> Defendant.

the 13<sup>th</sup> Defendant (Shahrin bin Sabu) is an individual and in year 2019, the 13<sup>th</sup> Defendant had introduced a housing development project in Presint 5 Putrajaya to the Plaintiff.

**[8]** The Plaintiff alleged and claimed that its losses are due to the scheme that involved all the Defendants, namely

in the year of 2016, the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim) represented to Wang Peng/Nelson (Dato' Sri) that the 3<sup>rd</sup> Defendant would bring in some housing development projects in Malaysia and proposed to Wang Peng/Nelson (Dato' Sri) to invest in the business.

the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim) then recommender his siblings to manage the Plaintiff's business and its operations.

Wang Peng/Nelson (Dato' Sri) injected funds into the Plaintiff.

for the finances department, it was managed by the 4<sup>th</sup> Defendant (Mahadzer bin Harun) and the 5<sup>th</sup> Defendant (Nur Hidayah binti Roslee).

The scheme:

in the year 2020, the Plaintiff had carried out investigations and discovered that the siblings (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) with the assistance of the finance employees (the 4<sup>th</sup> and 5<sup>th</sup> Defendants) had siphon money out of the Plaintiff for their benefit and the 6<sup>th</sup> to 13<sup>th</sup> Defendants also connected to the scheme.

the Plaintiff alleged and pleaded that in the year of 2017, 2018 and 2019 there are dubious payments made by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants with the assistance of the 4<sup>th</sup> Defendant for purported business development expenses or business- related expenses. The payment vouchers prepared by the finances department and approved the 1<sup>st</sup> Defendant and/or the 3<sup>rd</sup> Defendant were made to some unknown individuals including the 12<sup>th</sup> Defendant; payments made for the pockets and benefit of the 1<sup>st</sup> Defendant and/or the 3<sup>rd</sup> Defendant; and the payments were unauthorized.

the Plaintiff alleged and pleaded that in the year of 2020, the 1<sup>st</sup> and/or the 2<sup>nd</sup> Defendants had caused the Plaintiff to enter into loan agreements in order to pay for several payments to the 6<sup>th</sup> Defendant (FMS Elegance Sdn Bhd) and several payments for year 2017 and 2018. The Plaintiff contends that the loans are the documented debts suffered by the Plaintiff and the siblings (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) had evaded their liabilities by leaving/resigning their positions in the Plaintiff.

The conspiracy:

premised on the scheme, the Plaintiff alleged and claimed that the 1<sup>st</sup> to 5<sup>th</sup> Defendants had siphoned the money out of the Plaintiff by way of purported funding the Plaintiff's business operations. the business development on the housing projects were confirmed to be non-existent, sham and/or did not make any significant progress. Instead, the Plaintiff had made payments such as Presint 5 Project, renovation by ZAQ Interior & Design Sdn Bhd which has charged the Plaintiff with exorbitant price, etc.

for the conspiracy to defraud the Plaintiff, paragraph 68 in the statement of claim stated that further and/or in the alternative, the Plaintiff contends that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants assisted by the 4<sup>th</sup> and 5<sup>th</sup> Defendants together with the 6<sup>th</sup> Defendant (FMS Elegance Sdn Bhd) to the 12<sup>th</sup> Defendant (Abdul Karim bin Mustafa) had conspired to defraud the Plaintiff by way of falsely represented to the Plaintiff or being reckless about the authenticity/viability of the housing development projects; payments were made by the Plaintiff not for the Plaintiff's benefit but for the 1<sup>st</sup> to 12<sup>th</sup> Defendants own benefits.

**[9]** Further and/or in the alternative, the Plaintiff contends that the directors of the Plaintiff and the finance employees of the Plaintiff had breach their fiduciary duty, duty of fidelity, duty as advisor, general duty and/or professional duty against the Plaintiff.

**[10]** Therefore, as a result to all the above-mentioned wrong doing done by the Defendants, the Plaintiff contends that it had suffered huge financial loss throughout the years 2016, 2017, 2018 and 2019.

**[11]** Be that as it may, in year 2021, the Plaintiff also had filed the legal action at the Subordinate Courts as follows:

- i. at Petaling Jaya Sessions Court, Suit No.: BK-B52NCvC-112- 07/2021 where the Plaintiff sued the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim) for RM177,000.00;
- ii. at Sepang Sessions Court, Suit No.: BK-B52NCvC-11- 07/2021 where the Plaintiff sued the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim) for RM506,000.00;
- iii. at Petaling Jaya Sessions Court, Suit No.: BB-B52NCC-7- 03/2021 where Wang Peng (Nelson) (Dato' Sri) sued the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim) and the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim) for USD200,000.00; and
- iv. at Sepang Sessions Court, Suit No.: BK-A52-2-03/2021 where Wang Peng (Nelson) (Dato' Sri) sued the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim) for AED140,100.00.

**[12]** The Plaintiff stated that the status of the cases is that the Plaintiff had entered judgment in default of appearance in suits ii, iii and iv. For suit no i, the 1<sup>st</sup> Defendant had entered appearance, filed its defence and counterclaim against the Plaintiff.

#### **The Issues to be tried**

**[13]** There are 9 issues to be tried as in Enclosure 87 filed by the Plaintiff. But there are overlapping issues and this Court finds that the following issues must be determined in the full trial:

- (a) whether the dubious payments discovered by the Plaintiff for year 2017, 2018 and 2019 were made not for the Plaintiff business development expenses or business related expenses and/or did not make any significant progress?
- (b) whether the Presint 5 project is a non-existent and/or sham project?
- (c) whether the renovation costs by ZAQ Interior & Design Sdn Bhd was inflated and had charged the Plaintiff in exorbitant price?
- (d) whether the loan agreements be null and void?
- (e) whether as a result of issue in (a), the Defendants had conspired to injure the Plaintiff and had conspired to defraud the Plaintiff?
- (f) whether the Defendants had breached its duties and/or negligence?
- (g) whether the Plaintiff is entitle for the monetary as specified in the reliefs as in paragraphs (b) to (p)?

#### **The trial**

**[14]** In the trial, I have heard the oral evidence and documentary evidence from the following witnesses:

**The Plaintiff's case:**

**PW-1: Wang Peng (Nelson) (Dato' Sri), businessman. PW-2: Che Mokhtar bin Shaari, director of Plaintiff. PW-3: Nurul Athirah binti Mohamad Rafi (subpoena witness), junior auditor.**

The 1<sup>st</sup> to 5<sup>th</sup>,  
Defendants' case:

7th

to

11th

SD-1: Sheikh Azhar bin Shaik Abdul Rahim, the 1<sup>st</sup> Defendant, Not working. SD-2: Mahadzer bin Harun, the 4<sup>th</sup> Defendant, Not working.

SD-3: Sheikh Annuar bin Shaik Abdul Rahim, the 3<sup>rd</sup> Defendant, Retired/Freelancer.

SD-4: Nur Hidayah binti Roslee, the 5<sup>th</sup> Defendant, Senior Account Executive at a company in Bandar Sunway. SD-5:

Fadzwin binti Mad Salleh, the 7<sup>th</sup> Defendant, Not working. SD-6:

Noorafzan binti Shaik Abdul Rahim, the 10<sup>th</sup> Defendant, Confinement Lady @ Nor Mobila.

The 12th Defendant's case:

Abdul Karim bin Mustafa, the 12th Defendant, Self-employed.

**[15]** The 6<sup>th</sup> Defendant (FMS Elegance Sdn Bhd), the 8<sup>th</sup> Defendant (Grand Infra Sdn Bhd) and the 13th Defendant (Shahrin bin Abu) did not enter any appearance and no defence are filed.

**The Law****Burden of proof:**

**[16]** In *Pernec Ebiz Sdn Bhd v. CCI Technology Sdn Bhd & Ors* [\[2015\] 2 MLJ 117](#), the Court of Appeal held –

“Even though the burden upon a plaintiff in a civil suit is only to prove its case upon a balance of probabilities, it must present its case sufficiently clearly to do so. It cannot merely file pleadings, file bundles of documents, proceed to trial, call witnesses to testify and argue on the various issue and expect the court to make out the case on its own for one party or other. ... Where the party upon whom the burden of proving its case lies fails to do so, it fails to prove its case and its action must be dismissed.”.

**[17]** Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* 64 TLR 177 at p. 178 held–

“... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: ‘This is what I have lost, I ask you to give me these damages’. They have to prove it.”.

**[18]** The well-established principle that the burden of proof at all times is borne by the Plaintiff on the balance of probabilities to establish his case against the Defendant/s or the existence of a legally enforceable claim against the Defendant/s. It is upon the Plaintiff, and certainly not the Defendant, to discharge that burden. It is for the Plaintiff to prove his case and satisfy the court that his claim is well-founded before the court can grant judgment on his claim.

**[19]** In this case, the fact that the Defendants had led evidences and called the material witnesses i.e. the 1<sup>st</sup> Defendant, the 3<sup>rd</sup> Defendant, the 4<sup>th</sup> Defendant, and the 5<sup>th</sup> Defendant who are directly involved in the Plaintiff’s management, operation and finance had proved to this Court that they had discharged their duties in accordance to their scope of works and obligations in the Plaintiff.

#### **Tort of Conspiracy:**

**[20]** The learned counsels for the Plaintiff and the Defendants had cited the cases pertaining to tort of conspiracy, namely –

Justice Viscount Dilhorne in the case of **Scott v Metropolitan Police Commissioner AC 819**.

*Tekital Sdn Bhd v Sarina binti Kamaludin & Ors* [2012] 8 MLJ 734 where, Her Ladyship, Nallini Pathmanathan (as she was then), discussed thoroughly the doctrine of conspiracy to injure, –

“[93] In Clerk & Lindsell on Torts, (18th Ed), at chapter 24 the author states in relation to the element of ‘agreement’ as follows: Of the various words used to describe a conspiracy, ‘combination’ has been preferred on the ground that ‘agreement’ might be thought to require some agreement of a contractual kind, whereas all that is needed is a combination and common intention, (see *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393.

But judicial descriptions still speak of ‘concerted action taken pursuant to agreement’ ... But there must be a combination; lack of overt acts or an uncommunicated intention to join a conspiracy may show there has not been an effective combination ... A company, being a separate legal person can conspire with its directors; and the knowledge of the company may be found in the person (Usually a director) who has management control (as its alter ego) for the transaction or act in question ...

[94] From the foregoing passage it is evident that it is not necessary that evidence of any form of contractual agreement be produced. It is sufficient that there is evidence produced that the defendants acted in combination, which is the case here. I have set out in this judgment in relation to each of the defendants why I have concluded that they acted in combination and with common intention.

In the case of *Shell (M) Trading Sdn Bhd v Tan Bee Leh @ Tan Yue Khoen & Ors* [2013] 8 MLJ 533, it was held that –

“[23] Notwithstanding the above inferences, it is trite that in an action premised on a tort of conspiracy, it is incumbent on the plaintiff to prove the existence of the defendants’ conspiratorial agreement to intentionally injure and cause economic loss to the plaintiff.”.

In the case of *Muniandy a/l Nadasan & Ors v Dato’ Prem Krishna Sahgal & Ors* [2016] 11 MLJ 38, His Lordship, Wong Kian Kheong held that–

“[18] My understanding of case law is that there are two kinds of tort of conspiracy to injure, namely: (a) tort of conspiracy to injure by unlawful means; and (b) tort of conspiracy to injure by lawful means.

[34] It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement.”.

#### **Law on director’s fiduciary duty:**

**[21]** The learned counsel for the Plaintiff had cited the provisions on the director’s duties as codified under the Companies Act 2016 that are in [sections 213, 214](#) and [215](#) of the [Companies Act 2016](#) that directors shall exercise reasonable care, skill and diligence; that directors must make business judgment in good faith and must not have

“material personal interest”; and that directors’ reliance must be made in good faith and must make reasonable inquiries.

**[22]** The learned counsel for the Plaintiff also had cited the 2 books, first, “Company Directors – Duties, liabilities, and Remedies” - 2<sup>nd</sup> edition, wherein the author Simon Mortimore QC has this to say, at pg 297 –

“It has been consistently emphasized by the courts on numerous occasions that the question whether a director has in fact acted in breach of his duty of care can only be determined upon consideration of the facts and circumstances of the particular case. In order to ascertain whether a breach has occurred, it is first necessary to determine the extent of the duty. That depends on ‘how the particular company’s business is organized and the part which the director could reasonably have been expected to play’.....”

and second, “Annotated Malaysian Companies Act 2016”, wherein the author Cheah Foo Seong summarized in principles in the English case *Daniels v AWA Ltd*, at pg 275 – 276 as thus –

“[213.10] in *Daniels v AWA Ltd* (above), the following are held to be the minimum standards of care, skill and diligence that must be demonstrated and exercised by directors:- (a) Directors must acquire a basic understanding of the business of the company and must be familiar with the fundamentals of the company’s business.”.

### Findings of The Court

**[23]** First and foremost, the Plaintiff is a corporate entity and not a human. A company, not being a natural person, cannot act on its own. It can act only through the agency of natural persons.

**[24]** The Federal Court in *Tengku Dato’ Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [\[2018\] 2 MLJ 177](#), held –

“[103]A company is an artificial person and has no physical existence. Its legal existence is recognised only by reason of the Act. A company, not being a natural person, cannot act on its own; it can act only through the agency of natural persons. As stated by Cairns LJ in *Ferguson v Wilson* (1866) LR 2 Ch App 77 at p 89 ‘the company itself cannot act in its own person, for it has no person’.”.

**[25]** In *Christopher Grant v Teh Beng Leong & Anor* [\[2019\] MLJU 1574](#) (High Court) held –

“[10] The plaintiffs claim against the 1<sup>st</sup> defendant for negligence is clearly misconceived. The 1<sup>st</sup> defendant is a body corporate or an artificial legal person created by written law. As such it can only act through living persons and liability visited upon it vicariously for the acts of those persons such as its employees or agents. The 1<sup>st</sup> defendant is therefore incapable of committing the tort of negligence. On the other hand, any person who commits the tort of negligence is personally liable to the person he causes injury or damage to.”.

**[26]** In analyzing the pleaded case of the Plaintiff, the following points/matters are well shown to this Court:

- (a) the relationship between the Plaintiff specifically Wang Peng (Nelson) (Dato’ Sri) and his father with the siblings that are 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim), 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim) and 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim) was about a company named Grand Energy E & C Sdn Bhd (the Plaintiff). However, Wang Peng’s father is not called as a witness.
- (b) the meeting and discussion between Wang Peng (Nelson) (Dato’ Sri) and his father with the siblings led to the agreement to become investor in Malaysia. Therefore, Grand Energy E & C Sdn Bhd (the Plaintiff) had been incorporated on 16-5-2016 under the Companies Act 2016.
- (c) the 1<sup>st</sup> Defendant (Sheikh Azhar bin Shaik Abdul Rahim) and the 2<sup>nd</sup> Defendant (Shaik Amar bin Shaik Abdul Rahim) had become the directors of Grand Energy E & C Sdn Bhd (the Plaintiff). The 1<sup>st</sup> and the 2<sup>nd</sup> Defendants are also the the shareholders in Grand Energy E & C Sdn Bhd (the Plaintiff). Whilst, the 3<sup>rd</sup> Defendant (Sheikh Annuar bin Shaik Abdul Rahim) is the business advisor of Grand Energy E & C Sdn Bhd (the Plaintiff).
- (d) in supporting the management and operations of Grand Energy E & C Sdn Bhd (the Plaintiff), the 4<sup>th</sup> Defendant (Mahadzer bin Harun) and the 5<sup>th</sup> Defendant (Nur Hidayah binti Roslee) had been appointed as

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the accounting manager and accounts executive (finance officers) of Grand Energy E & C Sdn Bhd (the Plaintiff).

- (e) the incorporation/creation of another 2 companies i.e. the 6<sup>th</sup> Defendant (FMS Elegance Sdn Bhd) and the 8<sup>th</sup> Defendant (Grand Infra Sdn Bhd) who are unrepresented in this suit and did not enter appearance, was for the purpose of the purchase of Malay Customary lands which the Plaintiff was unable to purchase on its own. The director of the 6<sup>th</sup> Defendant is the wife of the 1<sup>st</sup> Defendant who is named as the 7<sup>th</sup> Defendant and the director of the 8<sup>th</sup> Defendant is the wife of the 3<sup>rd</sup> Defendant who is named as the 9<sup>th</sup> Defendant.
- (f) since the 6<sup>th</sup> and 8<sup>th</sup> Defendants did not enter any appearance, only the 7<sup>th</sup> Defendant (Fadzwin binti Mad Sallih) has become the Defendants' witness.
- (g) another company that is the 11th Defendant (Teras Tanjung Sdn Bhd) was created/incorporated in order to assist the Plaintiff's business namely for operation, assets expenses, investment and project development.
- (h) premised on the scheme that related to the Plaintiff's businesses, the Plaintiff alleged that the Defendants had siphoned the Plaintiff's money.

**[27]** Before this full trial, this Court had heard the ex-parte interlocutory application made by the Plaintiff for Mareva injunction. On 27-1-2022, this Court has granted the Mareva injunction against the Defendants. On 14-6-2022, this Court had upheld the Mareva injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants and dismissed the Mareva injunction against the 5<sup>th</sup> Defendant (Nur Hidayah binti Roslee).

**[28]** The burden of proof is in the shoulder of the Plaintiff and the material witness is Wang Peng (Nelson) (Dato' Sri). The other 2 of the Plaintiff's witnesses that are Che Mokhtar bin Shaari (director/in-house consultant) and Nurul Athirah binti Mohamad Rafi. These 3 witnesses must prove and show that the Defendants had done the acts that caused the Plaintiff's losses.

**[29]** The facts relied upon by the Plaintiff to prove its losses are pertaining to –

- > Marketing/business development expenses
- > Payments purportedly for the Presint 5 Putrajaya Project
- > Payment to Seven Spokes Sdn Bhd
- > Payments to the 6<sup>th</sup> and 8<sup>th</sup> Defendants
- > Payments on behalf of the 11th Defendant
- > Payments for amount owing to directors
- > Payment as the 1<sup>st</sup> Defendant's house rental
- > Unaccounted money

**[30]** PW-1, Wang Peng (Nelson) (Dato' Sri), is one of the directors of the Plaintiff but his role in day-to-day managing the business and operations of the Plaintiff is that he relied heavily on the siblings (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants). Wang Peng (Nelson) (Dato' Sri) testified that he had entrusted the Plaintiff to the siblings and he is "just" the investor and provide money to the Plaintiff's businesses in Malaysia.

**[31]** Wang Peng (Nelson) (Dato' Sri) brought PW-2 as his witness to support its case. However, PW-2 as the director and also former in-house consultant for the Plaintiff has failed to prove that the losses suffered by the Plaintiff are caused by the reckless, negligent, mismanagement and conspiracy by the Defendants.

**[32]** The pleaded defence of the Defendants (except 6<sup>th</sup> Defendant, 8<sup>th</sup> Defendant and 13th Defendant) had reiterate that as the directors to the Plaintiff they had exercise reasonable care, skill and diligence within the extent of duty borne by them, make business judgment diligently, no material personal interest and not blindly rely on

others' information without making reasonable enquiries. Above all, the siblings (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) had acted in good faith in the best interest of the Plaintiff.

**[33]** The Plaintiff had failed to prove that being the directors and shareholders, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had acted in concert to injure the Plaintiff's business.

**[34]** As far as the evidences led by Fadzwin binti Mad Sallih (7th Defendant) and Noorafzan binti Shaik Abdul Rahim (10th Defendant), these 2 ladies as the director of the companies created for the benefit of Wang Peng (Nelson) (Dato' Sri) who so called the investor in this country.

**[35]** The Plaintiff has failed to discharged its burden against the 1<sup>st</sup> Defendant, on balance of probabilities, for his breach of fiduciary duty, for failing to exercise reasonable care, skill and diligence on the payments claimed to unwarranted and unauthorized. Wang Peng (Nelson) (Dato' Sri) is the final person who can approved all these payments when he approved payments to those vouchers related to his approval. The finance department headed by the 4<sup>th</sup> Defendant and assisted by the 5<sup>th</sup> Defendant just the ordinary employees to manage the Plaintiff's finances.

**[36]** The discovery and investigation by the Plaintiff that the claims against the Defendants only based on the documents showed by Che Mokhtar bin Shaari (PW-2) and Nurul Athirah binti Mohamad Rafi (PW-3) to Wang Peng (Nelson) (Dato' Sri). The Plaintiff alleged that the payments were unaudited and unauthorized by the Plaintiff.

**[37]** The learned counsel for the Plaintiff submits that –

“In face of the numerous payments in which the 1<sup>st</sup> to 3<sup>rd</sup> Defendants admittedly received the cash and the 6<sup>th</sup> to 13<sup>th</sup> Defendants received from the Plaintiff, all were unexplained and unsubstantiated with documentary evidence, all that the Defendants can show are bare denial and bare assertions.”.

I disagree.

**[38]** The document that produced by the Plaintiff to Nurul Athirah binti Mohamad Rafi (PW-3), is the Audit Findings by H.H. Fong & Co., the Chartered Accountants in Common Bundle of Documents/B7 (Part C) at pages 2618 to 2627.

**[39]** PW-3 is not the maker of the Audit Findings and her testimony on the contents of the Audit Findings are doubtful. PW-3 has no personal knowledge on the detailed findings and the Auditor's recommendations. In the Audit Findings, I finds that no response from the Plaintiff (i.e. in the column “the Management's response”). Therefore, the issues raised by the Auditor, namely –

- cheques were cashed out over the bank counter;
- cheques were issued in the names of individual instead of the names as indicated on the said invoices/documents;
- payments for some invoices were made by series of cash cheques;
- the absence of any contractual documentation that led to the Plaintiff's obligations and commitments;
- lapses in the internal control system with regards to the issuance of cheque payments,

had the risks and negative implications to the Plaintiff (Grand Energy E & C Sdn Bhd are not proven.

**[40]** PW-3 testified that the persons in charge of the Audit Findings are Mohd Rosdi and Mohd Hazim who had resigned from the Plaintiff.

**[41]** The Audit Findings is an internal audit report for the Plaintiff's consumption first before the Plaintiff take the legal action against the Defendants.

**[42]** During the cross-examination, Wang Peng (Nelson) (Dato' Sri) agreed that the audit was only be done from January 2019 until December 2019. However, he said that there was an audit made in 2018, but when asked by the counsel whether he had tendered the evidence on audit 2018, he was unable to do that because there was no audit made in 2018 at all.

**[43]** In order for the Plaintiff win and entitle to the monetary claims against the Defendants named in the statement of claim, the Plaintiff must prove that –

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the 1<sup>st</sup> to 5<sup>th</sup> Defendants had taken monies for the purpose of the housing projects which then turn out to not exist or have not progressed; and

the payments for business consultation and advisory paid to Seven Spokes Sdn Bhd and directors' fee and housing rental of the 1<sup>st</sup> Defendant,

were made without the approval by Wang Peng (Nelson)(Dato' Sri).

**[44]** The testimony by the 3<sup>rd</sup> Defendant is that the payments were made *via* Seven Spokes Sdn Bhd for his advisory's fee since the 3<sup>rd</sup> Defendant is still the employee of Petronas. There is no evidence by the Plaintiff's witnesses to deny this fact.

**[45]** This Court finds that the marketing/business development expenses are for consultant fees, for payments to certain "agencies/persons" to approve the proposal of Plaintiff's related business in housing project, and others were approved by the 1<sup>st</sup> Defendant and the final say is upon Wang Peng (Nelson)(Dato' Sri).

**[46]** As the investor and the only person who had funded the capital in the Plaintiff's business in Malaysia be that in housing projects or purchasing lands, it is abundantly clear from the evidence that the 1<sup>st</sup> Defendant had approved the payments whereby he himself was the payee.

**[47]** As the sole person who is in charged of the Plaintiff, the 1<sup>st</sup> Defendant had done the necessary action for the Plaintiff and he admittedly received the cash money after the cheques were cashed out by the 4<sup>th</sup> and 5<sup>th</sup> Defendants are for the Plaintiff's business.

**[48]** The claim by the Plaintiff that there was no support document and/or particulars to substantiate that these payments were indeed for the Plaintiff's business did not at all proven that the 1<sup>st</sup> Defendant had breach the fiduciary duty.

**[49]** This Court cannot agree with the Plaintiff that the facts that the housing projects are just at planning permission stage or at proposal stage only had shown that the Plaintiff has proven its case against the 1<sup>st</sup> Defendant for breach of fiduciary duty, on balance of probabilities, as he conducted the business without due care, without skill and diligence and he had material personal interest.

**[50]** Sheikh Azhar bin shaik Abdul Rahim (DW-1) in his evidence in chief via the witness statement, had explained that throughout his time as one of the directors in the Plaintiff, he had introduced and proposed numerous housing development projects to the Plaintiff for investment, namely –

- (a) project in Setiu, Terengganu.
- (b) project in Batu Maung, Penang
- (c) project in Kota Sipteh, Kedah
- (d) project in Perak
- (e) project in Pahang
- (f) project in Ayer Kuning & Batang, melaka
- (g) project in Papar, Sabah
- (h) development of school project
- (i) project in Presint 5 Putrajaya
- (j) The ECRL project

**[51]** Plaintiff contends that the projects are just at planning permission stage or at proposal stage only but numerous payments were made by the Plaintiff via the approval of the 1<sup>st</sup> Defendant and assisted by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Plaintiff has failed to proof what are the projects that only remains at planning permission stage or at proposal stage.

**[52]** For the project in Presint 5 Putrajaya, the 1<sup>st</sup> Defendant admitted that the 13th Defendant had introduced an intermediary person in order to get the approval from the letter from Putrajaya Corporation. For the project in Presint 5 Putrajaya, the Plaintiff was conned by that intermediary person and police report was lodge accordingly.

[53] The Presint 5 Putrajaya project which then turned out to not exist, the Plaintiff claimed that there are several payments made to the siblings which are unsubstantiated. This Court finds that the Presint 5 Putrajaya project did not exist and the documents had proved that the Plaintiff had been coned by certain unidentified individuals. There is no witness from Putrajaya Corporation been called to verify this project. It is not for the Defendants to prove otherwise.

[54] From the payments vouchers tendered by the Plaintiff, the payments were made for the consultation service fees, Plaintiff's business operations and Plaintiff's business development activities. The Plaintiff blamed the 1<sup>st</sup> Defendant for the payments that the Plaintiff alleged to be unwarranted and unauthorized.

[55] In PW-1 witness statement, the Plaintiff's bank accounts are managed as per the Plaintiff's Circular Resolution, where the signatories for the amount RM100,000.00 and above, PW-1, DW-1 and/or DW-3 and the 2<sup>nd</sup> Defendant. Therefore, the cash calls were made by the signatories for the bank accounts.

[56] The involvement of the Plaintiff in business in Malaysia since 2016, it is undisputed that the Plaintiff had paid a huge sums of money and to say that the payments are spent purportedly as marketing development expenses, it is the duty for the Plaintiff to prove it.

[57] In *Lysko v Braley* [2006] CanLII 17253 (Court of Appeal for Ontario), the Ontario Court of Appeal held –

“The Ontario Court of appeal further held ‘Absent proof of vicarious liability or actions in concert, we do not make individuals liable for the anonymous acts of others.’ “.

[58] In this case, if the Plaintiff proves the facts pleaded, the Plaintiff is not have made out a prima facie case. Proving that the siblings (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) had acting in concert to injure the Plaintiff's business and caused the loss to the Plaintiff, does not make out a case against any of them. Absent proof of vicarious liability or actions in concert, I do not make individuals liable for the anonymous acts of others.

[59] I have scrutinised the evidence carefully. No evidence was led by the Plaintiff during trial in support of the submission by the Plaintiff's learned counsel.

[60] It is amazing to see the Plaintiff's alternative relief to this Court that this Court shall –  
an order the Defendants to give the detail account of all money disbursed from the Plaintiff's bank accounts for payments vouchers prepared by the finances department;  
an order that parties to appear before the Registrar to take directions under Order 43 Rules of Court 2012;  
an order that an independent qualified firm of auditors be appointed by this Court, at the expense of all the Defendants, to determine the payments that were not accounted between 2016 and 2019.

[61] The Plaintiff should seek all the alternative reliefs by itself without the help of the Court's order/s.

[62] As admitted by Wang Peng (Nelson) (Dato' Sri) that he manages a group of companies under the name of “Grand Energy” having its presence in China, Middle East, Africa and Malaysia; and its main line of business is oil and gas and the related development projects, the issues raised by the Plaintiff against the Defendants are within Wang Peng (Nelson) (Dato' Sri)'s knowledge.

[63] In the event that the losses suffered by the Plaintiff's due to the proposed projects, the Plaintiff should not just bring this suit before this Court to ask for damages and for the appointment of auditors to check the Plaintiff's daily management and operation.

[64] All the orders sought by the Plaintiff had proved that Wang Peng (Nelson) (Dato' Sri) does not have any personal knowledge pertaining to the Plaintiff's management and operation. When Wang Peng (Nelson) (Dato' Sri) testified that he relied heavily on the siblings (1<sup>st</sup> to 3<sup>rd</sup> Defendants) in running the Plaintiff's business as he is an investor, the misconduct in the management and finances of the Plaintiff as per the Audit Findings must be proven first and it is not for the Defendants to prove otherwise.

[65] As correctly cited by the learned counsel for the Plaintiff in the case of *Low Keang Guan v Sin Heap Lee-Marubeni Sdn Bhd* [2005] 1 LNS 289, it was held that “in appreciating and being receptive to oral evidence, this court must have regard to the contemporaneous documents when there is a conflict of oral evidence, after all, the

weight of documentary evidence outweighs everything else”, therefore this Court has decided that the Audit Findings is the contemporaneous document that can prove the claims against the Defendant. Unfortunately, the Plaintiff has failed to discharge the burden of proof.

**[66]** The role played by the finance officers that are the 4<sup>th</sup> and 5<sup>th</sup> Defendants are purely and genuinely under the instruction by their supervisors that are the 1<sup>st</sup> Defendant and the approval for the vouchers and cheques must come from Wang Peng (Nelson) (Dato’ Sri).

**[67]** The 4<sup>th</sup> and 5<sup>th</sup> Defendants are not liable for any alleged breach of fiduciary duty and/or breach of duty of fidelity.

**[68]** It is sufficient to reiterate the following:

- (a) an employee owes the fiduciary duty to the company if he holds a senior position in the company; and
- (b) an employee generally owes an implied duty of fidelity to his employers to have regard to the interest of his employer.

Blindly following an instruction which is clearly unlawful is also in breach of duty of fidelity.

**[69]** The employees in the finance department only made the payments as per the instructions by the directors, be that the 1<sup>st</sup> Defendant or Wang Peng (Nelson) (Dato’ Sri). The 4<sup>th</sup> and 5<sup>th</sup> Defendants are not the decision-makers. There is no evidence by the Plaintiff that the internal audit has been done to prove that the 4<sup>th</sup> Defendant as a manager in-charge of the Plaintiff’s finances has siphoned money out of the Plaintiff.

**[70]** The 4<sup>th</sup> Defendant in his evidence has proved that he did not blindly follow the 1<sup>st</sup> Defendant’s instruction, as a senior Accounts and Finance Manager, the 4<sup>th</sup> Defendant had protected the Plaintiff’s interest. The 4<sup>th</sup> Defendant also did communicate with Wang Peng (Nelson) (Dato’ Sri) in making the payments and the 4<sup>th</sup> Defendant also received instruction from Wang Peng (Nelson) (Dato’ Sri).

**[71]** Therefore, the Plaintiff has failed to prove its case on a balance of probabilities against the 4<sup>th</sup> Defendant and 5<sup>th</sup> Defendant for breach of fiduciary duty.

**[72]** The burden should not shift to the Defendants to prove otherwise to fulfil [sections 101](#) and [102](#) of the *Evidence Act* whereby the Plaintiff at first instance has failed to discharge its burden of proof. The learned counsel for the Defendants’ submissions are not bare assertions and do not contradict the documentary evidence.

**[73]** The issues between the Plaintiff and the 12<sup>th</sup> Defendant are whether the 12<sup>th</sup> Defendant had conspired to injure the Plaintiff by siphoning monies out of the Plaintiff for the business operation of the corporation Defendants and/or for the personal gain of the individual Defendants; whether the 12<sup>th</sup> Defendant had conspired to defraud the Plaintiff by making false representation, or being reckless, as to the authenticity/viability or the numerous proposed housing development projects?

**[74]** The 12<sup>th</sup> Defendant was employed by the Plaintiff in 2017 as a Business Development Manager and in 2018 he joined the 11<sup>th</sup> Defendant as a director and shareholder.

**[75]** The cause of action by the Plaintiff against the 12<sup>th</sup> Defendant is grounded on tort of conspiracy with the other Defendants for the purpose to injure and defraud the Plaintiff by purportedly siphoning the Plaintiff’s money for his own benefit and personal gain. The evidence tendered by the Plaintiff against the 12<sup>th</sup> Defendant is the payment vouchers given to the 12<sup>th</sup> Defendant during his tenure as business development manager of the Plaintiff, way back in 2017.

**[76]** With regard to the tort of conspiracy to injure and to defraud the Plaintiff, there is nothing in the bundle of documents to show that the 12<sup>th</sup> Defendant had taken any profits or steal the money from the Plaintiff for his own benefit. During the cross examination on Sheikh Azhar bin Shaik Abdul Rahim (DW-1), he agreed that the payment of RM10,000.00 to the 12<sup>th</sup> Defendant was for the purpose of his allowance as the Business Development Manager.

**[77]** The Plaintiff also failed to show and prove to the court that there were any efforts done on the part of the 12<sup>th</sup> Defendant to injure the Plaintiff. All that has been done by the 12<sup>th</sup> Defendant which was un rebutted is that, the 12<sup>th</sup> Defendant was not involved in any fake projects as claimed by the Plaintiff, and the projects that he involved were

projects that were approved by the Plaintiff, and the evidence shows that 12th Defendant received his monthly allowance for the service he rendered to the Plaintiff.

**[78]** Last but not least, as prayed by the Plaintiff for a declaration that the loan agreement dated 19-2-2020 between the Plaintiff and the 6<sup>th</sup> Defendant (FMS Elegance Sdn Bhd); the loan agreement dated 19-2- 2020 between the Plaintiff and the 8<sup>th</sup> Defendant (Grand Infra Sdn Bhd); and the loan agreement dated 15-1-2020 between the Plaintiff and the 11th Defendant (Teras Tanjung Sdn Bhd) be null and void. I allowed such declaration. The loan agreements are no longer in force that binds the Plaintiff. The 6<sup>th</sup> and 8<sup>th</sup> Defendants did not at all filed the memorandum of appearance nor the defence, and no further actions taken by the Plaintiff up until this trial against the 6<sup>th</sup> and 8<sup>th</sup> Defendants.

**Conclusion**

**[79]** In view of the foregoing reasons, I find that the Plaintiff had failed on a balance of probability in demonstrating that the Plaintiff had suffered tremendous amount of loss nor had suffered huge financial loss due to the Defendants (except the 13th Defendant).

**[80]** Accordingly, I dismiss the Plaintiff's claims with costs to be awarded as follows:

- (a) D1, D2, D3, D7, D9 dan D10 sebanyak RM40,000.00 (tertakluk kepada fi alokatur).
- (b) D4 sebanyak RM20,000.00 (tertakluk kepada fi alokatur).
- (c) D5 sebanyak RM15,000.00 (tertakluk kepada fi alokatur).
- (d) D12 sebanyak RM15,000.00 (tertakluk kepada fi alokatur).