Malayan Law Journal Unreported/2017/Volume/Menta Construction Sdn Bhd v SPM Property & Management Sdn Bhd & Anor - [2017] MLJU 526 - 28 November 2016

[2017] MLJU 526

Menta Construction Sdn Bhd v SPM Property & Management Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR)
LEE SWEE SENG J
SUIT NO WA-22C-11-02 OF 2016
28 November 2016

: Dinesh Nandrajog (Pradeep Nandrajog Henna Nandrajog with him) (Syarikat KL Rekhraj) for the plaintiff

Dinesh Nair (Melvin Yasmin & Assoc) for the defendants

Lee Swee Seng J:

JUDGMENT OF Y.A. LEE SWEE SENG

Parties and Project

[1] The 1st Defendant had appointed the Plaintiff as a subcontractor under a Construction Agreement dated 3.2.2005 for a Proposed Mixed Development on 45.29 acres of Land at Kg Kuala Kemaman called Site A, a further Proposed Commercial Development on 9.75 acres of Land along Jalan Chukai, Air Puteh, Mukim Binjai known as Site B and finally a Proposed Ice Factory Development on 5.30 acres of Land at Kuala Kemaman called Site C (the "Project") (hereinafter known as the Construction Agreement). The 2nd Defendant is Encik Ismail Bin Yoop Razali, the Managing Director and 99% shareholder of the 1st Defendant.

[2] The scope of the Plaintiff's Works was to carry out site clearance, earthworks and retaining wall works for the Project. The subcontract price had initially been fixed at RM12,552,782.00 but after re-measurements and/or omissions, the final subcontract price was fixed at RM7,230,687.96.

[3] The 1st Defendant had also, on 5.3.2005, executed a Loan Agreement with the Plaintiff wherein at the request from the 1st Defendant for a loan sum of RM2,000,000.00 for the purposes of financing part of the costs of constructing the Project, the Plaintiff had agreed to advance the said loan to the 1st Defendant, subject to the terms and conditions therein. The purposes of the loan sum included the payments that were needed to be made to the relevant authorities and for the premiums and/or other costs payable for 66 parcels of land.

[4] The Plaintiff commenced its Project Works in April 2005 and from time to time, issued its progressive invoices and progressive statement of accounts to the 1st Defendant for its payment. Upon receiving such progress claims/invoices/statements, the Project Architect would verify the Plaintiff's progress claims and subsequently issue Progress Payment Certificates instructing the 1st Defendant to make payments to the Plaintiff according to the recommended certified amount of the Progress Payment Certificates. The Plaintiff duly completed on 3.2.2005 its Subcontract Works as required under the Construction Agreement. The Project Architect issued a Certificate of Practical Completion on 3.3.2006

Problem

[5] The Plaintiff on 6.10.2006 and on other dates, enquired with the 1st Defendant on the status of payment

of monies under the Construction Agreement. The letter is at page 250 of PBOD1.

[6] The 1st Defendant replied by its letter of 12.10.2006 and had agreed and admitted to monies owing by it to the Plaintiff. It however sought the Plaintiff's indulgences on these payments due because of its financial constraints. The letter is at page 251 of PBOD1.

[7] The Plaintiff, on 17.10.2006, granted indulgences to the 1st Defendant on the postponement of payment for monies due and owing by the 1st Defendant to the Plaintiff. (See page 252 of PBOD1)

[8] The 1st Defendant, on 27.1.2010, instructed the Project's Consultant Quantity Surveyor (Juru Kos) to forward the draft Final Account to the Project Engineer and thereafter to prepare the complete set of Final Account for the Project. (See page 253 of PBOD1).

[9] The Project Consultant Quantity Surveyor (Juru Kos) subsequently issued the Project's Final Account dated 25.11.2010 wherein a sum of RM7,230,687.96 was recognised as being the value of works done by the Plaintiff towards the Project. The Plaintiff said it is entitled to be paid such sum. (See pages 255-258 of PBOD1). The 1st Defendant contended that the Architect had not certified the Project's Final Account. The 1st Defendant also argued that the sum assessed by the Project Consultant QS is not binding as the 1st Defendant had not signed off the Statement of Final Account.

[10] The Plaintiff, on 28.12.2010, forwarded the Statement of Final Account to the 1st Defendant for its endorsement and early payment at page 259 of PBOD1.

[11] On 30.9.2011 the Plaintiff issued a formal statement of account to the 1st Defendant containing all of the details of the sums due and owing to the Plaintiff under the Construction Agreement, including interest accrued thereon as at 30.9.2011 amounting to RM8,929,475.82 ("the Construction Statement of Account"). (See page 260 of PBOD1).

[12] The Plaintiff also issued a formal statement of account to the 1st Defendant, setting out a breakdown of the monies due and owing to the Plaintiff under the Loan Agreement ("the Loan Statement of Account") which at that point in time amounted to RM1,875,622.22. (See pages 261- 262 of PBOD1)

[13] Subsequently on 3.10.2011 the Plaintiff's Managing Director, Mr. Tan Choon Hock PW 1 and the 2nd Defendant DW 1 had a meeting on at the 2nd Defendant's office wherein Mr. Tan Choon Hock had personally handed over both the Construction Statement of Account and Loan Statement Account dated 30.9.2011 to the 2nd Defendant.

[14] Upon receipt of the Construction and Loan Statements of Accounts, the 2nd Defendant, on behalf of the 1st Defendant, acknowledged the debt due and owing therein and requested for more time to repay the same. The Plaintiff also contended that the 2nd Defendant also further warranted, represented, undertook, and promised to be personally liable for the debt in the event the debt was not paid by the 1st Defendant to the Plaintiff. (See pages 260-262 of PBOD1). This was vigorously and vehemently denied by the Defendants.

[15] According to the Plaintiff, on 10.11.2011 the Defendants again sought indulgences from the Plaintiff on the postponement of payment of monies due and owing and had agreed to proposals towards settlement of its dues to the Plaintiff by various means including the transfer of properties into the Plaintiff's name as a means of set-off. To this effect, a valuation of the 66 parcels of land was carried out to enable parties to ascertain the actual value of the said properties that were intended to be set-off with the 1st Defendant's debts due and owing to the Plaintiff. (See page 254 of PBOD1)

[16] In early 2015, a draft Settlement Agreement was also prepared by the Plaintiff for the purposes of the contra of properties however it was not executed by the 1st Defendant. (See pages 263-287 of PBOD1)

[17] Whatever indulgences and patience the Plaintiff had extended to the 1st Defendant had finally dried up and on 10.2.2016 the Plaintiff commenced this suit against the 1st Defendant as well as against the 2nd Defendant. The Plaintiff contended that the 2nd Defendant's liability is under the warranty, representation,

undertaking and promise given by him to the Plaintiff that he would be personally liable for the debts under the Construction Agreement and the Loan Agreement.

Prayers

[18] The Plaintiff's total claim against the Defendants is for a sum of **RM14,756,519.31** being monies due and owing by the Defendants to the Plaintiff under the Construction Agreement dated 3.2.2005 and Loan Agreement dated 5.3.2005.

[19] The breakdown of the total claim of **RM14,756,519.31** (as at 31.12.2015) is as follows with the Plaintiff praying for the following reliefs:

a) An order that the 1st Defendant and/or 2nd Defendant pay the Plaintiff the sum of RM7,230,687.96 being the outstanding principal sum under the Construction Agreement;
b) An order that the 1st Defendant and/or 2nd Defendant pay the Plaintiff the sum of RM5,204,953.10 being interest at 8.8% per annum on the principal sum as at 18.12.2015 under the Construction Agreement;
c) An order that the 1st Defendant and/or 2nd Defendant pay the Plaintiff the sum of RM1,200,000.00 being the outstanding principal sum under the Loan Agreement;
d) An order that the 1st Defendant and/or 2nd Defendant pay the Plaintiff the sum of RM1,120,878.25 being interest at 8.8% per annum on the principal sum as at 18.12.2015 under the Loan Agreement;
e) Further interest in the sum of RM2,320,878.25 and RM12,435,641.06 respectively at the contracted rate of 8.8% per annum from 19.12.2015 until full realization;
f) Costs; and
g) Any further or other reliefs as deemed fit by this Court.

[20] The Plaintiff called 3 witnesses : 1) Tan Choon Hock PW 1 - Plaintiff's Managing Director, 2) K. Kalaiselvan PW 2 - Plaintiff's General Manager and 3) Kuh Chon Sen PW 3 - Project's Quantity Surveyor (Subpoenaed Witness). The Defendant's only witness was Encik Ismail Bin Yoop Razali - 1st Defendant's Managing Director and the 2nd Defendant herein.

Principles

Whether the principal amount due under the Construction Agreement is the amount as certified by the Project's Quantity Surveyor as per the Statement of Final Account dated 25.11.2010 or the amount admitted in the Construction Statement of Account of 30.9.2011

[21] The Plaintiff submitted that it is widely recognised in the Construction Industry that the Statement of Final Account issued in a Project is a statement of the final value of the works executed by a contractor under a construction contract. I have no quarrel with that proposition.

[22] It was also submitted by the Plaintiff that the Statement of Final Account is conclusive with respect to the actual value of works carried out by a contractor in the Project as it has been independently valued and/or quantified and/or certified by the Project Appointed Consultant (either quantity surveyor or architect).

[23] This proposition is supported by the authors of '**Construction Law in Malaysia by Sundra Rajoo & Harbans Singh KS;** Sweet & Maxwell Asia; 2012 edition' which said at page 486:

> "If not, resort will have to be made to the authoritative texts which basically describe it as '**a statement prepared following the completion of all work under a construction contract and the defects liability maintenance period...It is generally expected to show the original contract sum and a tabulated breakdown of** the items which arise from variations...From these figures, the final contract sum is computed...

> Therefore, it is basically **a statement of the value of the works executed by the contractor under the construction contract together with all further sums which show the final adjustment of the contract sum.**" (emphasis added)

[24] The High Court case of *Shen Yuan Pai v Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16, in applying English case-law, adopted the findings that a final certificate is conclusive in nature. It held at page 21:

> "The same principle to which reference was earlier made was enunciated in *Hosier & Dickinson Ltd v P&M Kaye Ltd* (a decision affirmed on appeal to the House of Lords in *Kaye v Hosier*) where Lord Denning said at page 305:
>
> > 'After all, the architect is the agent of the employers. He owes a duty to the employers to use due care in giving his final certificate. If he should negligently give a final certificate barring the employers from a good claim, he would, I think, be liable in damages. (See *Satcliffe v Thackrah* [1974] 1 All ER 859, a recent House of Lord's decision)' and lower down:
> >
> > 'If the architect was satisfied that the work had been properly completed, he was quite entitled to bring the matter to a close and to issue his final certificate. Once issued, it was conclusive."

[25] Likewise in the case of *James Png Construction Pte Ltd v Tsu Chin Kwan Peter* [1991] 1 MLJ 449 it was held at page 452 as follows:

> "I therefore hold that **the final certificate issued by the architect on 12 June 1989 was perfectly valid. Its conclusiveness cannot be impugned.** If the defendant contends, as he does, that the architect had not listed all the defects which he ought to have listed or that the listed defects were not satisfactorily done, then the defendant's redress is against the architect. He cannot, as the authorities now stand, withhold payment to the plaintiffs." (emphasis added)

[26] In the present case, the Project Consultant Quantity Surveyor (Juru Kos) had issued a Statement of Final Account dated 25.11.2010 (See pages 255-258 of PBOD1) which recognised, valued and quantified that the Plaintiff had carried out a total value of works towards the Project amounting to RM7,230,687.96 and that the Plaintiff was entitled to be paid the said sum by the Defendants.

[27] The said assessment and valuation of the Project Consultant Quantity Surveyor (Juru Kos) as per its Statement of Final Account is reproduced as page 258 of PBOD1.

[28] The Project's Quantity Surveyor PW 3 (Mr. Kuh) in confirming that the Plaintiff was entitled to be paid a sum of RM7,230,687.96 being the total value of works carried out by the Plaintiff towards the Project, testified during the trial (See pages 72, 84 of NOE):

> Q: Pg 257 PBOD 1. Would you agree that this St of Final Ac is to quantify that the P has carried out the total value of works carried out by the P is RM7,230,687.96.
>
> A: Yes.
>
> ...
>
> Q: Whether the D signed it does not detract from the valuation done by you i.e. RM7.23m.
>
> A: Yes.

[29] The Plaintiff stated that its claim for the principal sum due and owing by the Defendants to the Plaintiff under the Construction Agreement is for a sum of RM7,230,687.96 (paragraph (a) at page 34 of Bundle IP). This amount claimed by the Plaintiff against the Defendants is as per the Project Consultant Quantity Surveyor's (Juru Kos) Statement of Final Account dated 25.11.2010 (See pages 255-258 of PBOD1).

[30] It must be noted that notwithstanding the Plaintiff having sent its various Progress Claims to the 1st Defendant in the years of 2005 and 2006 which totals RM7,838,641.27 (as recognised in the Statement of Final Account - see page 258 of PBOD1) and Interim Certificates had been issued to that effect without any payment thereto, the Plaintiff's claim against the Defendants is not as per its Progress Claims totaling RM7,838,641.27 (which was subject to re-measurement), but its claim against the Defendants is as per the Project Consultant Quantity Surveyor's (Juru Kos) certified amount of RM7,230,687.96 (See page 258 of PBOD1).

[31] This was confirmed by the 2nd Defendant (En Ismail) himself when he testified in cross-examination (See pages 273, 275, 287 of NOE):

> DNN So would you agree with me now that all these interim certificates, the valuation and the quantification and all so on and so forth are all subject to be re-measured in the final account. Agree or disagree?
>
> ISMAIL Agree.
>
> ...
>
> DNN And would you agree with me, En Ismail, that this final account that is issued by the QS will quantify and measure the actual works carried out by the Plaintiff for the project?
>
> ISMAIL Yes.
>
> ...
>
> DNN Paragraph 8, page 34, paragraph 8. What the Plaintiff is claiming in its pleadings is RM7.2 million. So now my question is, would you agree with me that the Plaintiff's claim for principal sum under the Construction Agreement is, you look at now compare page 258, is as per the QS certified, certifications value of work and not the own Plaintiff's progress claims of RM7.8 million in there.
>
> ISMAIL Yes.

[32] Learned counsel for the Defendants' stand was that since the 1st Defendant had not countersigned the Statement of Final Accounts, it would mean that the 1st Defendant had not agreed on the Statement. That is not very helpful and no weight could be placed on such a statement from the 1st Defendant when it should be stating the reasons for its disagreement with the Statement of Final Accounts and which particular items in the Statement it disagreed with. A bare and bald statement that the 1st Defendant had not signed the Statement of Final Accounts and so is not binding on the 1st Defendant is a hollow statement bereft of any credibility unless it descends to detailing the areas of disagreement and the reasons for it.

[33] However subsequent to the issuance of the Statement of Final Accounts by the QS, the Plaintiff and the 1st Defendant had agreed to a lesser principal sum owing as can be seen in the Construction Statement of Account dated 30.9.2011 prepared by the Plaintiff for the 1st Defendant to confirm and agree. See page 260 of PBOD1.

[34] The 1st Defendant, through its Managing Director who is the 2nd Defendant, acknowledged receipt of the Statement on 3.10.2011 and requested for the Plaintiff's kind consideration to give the 1st Defendant more time to pay the debt.

[35] This Construction Statement of Account dated 30.9.2011 was nearly a year after the Statement of Final Account dated 25.11.2010. As the Plaintiff had signed the Statement of Final Account and the 1st Defendant

for reasons best known to itself, had refused to sign, this subsequent Construction.

[36] Statement of Account prepared by the Plaintiff and confirmed by the 1st Defendant must be taken to be a new negotiated sum that both parties could agree. The evidence of PW 1 the Managing Director of the Plaintiff and confirmed by DW 1, the Managing Director of the 1st Defendant, was that the parties met almost every month after the completion of the Works to discuss on the mode of payments of the outstanding amount. There is no need to go behind the reason for the reduced sum of RM6,094,565.27 from the sum of RM7,230,687.96 for businessmen must be deemed to have their reasons for agreeing to a reduced sum both for business resolution and finality.

Whether there has been a fresh acknowledgment of debt within the meaning of Section 26 of the Limitation Act 1953 thus reviving the cause of action of the Plaintiff

[37] I agree with the Defendant that there is no need to wait for the Statement of Final Accounts before the Plaintiff could sue for the various amounts due under the various Interim Certificates issued. Clause 17 of the Construction Agreement makes it very clear that an Interim Certificate becomes due after 30 days after its issuance. Thereafter the Plaintiff could sue and recover all monies based on Interim Certificates 1 to 9. The Plaintiff's cause of action would arise after 30 days of the issuance of the Interim Certificates, as per Clause 17.

[38] One need not go further than to quote the relevant passage in the Federal Court case of *Tenaga Nasional Bhd v Kamarstone* [2014] 2 MLJ 749 on the meaning of an accrual of a "cause of action":

> "[16] Gill FJ, then thus enunciated on 'the date of accrual' in the case of a debt:
>
> > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland LR* 4 QB 509 at p511, decided in 1843, **that the cause** of action arises at the time when the debt could first have been recovered by action...**"** (emphasis added)

[39] The purpose served by the Statement of Final Accounts does not in any way postpone the commencement of a cause of action based on the Interim Certificates issued. Once the Statement of Final Accounts is issued, both the Plaintiff and the 1st Defendant may then compare what is stated in the Statement of Final Accounts as against what has been paid by the 1st Defendant to Plaintiff under all the Interim Certificates. In the event the 1st Defendant has overpaid the Plaintiff then the 1st Defendant can claim the amount overpaid. In the event there is a balance outstanding shown as owing to the Plaintiff, then the Plaintiff would be able to claim this amount.

[40] The Plaintiff's own witness in the Quantity Surveyor as PW 3 had testified that the Plaintiff had taken up to 4 years to hand over all the documents to the QS to prepare the Final Accounts when it was supposed to be done within 12 months of the CPC. This delay is not so much the cavalier attitude of the Plaintiff but rather that the 1st Defendant had requested to withhold finalizing the accounts as the 1st Defendant had cashflow problem in making payments to the Plaintiff.

[41] Section 6(1) of the Limitation Act 1953 states as follows:

> "6. Limitation of actions of contract and tort and certain other actions:
>
> (1) Save as hereinafter provided **the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued,** that is to say -

(a) **actions founded on a contract or on tort;**
(b) actions to enforce a recognisance;
(c) actions to enforce an award;
(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture." (emphasis added)

[42] The Plaintiff's submission that a cause of action can only accrue from the date the actual debt materializes and/or is ascertained is misplaced in the context and circumstances of this case. The whole purpose of Interim Certification is such that it allows for the Plaintiff contractor who has done the work to be paid for the work done. The amount is as stated in the Interim Certificate. The fact that the Certificate is interim gives no right to the Defendant as Employer to refuse payment. To agree with the Plaintiff's submission would be to cause a grave injustice to contractors who cannot claim or sue for payments due for work done progressively but that it must wait until the Statement of Final Accounts is prepared which is normally after CPC has been issued. That would be to require the Contractor to fund and finance the whole works and the Employer can just sit back and collect from the purchasers the monies due to it from its Progress Certificates to the purchasers. I know of no surer recipe for disaster in construction projects!

[43] The question may be asked in reverse: if the Plaintiff were to sue for amount due under the various Interim Certificates, can the Defendant apply to strike out the Plaintiff's claim on ground that the cause of action has not arisen? Surely not! Very obviously the cause of action has arisen once the deadline for payment is due; in this case after the expiry of 30 days from the date the Interim Certificate is issued. In fact in the Plaintiff's own Construction Statement of Account dated 30.9.11 has a third column from the left that is entitled "Due Date" where it is set out the due dates for the Certificates of Payments No.1-9. That must be taken to mean that the Plaintiff itself acknowledges that the various Certificates were due for payment on those dates stated.

[44] The Plaintiff's reliance on the Privy Council case of *Loh Wai Lian v Sea Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 is misplaced as in the present case the amount owing has been ascertained by the Interim Certificate. There in **Loh Wai Lian** (supra) the single sum to be calculated and ascertained at a particular date with respect to a late delivery claim for a house could not be ascertained as the house has not been delivered and that until that sum has been ascertained it does not become due and cannot be sued for.

[45] That is no justification for saying that in our present case, the debt of the Defendants to the Plaintiff only crystallized upon the issuance of the Statement of Final Account on 25.11.2010.

[46] Ordinarily then the cause of action, having arisen in 2005/6 the suit ought to have been filed in 2011/12 and not in 2016.

[47] A far more important question in this case is whether there has been a fresh acknowledgment of debt within the meaning of section 26(2) of the Limitation Act 1953 such that the cause of action has been revived. Section 26(2) reads as follows:

"26. **Fresh accrual of action on acknowledgment** or part payment:

(2) **Where any right of action has accrued to recover any debt** or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and **the person liable or accountable therefor acknowledges the claim** or makes any payment in respect thereof, **the right shall be deemed to have accrued on and not before the date of the acknowledgment** or the last payment..." (emphasis added)

[48] On 30.9.2011, the Plaintiff issued a formal statement of account to the 1st Defendant containing all of the details of the sums due and owing to the Plaintiff under the Construction Agreement, including interest accrued thereon as at 30.9.2011 amounting to RM8,929,475.82 ("the Construction Statement of Account") (See page 260 of PBOD1).

[49] On the same day, the Plaintiff also issued a formal statement of account to the 1st Defendant under the Loan Agreement, setting out a breakdown of the monies due and owing to the Plaintiff ("the Loan Statement of Account") which at that point in time amounted to RM1,875,622.22 (See pages 261-262 of PBOD1).

[50] At a meeting held on 3.10.2011 between Mr. Tan and En. Ismail, after discussions on the 1st Defendant's proposed method of payment of its debts due and owing to the Plaintiff, Mr. Tan had then personally handed over both the Construction Statement of Account and Loan Statement Account dated 30.9.2011 to En. Ismail.

[51] This was confirmed by the 2nd Defendant (En Ismail) himself when he testified in cross-examination (See pages 312-313 of NOE):

> DNN Correct? Now, just a little back track of this statement of accounts. **Do you agree with me that in October 2011, Mr Tan and you held a meeting somewhere in October 2011? Do you remember that you held a meeting with Mr Tan Choon Hock of the Plaintiff?**
>
> ISMAIL **Yes**.
>
> DNN Agree?
>
> ISMAIL **But we have many meetings**.
>
> DNN Ok, so in October 2011, do you remember having a meeting with Mr Tan?
>
> ISMAIL **I believe there is because every month he meets up with me**.
>
> ...
>
> DNN **What was the purpose of the meeting then**?
>
> ISMAIL **Basically asking me how am I going to pay him**.
>
> DNN **Ok. So the meeting was then for the methods of payment. How is the First Defendant going to pay the Plaintiff. The amounts due, correct**?
>
> ISMAIL **Yes**.
>
> DNN **And during this meeting, you told Mr Tan the First Defendant can't make payment now to the Plaintiff because the First Defendant is dormant, correct**?
>
> ISMAIL **Yes**.
>
> DNN So now my question to you, En Ismail, **would you agree with me that if the First Defendant at that point of time, if the First Defendant was not dormant, the First Defendant would have been able to make payment to the Plaintiff, correct**?
>
> ISMAIL **Yes**.
>
> DNN So after you all discussed, you told him dormant, cannot pay and all that, **Mr Tan then handed over to you these two statement of accounts, correct**?
>
> ISMAIL **Yes**.

[52] Upon receiving the said two Statements of Accounts, the 2nd Defendant thereafter affixed the 1st Defendant's chop and signed at the bottom of both the Statement of Accounts below the words, "*I*

acknowledge receipt of the above and request your kind consideration to give me more time to pay these debts" (See pages 260-262 of PBOD1). The said acknowledging pages are reproduced as below:

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MENTA CONSTRUCTION SDN BHD
2 Jalan 1/128 Taman Gembira 58200 Kuala Lumpur
Tel: 03-79837399,79827266, 79828443, 79803371,79806487
Fax: 03-79818813

SPM Property & Management Sdn Bhd
104A Jalan Burhanuddin Helmi
Taman Tun Dr Ismail
60000 Kuala Lumpur
Tel: 03-7727 2952 (En Rosli) Fax: 03-7728 7877

Date 30-09-11

STATEMENT

Cert. No.	Cert. Date	Amount (RM)	Due Date	8.80%	Total (RM)
1	13.05.05	166,868.74	01.09.05	89,353.87	256,222.61
2	13.06.05	353,444.98	01.09.05	189,260.59	542,705.57
3	05.07.05	543,009.22	01.09.05	290,767.30	833,776.52
4 & 5	09.08.05	1,512,996.25	09.09.05	807,251.90	2,320,248.15
6	19.09.05	634,156.40	19.10.05	306,227.08	940,383.48
7	17.10.05	450,348.42	17.11.05	232,680.84	683,029.26
8	01.12.05	1,310,705.29	01.01.06	663,295.88	1,974,001.17
9	09.01.06	513,579.44	09.02.06	255,073.10	768,652.54
Retention		609,456.53			609,456.53
				-	-
				-	-
				-	-
				-	-
TOTAL		6,094,565.27		2,833,910.55	8,928,475.82
					8,928,475.82

I acknowledge receipt of the above and request your kind consideration to give me more time to pay these debts.

SPM PROPERTY MANAGEMENT (212249-M)

Ismail Razali
5-10-11

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MENTA CONSTRUCTION SDN BHD
2 Jalan 1/128 Taman Gembira 58200 Kuala Lumpur
Tel: 03-79837399,79827266, 79828443, 79803371,79806487
Fax: 03-79818813

SPM Property & Management Sdn Bhd
104A Jalan Burhanuddin Helmi
Taman Tun Dr Ismail
60000 Kuala Lumpur
Tel: 03-7727 2952(En Rosli) Fax: 03-7728 7877

Date 30-09-11

STATEMENT

Date	Invoice No	Description	Debit (RM)	Credit (RM)	Total Balance (RM)
31/08/2008	ADMIN0442	SPM Property & Management Sdn Bhd - Aug'08	8,944.28		1,550,239.82
30/09/2008	ADMIN0451	SPM Property & Management Sdn Bhd - Sep'08	8,655.72		1,558,895.54
31/10/2008	ADMIN0456	SPM Property & Management Sdn Bhd - Oct'08	8,944.28		1,567,839.82
30/11/2008	ADMIN0464	SPM Property & Management Sdn Bhd - Nov'08	8,655.72		1,576,495.54
31/12/2008	ADMIN0468	SPM Property & Management Sdn Bhd - Dec'08	8,944.28		1,585,439.82
31/01/2009	ADMIN0476	SPM Property & Management Sdn Bhd - Jan'09	8,968.76		1,594,408.58
29/02/2009	ADMIN0496	SPM Property & Management Sdn Bhd - Feb'09	8,100.84		1,602,509.42
31/03/2009	ADMIN0519	SPM Property & Management Sdn Bhd - Mar'09	8,968.76		1,611,478.18
30/04/2009	ADMIN0537	SPM Property & Management Sdn Bhd - Apr'09	8,679.44		1,620,157.62
31/05/2009	ADMIN0555	SPM Property & Management Sdn Bhd - May'09	8,968.76		1,629,126.38
30/06/2009	ADMIN0560	SPM Property & Management Sdn Bhd - June'09	8,679.44		1,637,805.82
31/07/2009	ADMIN0571	SPM Property & Management Sdn Bhd - July'09	8,968.76		1,646,774.58
31/08/2009	ADMIN0580	SPM Property & Management Sdn Bhd - Aug'09	8,968.76		1,655,743.34
30/09/2009	ADMIN0589	SPM Property & Management Sdn Bhd - Sep'09	8,679.44		1,664,422.78
31/10/2009	ADMIN0597	SPM Property & Management Sdn Bhd - Oct'09	8,968.76		1,673,391.54
30/11/2009	ADMIN0601	SPM Property & Management Sdn Bhd - Nov'09	8,679.44		1,682,070.98
31/12/2009	ADMIN0606	SPM Property & Management Sdn Bhd - Dec'09	8,968.76		1,691,039.74
31/01/2010	ADMIN0609	SPM Property & Management Sdn Bhd - Jan'10	8,968.76		1,700,008.50
28/02/2010	ADMIN0610	SPM Property & Management Sdn Bhd - Feb'10	8,100.84		1,708,109.34
31/03/2010	ADMIN0623	SPM Property & Management Sdn Bhd - Mar'10	8,968.76		1,717,078.10
30/04/2010	ADMIN0629A	SPM Property & Management Sdn Bhd - Apr'10	8,679.44		1,725,757.54
31/05/2010	ADMIN0631	SPM Property & Management Sdn Bhd - May'10	8,968.76		1,734,726.30
30/06/2010	ADMIN0636	SPM Property & Management Sdn Bhd - June'10	8,679.44		1,743,405.74
31/07/2010	ADMIN0641	SPM Property & Management Sdn Bhd - July'10	8,968.76		1,752,374.50
31/08/2010	ADMIN0646	SPM Property & Management Sdn Bhd - Aug'10	8,968.76		1,761,343.26
30/09/2010	ADMIN0650	SPM Property & Management Sdn Bhd - Sept'10	8,679.44		1,770,022.70
31/10/2010	ADMIN0657	SPM Property & Management Sdn Bhd - Oct'10	8,968.76		1,778,991.46
30/11/2010	ADMIN0662	SPM Property & Management Sdn Bhd - Nov'10	8,679.44		1,787,670.90
31/12/2010	ADMIN0666	SPM Property & Management Sdn Bhd - Dec'10	8,968.76		1,796,639.66
31/01/2011	ADMIN0677	SPM Property & Management Sdn Bhd - Jan'11	8,968.76		1,805,608.42
28/02/2011	ADMIN0683	SPM Property & Management Sdn Bhd - Feb'11	8,100.84		1,813,709.26
31/03/2011	ADMIN0696	SPM Property & Management Sdn Bhd - Mar'11	8,968.76		1,822,678.02
30/04/2011	ADMIN0709	SPM Property & Management Sdn Bhd - Apr'11	8,679.44		1,831,357.46
31/05/2011	ADMIN0715	SPM Property & Management Sdn Bhd - May'11	8,968.76		1,840,326.22
30/06/2011	ADMIN0722	SPM Property & Management Sdn Bhd - Jun'11	8,679.44		1,849,005.66
31/07/2011	ADMIN0732	SPM Property & Management Sdn Bhd - Jul'11	8,968.76		1,857,974.42
31/08/2011	ADMIN0740	SPM Property & Management Sdn Bhd - Aug'11	8,968.76		1,866,943.18
30/09/2011	ADMIN0747	SPM Property & Management Sdn Bhd - Sept'11	8,679.44		1,875,622.62
				GRAND TOTAL (RM)	**1,875,622.62**

I acknowledge receipt of the above and request your kind consideration to give me more time to pay these debts.

SPM PROPERTY MANAGEMENT (212249-M)

3.10.11

[53] The 1st Defendant's contention was that it only acknowledged receipt of the Statement of Account and did not acknowledge the debt owed. That is an artificial distinction seeking to avoid the consequences of what was stated in the acknowledgment of receipt of the Statement as well as in requesting the Plaintiff in extending its kind cooperation to give the 1st Defendant more time to pay the debt outstanding. The question might well be asked: if there is no acknowledgment of debt but merely the acknowledgment of receipt, why then would the 1st Defendant request for "more time to pay these debts." One would instead expect a vigorous challenge to a vile concoction of a debt outstanding to the tune of RM6 million where the principal sum is concerned!

[54] The fresh acknowledgement of debt need not be in any prescribed format. So long as the debt is clearly identified and the acknowledgment of indebtedness is clear and unequivocal, there is a fresh acknowledgment of debt from the date of that acknowledgment which is 3.10.2011.

[55] DW 1 En Ismail cannot claim that he did not understand what he had signed or that he had signed it hurriedly without fully appreciating its contents. The words are simple enough to understand. He is himself an architect and in his giving of evidence in Court he had chosen to speak in English. Judging by the quality of English spoken by him in Court during cross-examination, I can say that he is very confident and comfortable with the English language. He spoke with clear diction, crisp pronunciation and with impeccable inflexion. There is the flow and fluency of language possessed by one with a good command of it. DW 1 knew full well that he was acknowledging the debts on behalf of the 1st Defendant and imploring for time to pay. He could have qualified the acknowledgment of the debts owing by stating that it is only for the Plaintiff's income tax purpose as he had wanted this Court to believe or that it is an acknowledgment on a without prejudice basis, but he did not do that. There was no trickery or trap involved in getting him to acknowledge the 2 debts outstanding under the Construction Statement of Account and the Loan Statement of Account.

[56] One might recall the salutary words of his Lordship James Foong J (later FCJ) in the case of *Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 640 where in deciding that a party has only himself to blame when signing documents without finding out the contents therein, observed at page 643 as follows:

> "I find the aforesaid authorities laid down sound principles of law on persons executing blank documents. **A person who chose to be careless, or not bothered to find out the contents therein, or relied completely upon others to complete the same, is** responsible for his own actions and, he is prevented from denying the contents therein do not bind him.**" (emphasis added)**

[57] There was no evidence that those words were 'foisted' or 'forced' upon him as in some form of coercion as DW 1 would have wanted the Court to believe. There was no contemporaneous police report lodged if really there was coercion. In *Lee Teck Seng v Lasman Das Sundra Shah* [2000] 8 CLJ 317 it was observed at pages 320 as follows:

> "[1] **When a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not.** His signature is irrefutable evidence of his assent to the whole contract including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.
>
> ...
>
> **[1b] Furthermore, the fact that the defendant took no action to report to the police the matter of threats or the fact that he was coerced into signing the document was inconsistent with his** claim that he had been constantly harassed and that he feared for his life.
>
> ...
>
> [2b] Moreover, on a careful scrutiny of the page, the defendant's signature was carefully placed on the designated spot, where signatures are normally placed with the defendant's identity card number placed below the signature in the same style of writing as his signature. This is inconsistent with the defendant's claim that he was intoxicated at the material time." (emphasis added)

[58] To a question from the Court as to whether he had genuinely wanted to pay when he asked for more time to pay, he stated that he was genuine in expressing his intention to pay. The relevant transcript at pages 363-364 of the Notes of Evidence is reproduced below:

> YA **When you signed on 260 and 262, you genuinely wanted to pay? You genuinely wanted to pay? Because the words there says 'Give me more time to pay.' You genuinely wanted to pay, is it**?
>
> ISMAIL But this is not my words.
>
> YA I know, **but you know what those words mean**?
>
> ISMAIL **Yes, yes**.
>
> YA **Did you genuinely want to pay or you didn't have intention to pay**?
>
> ISMAIL **No, of course I wanted to pay**. YA **You wanted to pay**?
>
> ISMAIL **Yes**.
>
> YA When you signed at page 92, genuinely want to pay.
>
> Answer 'of course I wanted to pay.' **So the words correctly reflect your intention? The words correctly reflect your intention**?
>
> ISMAIL **Yes**.

[59] The fact that those words are pre-typed by the Plaintiff in both the Statements of Account does not derogate from or denude the intention of the 1st Defendant as reflected in those words and as confirmed by this Court from DW 1. As DW 1 had confirmed that his intention to pay was genuine, this Court does not see the acknowledgment of debt as a sinister attempt to circumvent the effect of section 6 of the Limitation Act though a proper acknowledgment as in this case has that effect.

[60] There is also no merit in the Defendants' argument that the acknowledgment of debt is not valid because the Statements concerned do not bear the signature of the Plaintiff or the name of the Project or the description of the Loan. Even a short messaging system (SMS) of acknowledgment was held valid in the more recent case of *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 6 CLJ 285 at 304, where the Federal Court found that liability was established upon the defendant's admission on the fresh acknowledgement of debt via SMS. The Court held as follows:

> "[38] From the above mundane approach of alluding to authoritative books and cases it has been satisfactorily established that signatures need not be written. Suffice if there be any mark, written or not, which identifies the act of the party, perhaps in the form of mark or by some distinguishing feature peculiar only to that person, then the acknowledgement has been signed. Analogically we hold the view that the conventional paper is substituted by the mobile phone, which holds features that can preserve information or transmissions in the like of the SMS, with the telephone number representing the caller or the sender of some message. In fact it is the norm nowadays to substitute the number of an identified person with his name to assist instant recognition. The fact that the respondent admitted sending the SMS sealed his liability."

[61] There is no evidence that the Defendant could have been confused as to some other Projects that the Plaintiff might be referring to or that there were some other Loans other than the single loan of RM1.2 million.

[62] In *Southern Bank Bhd v Shin Huat Joo Enterprise Sdn Bhd & Ors* [1998] 3 CLJ 941, his Lordship Suriyadi Halim Omar J (now FCJ) in deciding that there was a fresh accrual of action upon the debtor's acknowledgement of debt, explained at page 953 as follows:

"**Currently the law, as I understand it regarding acknowledgement of debts, is that if at any time after a debt is due and the debtor renews that promise to pay it or acknowledges that debt as being due, he therefore renews his liability on the date of such promise or acknowledgement. If a suit is filed within six years, after that promise or acknowledgement had been made, the debtor thereafter cannot avail himself of the protection of Limitation Act 1953**, s. 6(1) of the Limitation Act 1953 **(Act 254).** This promise or acknowledgement in reality does not create a new debt but merely revives the old debt. Lord Sumner in *Spencer v Hemmerde* [1922] 2 AC 507 viewed that that acknowledgement "continues or 'renews' or 'establishes' the original promise... corresponds with and is not at variance from or in contradiction of that promise". Lawton J in *Busch v Stevens* [1962] 1 All ER 412 equated that acknowledgement or payment for any debt equivalent to being "given a notional birthday and on that day... rises again in renewed youth." These views were met with approval by the Federal Court in the case of *K.E.P. Mohamed Ali v K.E.P. Mohamed Ismail* [1981] 2 MLJ 10 when Raja Azlan CJ in no uncertain terms said that an acknowledgement of a statute-barred claim did not raise a new claim or a new cause of action but constituted the accrual of a right of action to recover the debt. Lord Bridge of Harwich for the Privy Council in *Oversea- Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1 approved that view and thenceforth reversed the decision under appeal..." (emphasis added)

[63] Learned counsel for the Plaintiff also referred to the case of *Malayan Banking Bhd v Wembley Industries Holdings Bhd* [2012] 5 CLJ 956 where after examining the law on "clear and unequivocal acknowledgement within the meaning of section 26(2) of the Limitation Act 1953", the Court held in that case that there was fresh acknowledgement of debt and as such, the cause of action accrues from the said acknowledgment date.

[64] Learned counsel for the Defendant also made some fuss about the fact that there was no inclusion of Certificate No. 10. That is no prejudice at all to the Defendants as it could only mean that the Plaintiff intended to exclude that Certificate No. 10 which the Defendants are disputing any way and only intended to claim until Certificate No. 9.

[65] Learned counsel for the Defendants warned against accepting the acknowledgment of the Construction Statement of Account as correct as the amount is much less than the Statement of Final Accounts prepared by the QS at pages 255-258 of PBOD1. That is the Defendant's blowing hot and cold; approbating and reprobating. In the first place it had argued that the Statement of Final Accounts is not binding on the 1st Defendant as it had not signed it without giving its version of what is the correct Statement. Now that the 1st Defendant had signed the Construction Statement of Account on 3.10.2011 it now wants to backtrack and prevail upon this Court that the sum acknowledged cannot be correct. Why then asked for time to pay if the sum acknowledged is not correct?

[66] Looking at the whole circumstances of this case, there is a fresh acknowledgment of debt on 3.10.2011 which is clear and unequivocal and so a fresh cause of action accrued or was renewed on that date and as the suit was filed in February 2016, it was brought well within the limitation period of 6 years as prescribed for a claim in contract under section 6 of the Limitation Act 1953.

[67] The same applies to the claim for the Loan sum which was expressed in Clause 4.1 of the Loan Agreement dated 5.3.2005 that the Advanced Sum shall be repaid with administrative charges by 30.9.2005. Even though the cause of action had arisen on the date of agreed repayment, yet it was revived with the fresh acknowledgment of debt on 3.10.2011 at pages 261- 262 PBOD 1, when the 2nd Defendant on behalf of the 1st Defendant signed beside the 1st Defendant's rubber stamp at the bottom of the line containing the Loan Statement of Account as at 30.9.2011 that reads:

"I acknowledge receipt of the above and request your kind consideration to give me more time to pay these debts."

Whether the 2nd Defendant has warranted, represented and undertaken to be personally liable for the debt of the 1st Defendant

[68] However the debt is that of the 1st Defendant and not that of the 2nd Defendant. The Plaintiff had addressed both the Construction Statement of Account and the Loan Statement of Account to the 1st Defendant and so any acknowledgment by the 2nd Defendant must be understood to be on behalf of the 1st Defendant. The rubber stamp used is that of the 1st Defendant and so when the words "I" and "me" are used in the acknowledgment and request for time to pay, it must be understood in terms of the company i.e. the 1st Defendant.

[69] This is so even though in this case the 1st Defendant is almost wholly owned by the 2nd Defendant in that all the 1,900,004 shares of the 1st Defendant are owned by the 2nd Defendant save for one. See page 291 of the CCM search in PBOD 1.

[70] It is trite law that a company is a separate legal entity from its shareholders and directors and in the absence of fraud, the controlling director cannot be made personally liable for the debts which remain that of the company, the 1st Defendant. This is so even if the 1st Defendant be a wholly-owned subsidiary of the 2nd Defendant. If the Plaintiff had wanted to make the 2nd Defendant jointly and severally liable for the debts of the 1st Defendant, the Plaintiff should have insisted on an irrevocable guarantee and indemnity from the 2nd Defendant. It is too late in the day to now make the 2nd Defendant liable as well for the debts of the 1st Defendant.

[71] There is no evidence that the 2nd Defendant has warranted, represented or undertaken to be personally liable for the debts of the 1st Defendant. The Plaintiff had not pleaded fraud by the Defendants or that the corporate veil ought to be lifted to find the 2nd Defendant personally liable as well.

Whether parties, by conduct, have agreed to postpone the limitation period

[72] This is a case where the main protagonists of the Plaintiff and the 1st Defendant, i.e. PW 1 Mr Tan Choon Hock and DW 1 Encik Ismail Yoop Razali, have known each other for years. For the Plaintiff to have to sue the Defendants, it would have to be an action of last resort where all else have failed.

[73] This is not a case where the Plaintiff through its own indolence, has failed to bring an action to recover the Construction debt and the Loan debt. Who would not want to claim back monies owing to it for work done or loan advanced when not a single cent has been paid. This is not a case where the Defendants have complained about the quality of work done or that there are defective works. In fact a Certificate of Practical Completion was issued on 3.3.2006 at page 248 PBOD 1.

[74] There were the letters from the Plaintiff to the 1st Defendant, dated 6.10.2006 and 17.10.2006, requesting very politely for payments for the Construction Works done as can be seen from pages 250-252 PBOD1. The replies from the 1st Defendant were equally polite: always thanking the Plaintiff for tolerating with the non-payment and assuring the Plaintiff that the 1st Defendant would be settling in due cause and stating the actions taken to source and raise financing and apologizing for any inconvenience caused.

[75] Through the years, the Plaintiff would forward its progressive invoices and progressive statement of accounts to the 1st Defendant for its payment (See pages 294-537 of PBOD2). However, the Defendants would always seek indulgences from the Plaintiff on the postponement of payment of any monies due and owing. Such conduct continued until as late as 28.12.2010 when the Plaintiff by letter to the 1st Defendant, enclosed 4 sets of the Final Account prepared by the QS Juru Kos, for the 1st Defendant's endorsement and for payment soonest. If there is any delay in the finalization of the accounts it is in all probability due to the 1st Defendant's perennial plea for patience on the Plaintiff's part in that the 1st Defendant is hopeful of securing some financing. It is not a case of the Plaintiff sitting on its rights. After the completion of the Project both PW 1 and DW 1 would meet almost monthly to explore how the 1st Defendant may be able to pay.

[76] I can believe PW 1 when he testified that towards settlement of its dues by the 1st Defendant to the Plaintiff, various options were explored including the transfer of properties into the Plaintiff's name as a means of set-off. To this effect, a valuation of the 66 parcels of shoplots and a parcel of Petrol Station was carried out to enable parties to ascertain the actual value of the said properties that were intended to be

set-off with the 1st Defendant's debts due and owing to the Plaintiff. There was a letter dated 10.11.2011 from the Valuer Henry Butcher Malaysia to the 1st Defendant at page 254 of PBOD1, stating the Market Value of those parcels to be RM11,670,000.00 and the Forced Sale Value to be RM8,170,000.00.

[77] In addition, there was a draft Settlement Agreement prepared by the Plaintiff for the purposes of the contra of properties to settle both the debt due under the Construction Agreement as well as under the Loan Agreement. However it was not executed by the 1st Defendant leaving the Plaintiff with no other choice but to file this suit against the Defendants. (See pages 263-287 of PBOD1).

[78] There was also the evidence of the Plaintiff's Second Witness PW 2 (Mr. Kalai) and the Defendants' Witness PW 1 (En. Ismail) during trial which showed the conduct of parties and the Defendants' intentions on negotiating/proposing settlement throughout all these years. (See pages 222, 225, 307-308, 328-329 of NOE):

> DNR **So what Menta wanted was for En Ismail to acknowledge his debt and request for some time to pay his debt. It was what Menta wanted, right**?
>
> KALAI **No, that's what he also agreed with Mr Tan. Not Menta wanted, he agreed with Mr Tan to give him more time to pay this**.
>
> DNR Alright. Fair enough. **But he was always asking for more time. Isn't that correct, Mr Kalai**?
>
> KALAI **Correct**.
>
> DNR **So he was always asking for more time from the year 2005 till the year 2016. Isn't that correct**?
>
> KALAI **Yes**.
>
> ...
>
> DNN Now the next question, Mr Kalai, several questions were asked in regard to the draft settlement agreement, what was, you know... you said he asked to prepare or it was prepared by the Plaintiff's solicitors and all that. **My question is fairly simple, Mr Kalai, why was this draft settlement prepared? What was its purpose**?
>
> KALAI **Because En Ismail wanted to give, what you call, want to show Mr Tan that he has the ability to pay and there are some lands that he can always transfer to Mr Tan if it doesn't, is not able to settle the money**.
>
> ...
>
> DNN And **would you agree with me that the Plaintiff had sent all these statement of accounts to the First Defendant to inform the First Defendant on the amount due and owing by the First Defendant to the Plaintiff**, correct?
>
> ISMAIL **Statement of account, yes**.
>
> DNN Correct? Agree?
>
> ISMAIL Yes.
>
> DNN Now, if I can refer En Ismail to page... before that, would you agree with me that throughout all this period, when the statement of accounts were sent and even before that
>
> -
>
> YA Which period is it?
>
> DNN I would say from, after the Defects Liability Period, from 2008 onwards. Statements were sent from -
>
> YA 2008 to?
>
> DNN 2010.
>
> YA 2010.
>
> DNN Yes, from 2010. Since the statements were from 2010. YA **'Throughout out this period from 2010 to'**?
>
> DNN **To 2015. It's the last date of the statement of account.** Would you agree with me that the First Defendant and

the Plaintiff were in negotiations on the repayment of the amount due and owing by the First Defendant to the Plaintiff? Throughout this period, both parties were always talking and negotiating about the payment method, how much to pay, when to pay and all that. Negotiations only. Agree or disagree**?**

ISMAIL **We were just talking but there was no negotiation yet**. DNN No negotiation. What were you talking about?

ISMAIL **How do I make the payment**. DNN **So the method of payment**? ISMAIL **Yes**.

YA **You were talking on method of payment**.

...

DNN 263 to 287, My Lord. Do you agree that this was the draft settlement agreement?

ISMAIL Yes.

DNN And would you agree with me that this settlement agreement was discussed and handed over to you in a meeting between Mr Tan and Mr Kalai from the Plaintiff and you on behalf of the First Defendant. Agree or disagree?

ISMAIL That was the second, third meeting, I think. DNN **So there were few meetings**?

ISMAIL **Before this**.

DNN In regards the draft settlement agreement. ISMAIL Yes.

DNN **And would you agree with me that throughout all this, the meetings for the draft settlement agreement, the purpose for the meeting was to discuss on the settlement terms between the parties. Agree or disagree**?

ISMAIL **Agree**.

[79] Whilst there was no concluded agreement in that the Settlement Agreement prepared in 2015 at page 263 PBOD 1 was not signed, there is undisputed evidence that parties were still negotiating a settlement right till 2015. I agree with the Plaintiff that the Defendants' conduct in entering into negotiations for settlement of the debt owing to the Plaintiff led the Plaintiff to believe that they would be compensated for all the monies owing by the 1st Defendant to the Plaintiff. The Plaintiff was restrained from filing this suit against the 1st Defendant at that material time as a result of the 1st Defendant's promises to settle its debt owing to the Plaintiff. As such, the 1st Defendant is estopped now from denying the Plaintiff's claim and on relying on the defence of limitation.

[80] In support of this proposition, the Plaintiff relied on the case of *Alfred Templeton & Ors v Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ Rep 219 where Justice Edgar Joseph Jr J (as he then was) in adjudicating upon this issue of estoppel and its effect on limitation, held that one can estop oneself out of the Limitation Act by conduct.

[81] His Lordship's adroit analysis of the law is reproduced below from pages 287 to 290:

"I must lastly consider whether one can estop oneself out of the Limitation Act. I confess this is a fine point of law which is not free from difficulty. In *Combe v Combe* [1951] 2 KB 215, Denning LJ (as he then was) enunciated the doctrine of promissory estoppel in these terms:

> *... where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him...*

The language of the learned Judge would seem apt to deal with a defendant who, it is alleged, has caused the plaintiff to delay proceedings.

Moreover, the so-called equitable proprietary estoppel has been expanded to create a cause of action. In other words, it can be used not just as a shield but also as a sword. I have, when considering the plaintiffs' claim to a declaration as to entitlement to an equitable easement, referred to an array of cases to illustrate the propositions that rights arising from proprietary estoppel can be given effect to in various ways. I have in mind especially the cases where the Court has made orders analogous to specific performance by directing the transfer to the promisee of the property or some other interest in the property in question. In particular, I have in mind cases such as *Crabb v Arun District* Council (ibid), *Duke of Beaufort v Patrick* **(ibid),** *Dillwyn v. Llewelyn* (ibid) and *Thomas v Thomas* (ibid) which I have already discussed.

Only six years ago, in *Amalgamated Investment and Property Co. Ltd. v Texas Commerce International Bank Ltd.* [1982] QB 84 Lord Denning emphasised the return to estoppel as a sword when he synthesized the cases and announced that the doctrine of estoppel had become "overloaded" with cases and that "the separate developments" of estoppel by representation, promissory and proprietary estoppel could now be seen "to merge into one general principle shorn of limitations." That general principle was that where a man by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be "unjust or inequitable" for him to do so. Lord Denning's actual words will repay reading and they are as follows:

> *The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations.*

When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands.

In *Kok Hoong v Leong Mines Ltd.* [1964] AC 993, a decision of the Privy Council from the then Federal Court of Malaysia, in a case of moneylenders, their Lordships said:

> *There are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not absolutely prohibitory and so do not preclude estoppels. One example of this is the Statute of Frauds (see Humphries v. Humphries* [1910] 2 KB 531 *in which it was no doubt considered that... the statute ought to be treated as regulating procedure, nor as striking at essential validity) a more direct test to apply... is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the Court must give effect in the interest of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise.*

These words are widely drawn and suggest that the Limitation Act can give way to estoppel. Indeed, there are dicta in *Turberville v West Ham Corporation* [1950] 2 KB 208 which suggest that a defendant will not be heard to rely on a statute of limitation if his acts on statements during the currency of the period have induced the plaintiff to delay proceedings. And, in *Othman & Anor v Mek* [1972] 2 MLJ 158 Ong, CJ said:

> *... Statutes of Limitation which bar the enforcement of a right by action are rules of procedure only: see 24 Halsbury, 3rd Edn., p. 181. A right which becomes unenforceable merely by reason of limitation does not ipso facto perish or vanish into thin air: see Holmes v Cowcher* [1970] 1 WLR 835 *where it was held that although under s. 18(5) of the Limitation Act 1939, arrears of mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, whether statute barred or not. If, as in that case, equitable rights did not perish by reason of limitation, can this same defence be set up here to deny the rights of a beneficial owner to be granted his claim to be a legal title?*

So far as may be necessary, I would hold that based on these dicta the Limitation Act is purely procedural. (See

Othman & Anor v Mek [1972] 2 MLJ 158 (ibid) and cf. *Michell v Harris Engineering Co. Ltd.)* [1967] 2 QB 703 and, therefore, **in certain circumstances, one can estop oneself out of the Limitation Act by conduct**.

...

I would conclude this part of the case by applying the approach adopted by Lord Denning in the *Amalgamated Investment and Property* case (ibid) that when, as here, the defendant company has by its words and conduct led the plaintiffs to believe that they would be provided a right of way from their Lots, which otherwise would be landlocked, it should not be allowed to go back on them when it would be unjust or inequitable for it to do so.

If, contrary to my primary view, the defendant could not or did not estop itself out of the Limitation Act, then I would hold that by reason of the promises made by its Managing Director to the first plaintiff at the meetings held in early 1980 at the Federal Hotel and at its registered office in Ipoh Road to provide for a right of way, it had acknowledged the plaintiffs' right or title to a right of way as claimed. (See, by analogy the case of *Eddington v Clark.)* [1964] 1 QB 367. The writ herein having been issued on 26 September 1981, the action is not barred by limitation." (emphasis added)

[82] The above cited case and principle was affirmed by the Federal Court in the case of *Asia General Equipment And Supplies Sdn Bhd & Ors v Mohd Sari Datuk Hj Nuar & Ors* [2011] 8 CLJ at 762 where the Federal Court in deciding that the doctrine of estoppel bars a litigant who is guilty of unconscionable conduct from raising and relying on limitation as a defence, held:

"[28] Regrettably, the Court of Appeal has failed to consider the case of *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* (supra) in their judgment. In this case, the Federal Court has declared that:

The time has come for this Court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstance of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

Edgar Joseph Jr (as he then was) in an illuminating judgment in Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 *at p. 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.*

[29] In fact, the factual matrix in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 1 CLJ 693;; [1989] 1 CLJ (Rep) 219 is very similar to that of our present case. There, the sale of the land to the defendant was conditional upon a right of way preserved in favour of the plaintiff. The defendant disregarded this condition in the agreement and set up limitation as a defence when they were sued by the plaintiff for breach of this condition...

...

[32] In this instance, when the trial judge having undertaken this onerous task and came to a conclusion that the plaintiffs have successfully established estoppel, the Court of Appeal should not have disturbed this finding of fact.

[33] Further, the trial judge also found that due to the 1st defendant's improper conduct the plaintiffs were prevented from filing this action earlier. Again, this is a finding of fact supported by cogent evidence. The Court of Appeal should not have replaced it with one of its own to prevent the plaintiffs from pursuing their claim by a defence of limitation."

[83] I agree that through the years the 1st Defendant in the present case is on the one hand imploring for indulgences from the Plaintiff, meeting almost every month to explore options open to settle the debts and negotiating on the mode of payment of its debts but on the other hand audaciously asserting that the Plaintiff ought to have brought its claim against it at the earliest available opportunity or within a 6-year period from the due dates of the various Certificates of Payment from September 2005 to February 2006!

[84] I agree with the Plaintiff that by applying the above principles established and supported by various case law, the 1st Defendant's conduct throughout the years has clearly estopped it from now denying the debts due and owing by them to the Plaintiff and especially from relying on the defence of limitation to bar the

Plaintiff from bringing this claim against the 1st Defendant.

[85] The 1st Defendant's conduct in leading the Plaintiff on with the assurances that settlement is coming and that the Plaintiff only needed to be more patient would combine to make it both inequitable and unreasonable for the 1st Defendant to now raise the defence of limitation. The law does not approve of such a conduct that is designed to lull the Plaintiff into thinking that the 1st Defendant needed only more time and when sued, to then say that the Plaintiff is out of time!

[86] The Plaintiff commenced this suit soon after realizing that it was really hoping against hope for the 1st Defendant refused to sign the Settlement Agreement prepared in 2015. The action having being commenced in February 2016 was well within time.

Whether the Plaintiff is entitled to impose interest at 8.8% per annum on the amount due under the Construction Agreement

[87] The Plaintiff submitted that this rate of 8.8% per annum is an agreed term by parties as incorporated in Clause 18(a)(i) of the Construction Agreement (See page 9-10 of PBOD1). However a closer reading seem to suggest that the interest of 8.8% per annum may only be imposed and calculated in the following restrictive manner in that if for any reason the amount in any progress payment certificate is not paid, the 1st Defendant has the option to defer paying the amount *inter-alia* subject to interest of 2% above Public Bank's Base Lending Rate would accrue on the overdue amount on a monthly rest basis. See Clause 18(a)(i).

[88] This Deferred Payment Scheme shall only be valid for a duration of six (6) months from the Date of Commencement and not any time thereafter. See Clause 18(a)(iv). Thus interest on Late Payments and also Payment Certificates attracting interest is limited to only 6 Months. Interest is only to be imposed on and accrues on all progress payment certificates that are issued within the 6 month period of the Deferred Payment Scheme (i.e between 1.3.2005 to 1.9.2005).

[89] Given that the Deferred Payment Scheme is valid for only six (6) months, the interest chargeable on all progress payment certificates that are issued within that period is limited to a maximum period of six (6) months and not longer. If it was intended that all progress payment certificates issued outside the 6 month period of the Deferred Payment Scheme should attract interest then it must be expressly stated. It may thus be argued that the interest sum of 2% above Public Bank's Base Lending Rate does not attach to or accrue on all progress certificates that are issued outside the period of six (6) months from the Date of Commencement i.e. from 2.9.2005 onwards.

[90] Whilst the clause on pre-judgment interest may be doubtful, the power of the Court to grant pre-judgment interest is by virtue of Section 11 of the Civil Law Act 1956 which states:

> "11. Power of Courts to award interest on debts and damages:
>
> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

[91] In a case like this where the Plaintiff has to take some responsibility for the delay in the finalization of accounts, though this is more likely than not at the behest of the 1st Defendant this Court would exercise its discretion and grant interest at 5% per annum simple interest from the date of the acknowledgment of debt which is 3.10.2011 to date of realization on the principal sum of RM6,094,565.27.

Whether the Plaintiff is an unlicensed moneylender notwithstanding only giving a one-off loan transaction and the Loan Agreement void and unenforceable under the Moneylenders Act 1966

[92] The Plaintiff's managing director, Mr. Tan, and the 2nd Defendant, En. Ismail, who is also the 1st Defendant's managing director, have been good friends for a long period of time. (See page 260 of NOE). As the saying goes, a friend in need is a friend indeed!

[93] At the request of En. Ismail and against the backdrop of trust and an on-going business relationship in the completion of the Project, the Plaintiff agreed to advance to the 1st Defendant a sum of RM 2,000,000.00 (Ringgit Malaysia Two Million) to help the 1st Defendant out financially with the financing of part of the costs of constructing the Project. This included the payments that were needed to be made to the relevant authorities for the premiums and/or other costs payable for 66 parcels of land. (See pages 92-229 of PBOD1). It was not disputed that finally only RM1.2 million was advanced by the Plaintiff to the 1st Defendant. The Loan Agreement dated 5.3.2005 are found at pages 93-96 PBOD 1.

[94] Under Clause 3.1 the 1st Defendant agreed and undertook to repay the Advanced Sum together with the administrative charges calculated at the rate of 8.8% per annum on monthly rests basis from the date of release of the Advanced Sum to the date if full repayment.

[95] Further under Clause 4.1 the 1st Defendant shall repay the Advanced Sum together with the administrative charges to the Plaintiff by 30.9.2005.

[96] This loan given by the Plaintiff to the 1st Defendant at the 1st Defendant's request, was a single loan transaction or more familiarly termed as a one-off **friendly loan** transaction. In this regard, the testimony of the Plaintiff's 2nd Witness PW2 (Mr. Kalai) is relevant at pages 225-226 of NOE**:**

> DNN Alright. And questions were also put to you, Mr Kalai, in regards that the Plaintiff is not a money lender, cannot impose interest, and all that. It's fairly simple question, Mr Kalai, **how many loans has the Plaintiff given to the First Defendant**?
>
> KALAI **Only one**.
>
> YA **How many**?
>
> KALAI **Only one**.
>
> DNN **So would you term it as one off loan transaction**? KALAI **Yes**.

[97] This was confirmed by the Defendants' Witness (En. Ismail) himself where he said (See page 304 of NOE):

> DNN En Ismail, would you agree with me that in all of these years, 2005 or however long that you have known Mr Tan or the First Defendant knows the Plaintiff, from 2005 the date of the agreements, the Contract Agreement, the Loan Agreement, right up till today. Would you agree with me that the Plaintiff has only entered into one Loan Agreement with the First Defendant? There have not been any other Loan Agreements between the parties. Agree or disagree?
>
> ISMAIL Repeat please?
>
> DNN **There has only been one Loan Agreement between Plaintiff and First Defendant. No other Loan Agreements between Plaintiff and First Defendant. Agree or disagree**?
>
> ISMAIL **Agreed**.

[98] There were major amendments introduced on 1 November 2003, with respect to the Moneylenders Act 1951. The changes brought about by the Moneylenders (Amendment) Act 2003 (MAA 2003) Act A1193 - PU(B) 332/2003. The watershed amendment was in the definition of "moneylender" which was amended to

read:

> "moneylender" means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him.

[99] Under such a definition, it would appear that even a single transaction would be caught if the agreed amount to be repaid would be more than the amount lent if one is not a licensed moneylender. Parliament must have realised that the net might have been cast too broadly such that even genuine friends who want to help might be caught even if they were to merely charged the borrower the costs of their funds.

[100] There was a further amendment effected in 2011 (vide Moneylenders (Amendment) Act 2011) of which the definition of "moneylender" under the old regime (Moneylenders Act 1951) has been re-introduced and re- adopted again. In *Leong Chooi Peng v Tee Yam* [2011] 1 LNS 1709, I had made this comment at the postscript as follows:

> "Perhaps Parliament has cast its net too wide in that in trying to stamp out the bad loan sharks it had also stymied the benign friends who can only be beneficial when in one's hour of need, help comes in a **friendly loan** where a borrower would not mind covering the cost of fund of the lender. Call it interest, call it a consideration of a larger sum being repaid - it is a harsh reality in a real world where the love of money in as much as the lack of money is a root of all kinds of evil. There seems to be a change of heart in the Moneylenders (Amendment) Act 2010 (Act A 390) which came into force on 15 April 2011 vide P.U.(B) 174/2011. 'Moneylender' has now been redefined to mean any person who carries on or advertises or announces himself or holds himself out in any way as **carrying on the business of moneylending, whether or not he carries on any other business.** A **new section 10OA** now reads:
>
> *"Where in any proceedings against any person, it is alleged that such person is a moneylender,* ***the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved****."*
>
> Being a rebuttable presumption, those cases that deal with the meaning of 'the business of moneylending' as referred to in *Muhibbah Teguh's* case (supra) might well prove relevant again in the future in resolving a once-off **friendly loan** transaction with interest." (emphasis added)

[101] Therefore, even though admittedly this is a once-off or one-off transaction, the burden is now shifted to the lender to show that it is not in the business of moneylending. The guidance provided in the case of *Muhibbah Teguh Sdn Bhd v Yaacob Mat Yim* [2005] 4 CLJ 853 would be helpful where Justice Vincent Ng J (as he then was) held, at page 857:

> "It is axiomatic that one or two moneylending transactions (even in consideration of a larger sum) does not make the lender a moneylender within the purview of the definition of 'moneylender' in s. 2 of the Act. It is also axiomatic that the Act is intended to apply to moneylenders exclusively and not to moneylending transaction or transactions per se. This statement of law was again affirmed by Federal Court in *Yeep Mooi v Chu Chin Chua & Ors* [1960] 1 LNS 169;; [1981] 1 MLJ 14 which I shall discuss later in this judgment. (See also *Cheong Kim Hock* [1992] 2 SLR 349, *Lek Peng Lung* [1992] 2 SLR 150 and *Subramaniam Dhanapakiam* [1991] 2 MLJ 447.)"

[102] Here there is no evidence of regularity, continuity or system where the Plaintiff has also either before or after this particular Loan Agreement, also lent to others. Neither has the Plaintiff made further loans to the 1st Defendant other than this particular transaction covered under the Loan Agreement. The loan is in relation to an existing construction project where the Plaintiff is a contractor and the 1st Defendant the

employer. It is incidental in that sense to a continuing business relationship where the Plaintiff was helping the 1st Defendant with the latter's temporary cashflow problem. The intention of the parties then was that the loan was to be repaid in 6 months.

[103] I would hold that the Plaintiff has rebutted the presumption of being involved in the business of moneylending.

Whether the Plaintiff is entitled to charge administrative charge on the Loan Sum

[104] The Plaintiff submitted that a party is entitled to charge interest on a one-off transaction notwithstanding that party not being a moneylender. The Plaintiff relied on the case of *Floral Trends Ltd v Li Onn Floral Enterprise (M) Sdn Bhd* [2006] 6 CLJ 525 at 536 Justice Abdul Malik Ishak J (as he then was) held:

> "[17] Next, it was argued that the loan granted by the plaintiff to the first defendant was illegal pursuant to the Moneylenders Act 1951 (Revised 1989) (Act 400). At all material times the plaintiff was running a floral business and this was not denied by the defendants in their affidavits. The plaintiff was not required to have a licence in order to give a loan with interest to the first defendant because the plaintiff was not operating a moneylending business and that the loan given to the first defendant was in the words of the plaintiff a "one off transaction"."

[105] I would prefer the decision of the Court of Appeal in *Tan Aik Teck v Tang Soon Chye* [2007] 5 CLJ 441 at 451 where no interest is generally allowed to be charged on a **friendly loan.** It was held as follows:

> "[12] The defendant contended that he hardly knew the plaintiff before the **friendly loan** was given to the defendant. As such the plaintiff could not be his friend. The defendant contended that from the evidence of the plaintiff himself, the plaintiff met the defendant about two or three times before the loan was given and as such it could not be a **friendly loan.** It is clear to me that the defendant, in particular his counsel, was under the misconception what is meant by a **friendly loan. A friendly loan is opposed to the normal borrowing from a moneylender or financial institution. A friendly loan is a loan between two persons based on trust. There may be an agreement such as an I.O.U. or security pledged to repayment but most important there will be no interest imposed."** (emphasis added)

[106] The Lender should not be complaining about being worse off than a licensed moneylender because there is the costs of funds and the risk element that he has to bear. It is not a business to begin with otherwise even a single transaction might be struck down. The Courts are entitled to take a stricter view on interest charged in the light of the rebuttable presumption that even a single transaction is presumed to be moneylending until the contrary is proved. This is to ensure that no lender takes advantage of a borrower in need and capitalise of the desperation of the borrower.

[107] Here there were no services rendered that justify an administrative charge of 8.8% per annum on a monthly rest on the RM1.2 million advanced. It is to put it bluntly interest that the Plaintiff wanted to charge the 1st Defendant and to which the 1st Defendant had little choice but to agree. The expression "administrative charge" is used as a camouflage for interest and to make the Loan Agreement more palatable and respectable.

[108] Here is a case where going by the amended statement of claim at paragraph 23, the interest of 8.8% per annum calculated from the due dates of the different tranches of release of the principal sum to 18.12.2015 had ballooned to RM1,120,878.25, in other words nearly the whole of the principal sum!

[109] This is compounded by the fact that upon the date of repayment being up by 30.9.2005 there was no claim made, the Plaintiff was happy with interest continuing to run. No doubt the 1st Defendant was not in a position to repay and had requested for more time but the Court may strike down the interest element in a

friendly loan transaction if the interest is exorbitant, excessive and unconscionable.

[110] There was no prior demand made for the repayment of the Loan Sum and so this Court is entitled to take the filing of the Statement of Claim as a formal demand for the repayment of the Loan Sum. In the circumstance I would allow simple interest at 5% per annum on the loan of RM1.2 million from the date of statement of claim to realization.

[111] Assuming for a moment that the transaction is that of moneylending, I would still hold that the principal sum is recoverable under section 66 of the Contracts Act 1950 with interest on the principal of 5% per annum from the date of the statement of claim until realization. In the case of **Muhibbah Teguh** (supra) Justice Vincent Ng J (as he then was) held, at page 864:

> "In any event, even should the plaintiff fail in both the above hurdles, yet since it is only contended by the defendant that the moneylending transaction(s) is (or are) void rather than illegal, s. 66 of the Contracts Act 1950 requires the defendant to refund the sum received, as the provision states 'When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.' **Thus, even should the plaintiff be held to be a moneylender and the loan in exh. P1 declared void, then in my view, the sum of RM150,000 would still be ordered to be refunded to the plaintiff under** s. 66 of the Contracts Act. **The reason being that** s. 15 **of the Moneylenders Act does not negate** s. 66 of the Contracts Act. Section 15 **only states that a loan contract in violation of the Act is 'unenforceable'.** This is axiomatic, as a void contract is unenforceable. It must be noted that as such loan contract is a void but not an illegal contract s. 66 should be applicable considering that s. 66 is a specific provision to cater to an agreement which 'is discovered to be void, or when a contract becomes void'. (emphasis added)

[112] See also the cases discussed on the applicability of section 66 Contracts Act 1950 to an unenforceable and void contract in *Leong Chooi Peng v Tee Yam* (supra).

Pronouncement

[113] To summarize, I had allowed the Plaintiff's claim against the 1st Defendant under the Construction Agreement based on the principal sum of RM6,094,565.27 and I had also granted interest at 5% per annum simple interest from the date of the acknowledgment of debt which is 3.10.2011 to date of realization on the principal sum of RM6,094,565.27.

[114] I had also allowed the Plaintiff to enter judgment based on the principal loan sum of RM1,200,000.00 together with interest at 5% per annum simple interest from date of the statement of claim to realization. As for costs, I had allowed costs of RM50,000.00 to be paid by the 1st Defendant to the Plaintiff.

[115] The Plaintiff's claim against the 2nd Defendant was dismissed with costs of RM20,000.00 to be paid by the Plaintiff to the 2nd Defendant.