

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
DALAM WILAYAH PERSEKUTUAN, MALAYSIA  
(BAHAGIAN DAGANG)  
WRIT SAMAN NO. 22M-67-04/2017**

**ANTARA**

**BANK MUAMALAT MALAYSIA BERHAD**

(No. Syarikat: 6175-W)

**... PLAINTIF**

**DAN**

**1. MAJLIS AGAMA ISLAM SELANGOR**

**2. KOLEJ UNIVERSITI ISLAM ANTARABANGSA  
SELANGOR SDN BHD**

(No. Syarikat: 365644-V)

**... DEFENDAN-  
DEFENDEN**

**DI HADAPAN**

**YA KHADIJAH BINTI IDRIS  
PESURUHJAYA KEHAKIMAN**

## **GROUND OF JUDGMENT**

### **Introduction**

[1] This is the Plaintiff's civil action to recover monies due from the Defendants under the Payment Guarantee Agreement executed by the Defendants to guarantee the payment of monies obtained by Redha pursuant to the financing facilities granted by the Plaintiff to finance the Development on the Second Defendant's land for the benefit of the First Defendant.

[2] After a full trial, the Plaintiff's claim as in paragraph 28 (a) – (f) of the Amended Statement of Claim was allowed but its claim under paragraph 28 (g) of the same was dismissed. The Defendants appealed against the said decision. No appeal filed by the Plaintiff in respect of dismissal of the said paragraph 28 (g). Thus this judgment relate to the appeal filed by the Defendants.

### **Parties**

[3] The Plaintiff, Bank Muamalat Malaysia Berhad, is a financial institution set up pursuant to the Islamic Financial Services Act 2013. In

this action the Plaintiff also acts as the Facility Agent and Security Agent to both Bank Pembangunan Malaysia (“Bank Pembangunan”) and Bank Kerjasama Rakyat Malaysia (“Bank Rakyat”).

[4] The First Defendant, Majlis Agama Islam Selangor (“MAIS”), is a statutory body pursuant to the Administration of the Religion of Islam (State Of Selangor) Enactment 2003.

[5] The Second Defendant, Kolej Universiti Islam Antarabangsa Selangor Sdn Bhd (“KUIS”) is a body corporate incorporated under the Companies Act 1965 and it operates as an institution of higher learning. KUIS is registered under the Private Higher Educational Institutions Act 1996. KUIS is wholly owned by MAIS.

### **Salient Facts**

[6] The salient background facts set below is adopted collectively from the parties’ pleadings and written submissions.

[7] MAIS is the registered owner of a piece of land held under H.S.(D) 61321, PT 39066, Mukim Kajang, Daerah Ulu Langat, Selangor Darul Ehsan (“the Land”). MAIS agreed to facilitate KUIS in procuring and

providing the Land for the Accommodation and Student Centre. The Accommodation consists of hostel room and / or apartments built for occupation by students and the Student Centre which house retail and non-retail space.

[8] KUIS privatised the design, supply, construction, completion, commission, operation, maintenance and management of the Accommodation and Student Centre (“the Development”) via the build-operate-transfer method. Via a tripartite concession agreement dated 7 March 2006 (“Concession Agreement”) MAIS and KUIS granted to Redha Resources Sdn Bhd (“Redha”) the concession to carry out the Development on the Land at Redha’s own costs and expense. In consideration thereof Redha was granted the right and authority to, inter alia, demand, collect and retain the charges as agreed in the Concession Agreement on the students occupying the Accommodation. The Concession Period was 33 years (inclusive of the 3 year construction period).

[9] A Supplemental Agreement dated 25 July 2007 was subsequently executed by the parties.

[10] For purpose of part financing the Development, Redha obtained the following financing facilities from a consortium of three banks –

- (a) a sum of RM 38,400,00.00 based on Syariah principle of Bai' Al-Inah (“Bai' Al-Inah Facility”). Towards this end, the Asset Purchase Agreement and Asset Sale Agreement were executed by Redha and Bank Pembangunan; and
- (b) a total sum of RM 87,400,000.00 from the Plaintiff and Bank Rakyat based on Syariah principle of Bai' Al-Istisna (“Syndicated Islamic Financing Facilities”). Pursuant thereto, Redha, Plaintiff and Bank Rakyat executed the Master Istisna Financing Agreement, Purchase Agreement and Sale Agreement all dated 3 August 2007.

The Plaintiff, Bank Pembangunan and Bank Rakyat are collectively hereinafter referred to as “the Banks”. The Bai' Al-Inah Facility and the Syndicated Islamic Financing Facilities are collectively hereinafter referred to as the “Financing Facilities”.

[11] Via the Facility Agency Agreement and the Security Sharing Agreement both dated 3 August 2007, the Plaintiff agreed to act as the

Facility Agent and Security Agent. Thus the term “Plaintiff” in this judgment refers to the Plaintiff in its capacity as the Facility Agent and Security Agent. As the Facility Agent, it was agreed that the Plaintiff will receive all monies guaranteed, due and payable by Redha under the Concession Agreement. The monies will then be distributed by the Plaintiff among the Banks in proportion to the financing extended to Redha.

[12] As a security for the Financing Facilities provided by the Banks, Redha executed an Assignment of Concession Agreement dated 3 August 2007 (“ACA”) with the Plaintiff as agent for the Banks. Pursuant to the ACA, the proceeds obtained by Redha from KUIS, being rental charges under the CA, will be paid to the Plaintiff (in its capacity as Facility Agent) for purpose of settling the financing taken and the profits due to the Plaintiff. Notice dated 9 August 2007 of the ACA was given to Second Defendant who had acknowledged receipt dated 13 August 2007.

[13] MAIS and KUIS had executed the Payment Guarantee Agreement for purpose of guaranteeing the repayment of the Financing Facilities by Redha to the Banks.

[14] The Development was completed and occupied by students of KUIS who collected and retain rental charges from the students.

Civil Action No. 22M-18-11/2014

[15] Redha failed to make repayment in relation to the Financing Facilities obtained from the Banks. Thus the Plaintiff commenced legal action via Civil Action No. 22M-18-11/2014 against, among others, Redha for the sum RM 326,669,571.59 as the monies outstanding under the Financing Facilities. The said sum is certified as Redha's indebtedness via certificate of indebtedness dated 30 September 2014. In January 2016 the Court of Appeal allowed the Banks appeal and summary judgment was entered in favour of the Banks for the said sum. The terms of the order dated 5 January 2016 is reproduced verbatim –

- i) *Rayuan Perayu-Perayu dibenarkan dengan kos global dibayar oleh Responden-Responden sebanyak RM30,000.00 di sini dan di bawah;*
- ii) *Penghakiman dicatatkan di mana Responden-Responden secara bersesama dan/atau berasingan dikehendaki membayar Perayu Pertama:*
  - a) *Wang berjumlah RM93,393,827.15 (Ringgit Malaysia Sembilan Puluh Tiga Juta Tiga Ratus Sembilan Puluh Tiga Ribu Lapan Ratus Dua Puluh Tujuh Dan Sen Lima Belas Sahaja) (setakat 30.09.2014);*





*Empat Ratus Lima Puluh Empat dan Sen Lima Puluh Tujuh Sahaja) (setakat 30.09.2014);*

*b) Ta'widh/gantirugi yang berterusan pada kadar 1% setahun daripada 01.10.2014 ke atas keseluruhan hutang sehingga tarikh penamatan. Selepas itu, 1% ke atas baki pokok (RM38,400,000.00) daripada tarikh penamatan sehingga tarikh penghakiman atau tarikh matang pembiayaan yang mana terdahulu dan selepas itu pada kadar Pasaran Wang Antara Bank Secara Islam ke atas baki pokok sehingga tarikh penyelesaian penuh; dan*

*v) Deposit Rayuan dikembalikan kepada Perayu-Perayu*

The sum RM 326,669,571.59 (“the Indebtedness”) remains outstanding.

### **Plaintiff’s claim against the Defendants**

[16] It is the Plaintiff’s pleaded case that MAIS and KUIS is severally and jointly liable for the sum RM 326,669,571.59. The Defendants failed to pay the Indebtedness of Redha even though the Defendants are enjoying the benefit of the Development and collecting rental charges from the students. It is the Plaintiff pleaded case that the monies received by the Defendants are held in trust for the Plaintiff. Via paragraph 28 (a) – (h) of the Plaintiff Amended Statement of Claim the Plaintiff seeks the following relief –

- (a) a declaration that the Defendants are estopped from denying their liabilities under the Payment Guarantee Agreement;
- (b) a declaration that the Defendants are liable under the Payment Guarantee Agreement to pay the sum RM 326,669,571.59 to the Plaintiff as the Facility Agent and Security Agent;
- (c) a declaration that all monies received by the Defendants from the utilisation of the Accommodation and Student Centre were received by the Defendants in trusts for and on behalf of the Plaintiff;
- (d) that the Defendants furnish to the Plaintiff, within 30 days from the date of the order made, a full and updated audited account in relation to all monies received by the Defendants from the utilisation of the Accommodation and Student Centre for the period 1 November 2014 until the date of judgment;
- (e) judgment for the sum RM 326,669,571.59 against the Defendants jointly and severally;
- (f) general damages to be assessed;
- (g) late payment charges on the amount awarded pursuant to Order 42 rule 12A Rules of Court 2012;

- (h) costs on solicitor client basis; and
- (i) other reliefs as deemed fit by the court.

### **Defendants' pleaded case**

[17] The Defendants submit Redha's right to impose rental charges on the students is subject to the issuance of Certificate of Completion and Compliance ("CCC"). The Defendants was informed by Majlis Perbandaran Kajang in January 2014 that the building plan has yet to be approved and the CCC of the building has yet to be issued. Since Redha failed to secure the CCC, Redha is not entitled to any payment. It is the Defendants' pleaded case that when Redha allowed KUIS students to occupy the building since 2008 it is the Defendants' belief that Redha has obtained all the necessary approval from the relevant authorities in relation to the building plan and the CCC.

[18] In April 2015 the Defendants commenced legal proceedings against Redha and the Plaintiff at the Shah Alam High Court Civil Suit No.: 22NCVC-205-04/2015 ("Shah Alam High Court Suit"). Based on the pleadings of the said suit the Defendants sought, inter alia, the following reliefs –

- (a) against Redha
  - (i) a declaration that Redha has breached the Concession Agreement (as a result of Redha's failure to obtain approval for the building plan and for the CCC to be issued) and that the said agreement is therefore void;  
and
  - (ii) in the event the Concession Agreement is declared void and not binding, the Supplementary Agreement is consequentially void.
  
- (b) as against the Plaintiff, the Defendants claimed that the Plaintiff was negligent for disbursing the financings to Redha because the building plan has yet to be approved and the Lease Agreement has yet to be registered at the Land Office. The Defendants sought for the Payment Guarantee Agreement to be declared void in the event the Concession Agreement is declared void.

[19] On 21 December 2017 the Shah Alam High Court made, inter alia, the following orders –

- a. *Adalah diisytiharkan bahawa Defendan Pertama telah memungkirkan Perjanjian Konsesi (Concession Agreement) bertarikh 7.3.2006 di antara Plaintiff-Plaintif dan Defendan Pertama;*
- b. *Adalah diisytiharkan bahawa Perjanjian Konsesi (Concession Agreement) bertarikh 7.3.2006 di antara Plaintiff-Plaintif dan Defendan Pertama adalah terbatal;*
- c. *Perjanjian Tambahan yang dikenali sebagai "Supplemental Agreement (to the Concession Agreement dated 7<sup>th</sup> March 2006) bertarikh 25.7.2007 di antara Plaintiff-Plaintif dan Defendan Pertama dan Perjanjian Pajakan bertarikh 7.3.2006 di antara Plaintiff-Plaintif dan Defendan Pertama, kedua-duanya turut terbatal dan tidak mengikat pihak-pihak kepada Perjanjian tersebut;*
- d. *Satu injunksi terhadap Defendan-Defendan, wakil-wakil, representasi atau agen-agen mereka untuk tidak mengambil sebarang injunksi, memasuki Penginapan, Pusat Pelajar dan Kemudahan-Kemudahan Sampingan ("premis tersebut"), mengganggu apa-apa aktiviti yang berlangsung di premis tersebut sehingga penyelesaian kes ini;*
- e. *Plaintif-Plaintif hendaklah membayar Defendan Pertama nilai pasaran premis tersebut setakat tarikh penghakiman ditolak dengan semua jumlah pembayaran yang telah dibayar oleh Plaintiff-Plaintif sebelum ini;*
- f. *Nilai pasaran premis tersebut setakat tarikh penghakiman hendaklah ditaksirkan oleh Penolong Kanan Pendaftar, Mahkamah Tinggi Shah Alam;*
- g. *Pembayaran di perenggan (e) di atas hendaklah dibuat kepada Defendan Kedua.*

The above order is hereinafter referred to as “the Shah Alam Order”. The CCC was only obtained on 20 February 2017 during the trial of the Shah Alam High Court Suit.

[20] In the instant action the Defendants’ defence to the Plaintiff’s claim may be summarised as follows –

- (a) the provisions in the Payment Guarantee Agreement does not refer to any financing given by the Plaintiff to Redha and the agreements made between Plaintiff and Redha;
- (b) Plaintiff is not entitled to any payment under the Concession Agreement, Supplementary Agreement and the Payment Guarantee Agreement due to Redha’s failure to obtain the CCC. It is an offence for any person to allow the Building which is without a CCC to be occupied. Thus Redha’s right to collect the rental charges is subject to the issuance of the CCC;
- (c) the guarantee given by the Defendants under the Payment Guarantee Agreement is a conditional guarantee as it is subject to clause 2.1 of the same. Furthermore there was no

notice under clause 2.1 (b) and (c) of the Payment Guarantee Agreement [was issued by the Plaintiff]. There was also no notice under clauses 18.2.1 and 18.2.3 of the Concession Agreement issued by KUIS;

- (d) pursuant to the Shah Alam Order, the Plaintiff is not entitled to claim against the Defendants as it was ordered that Defendants are to pay to Redha the market value of the premise (Accommodation and Student Centre) minus all payments made by the Defendants. The payment was ordered to be paid directly to the Plaintiff. Thus Plaintiff has no cause of action against the Defendants;
  
- (e) pursuant to the Shah Alam High Court Suit and the Shah Alam Order, the Plaintiff's action against the Defendants is bared by res judicata and duplicity of proceedings. The Plaintiff failed to pursue its claim against the Defendants in the Shah Alam High Court Suit. Thus the Plaintiff's claim against the Defendants is an afterthought and is an abuse of the process of the court; and

- (f) due to complaints against Redha's services in managing and maintaining the building, KUIS had to take over the management and administration of the Building. As a result the Defendants incurred cost in relation to the operation and maintenance of the said building. Thus the Defendants are entitled to use all monies receive under the Concession Agreement for the said purposes.

## **Witnesses**

[21] The Plaintiff and Defendants each called 2 witnesses. Below is the summary of the witnesses' testimony.

### **Plaintiff**

- (a) Khisham Bin Paimin (PW 1), the Head Unit of Agency Section at the Investment Banking Division of the Plaintiff bank, tasked with the function of the Plaintiff as the Facility Agent and Security Agent in relation to the Financing Facilities. PW 1 testified the Financing Facilities were granted by the Banks to Redha for purpose of constructing the Accommodation and Student Centre via the public-private partnership concept



through the build, operate and transfer method. For that purpose the Concession Agreement was executed between the Defendants and Redha. Repayment of the Financing Facilities is from the rental charges collected from the students and other tenants. The number of students occupying the Accommodation is guaranteed under the Supplemental Concession Agreement. Under the Payment Guarantee Agreement the Defendants guarantee the payment to Redha all concession proceeds, namely, the rental charges collected from the students and other tenants under the Concession Agreement to enable Redha to repay the Financing Facilities to the Banks. The rental charges are paid directly to the Plaintiff. The Defendants are aware of this arrangement as they have agreed for the rental charges to be credited into the Project Revenue Account. Since January 2014, KUIS did not make any payment to the Plaintiff even though rental charges were collected from the students occupying the Accommodation.

The Plaintiff claims from the Defendants the amount RM 326,669,571.59 as stated in the certificate of indebtedness issued by PW 1 on behalf of the Plaintiff.

(b) Zain Azra'i bin Abd Samad (PW 2), an advocate and solicitor, was at the material a partner of Abdul Rahman Saad & Associates the legal firm appointed by the Banks to handle the financing documentation in relation to the Financing Facilities including the Payment Guarantee Agreement. According to PW 2, the purpose of the PGA is to ensure that the Financing Facilities granted by the Banks are repaid by the Defendants in the event Redha defaulted its financial obligations in relation to the Financing Facilities. PW 2 further explain under the Payment Guarantee Agreement the Financing Facilities is to be repaid through the concession proceeds under the Concession Agreement and the guarantee given by the Defendants is valid throughout the tenure of the Financing Facilities until its full settlement.

## Defendants

(a) Dato' Dr. Ab Halim bin Tamuri (DW 1) is the Rector of KUIS testified on behalf of KUIS and MAIS. DW 1 is in charge of, among others, the students' welfare. DW 1 confirms the Concession Agreement executed between the Defendants and Redha for the construction of the Accommodation and Student

Centre via the build, operate and transfer method and that Redha obtained financing from the Plaintiff to carry out the said construction.

The Defendants filed the Shah Alam High Court Suit against Redha for breach under the Concession Agreement due to Redha's failure to secure the CCC and approval for the building plan.

DW 1 testified that the Defendants had never agreed to guarantee Redha's indebtedness under the Financing Facilities. Under the Payment Guarantee Agreement if the Concession Agreement is terminated by the Defendants during the construction period, MAIS has agreed to guarantee the payment by KUIS, the value of the Construction Works to Redha in the event KUIS fail to do so. However the Concession Agreement was never terminated by the Defendants. Furthermore pursuant to the Shah Alam Order, the Defendants are ordered to pay to the Plaintiff the market value of the Accommodation and Student Centre. In addition to that the Plaintiff has also obtained judgment against Redha in Civil Action No. 22M-18-11/2014.

- (b) Nor Hafizin binti Abdul Wahab (DW 2), a treasurer with KUIS, who prepared the statement of accounts in relation to payments made to Redha. According to DW 2's testimony, KUIS paid rental until semester 1 and 2 of the 2012/2013 Session. Thereafter no payments were made as there was an agreement to contra the rental payments with expenses incurred for the operation of the Accommodation and Student Centre including maintenance and utilities. KUIS has paid a total RM 46,040,175.33 until semester 2 of the 2012/2013 Session and the total sum contra for utilities and security is RM 6,171,491.35.

### **Issues and findings of the court**

[22] The pertinent issues which need to be considered and determined may be broadly grouped as follows –

- (a) whether the Plaintiff has a cause of action against the Defendants under the Payment Guarantee Agreement and if the answer is in the affirmative, whether Defendants are liable under the Payment Guarantee Agreement to pay the sum RM 326,669,571.59 to the Plaintiff; and

- (b) whether the Plaintiff's claim is barred by the principle of res judicata and duplicity of proceedings.

*Whether the Plaintiff has a cause of action against the Defendants under the Payment Guarantee Agreement and if the answer is in the affirmative, whether the Defendants are liable under the Payment Guarantee Agreement to pay the sum RM 326,669,571.59 to the Plaintiff*

[23] It is argued on behalf of the Defendants that under the Payment Guarantee Agreement the Defendants did not guarantee Redha's indebtedness to the Plaintiff as there is no provision in the Payment Guarantee Agreement which provides as such. Clauses 3 and 7 of the Payment Guarantee Agreement did not provide that the Defendants are liable for the indebtedness of Redha to the Plaintiff.

[24] According to the Defendants the guarantee given is in relation to 2 situations, namely, default by Redha during construction period (as provided in clause 2.1 of the Payment Guarantee Agreement) and default by the Defendants during the Concession Period (as provided in clause 2.2 of the Payment Guarantee Agreement).

[25] It is the Defendants' stand that the applicable provision is clause 2.1 of the Payment Guarantee Agreement because pursuant to the Shah

Alam Order, it was declared that Redha had breached the Concession Agreement. By reading the said clause 2.1 and clause 18.2 of the Concession Agreement, MAIS is only liable to pay to the Plaintiff the value of the Construction Works (as defined in the Concession Agreement). It is further argued since clause 18.2.4 of the Concession Agreement is not invoked (because the pre-requisite notice stipulated in the said clause 18.2.4 was not issued by KUIS), the Defendants are not liable to pay the Plaintiff.

[26] The Plaintiff on the other hand argue their claim against the Defendants is premised on clause 3 of the Payment Guarantee Agreement read with clause 7 of the same. It is argued that the Defendants have jointly and severally guaranteed the payment of the sums due under the Facility Agreements from Redha to the Plaintiff. Based on PW 1's evidence in chief it is submitted that the Development will be rented to students and other tenants and Redha will utilise the rental proceeds to repay the Plaintiff in relation to the Financing Facilities obtained. Thus the occupation rate has to be 100% in order for Redha to honour its financial commitments with the Plaintiff. According to the Plaintiff, Redha has been making payments to the Plaintiff until the Defendants filed the Shah Alam High Court Suit and the Concession Agreement terminated. Thereafter no payments were made by the

Defendants although KUIS continue to receive rental charges from those occupying the Development the construction of which was financed by the Plaintiff.

[27] The Plaintiff relies on the evidence of PW 2 who was then the partner in charge of the legal firm appointed to draft the Payment Guarantee Agreement. PW 2 testified clause 3 was drafted for purpose of providing comfort to the Plaintiff that any outstanding amount under the financing facilities will be repaid notwithstanding the termination of the Concession Agreement. As such the guarantee under the Payment Guarantee Agreement is a continuing guarantee intended to be valid throughout the duration of the tenure of the financing facilities until full settlement.

[28] The above issue essentially relate to the interpretation of the Payment Guarantee Agreement. With regards to the principles governing the construction of a contractual document this court is mindful of the principles laid down in the cases cited by learned counsel for the Plaintiff. In *BCCI v Ali* [2002] 1 AC 251, the court opined as follows –

*To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.*

[29] In *Perkayuan Oks No. 2 Sdn. Bhd v. Kelantan State Economic Development Corpn* [1995] 1 CLJ 761 the Federal Court held –

*To gather the true intention of parties in a contract or an agreement, every provision of the agreement must be examined. In the case before us, the learned Judge below did say that in order to ascertain whether the agreement of 24 May 1988 was in effect a contract to appoint contractors or in reality a grant of assignment to Kempadang "the court has to look to the substance rather than the words."*

[30] Thus in construing the Payment Guarantee Agreement in order to ascertain the intentions of the parties the following factors are to be considered –

- (a) the terms of the Payment Guarantee Agreement must be considered as a whole;
- (b) the words used must be given its natural and ordinary meaning in the context of the contract; and



- (c) all relevant facts surrounding the transaction known to the parties including the parties relationship. This essentially means the background leading to the execution of the Payment Guarantee Agreement are relevant facts. Thus the Payment Guarantee Agreement must be construed in light of the Concession Agreement and the other related agreements executed therein.

[31] Via the Concession Agreement, the Defendants privatised the Development by adopting the build-operate-transfer method where Redha was granted the concession to implement the Development. The Concession Period was for 33 years which consists of Construction Period of 3 years and 30 years of operation and maintenance period. The Concession Agreement provides for default by the parties during Construction Period and the operation and maintenance period and the consequences thereto including termination of the Concession Agreement and the related payment that are to be made.

[32] Upon expiry of the Concession Period, Redha is obliged to hand over, at no cost to KUIS, the Accommodation and Student Centre to KUIS and the operation and maintenance of the same to the Defendants (clause 5.1.11 of the Concession Agreement).

[33] As Redha undertook the Development at its own risk and expense, Redha is responsible to raise or secure the necessary finance required to implement the Development. In return Redha is given the right to retain the revenue generated from the Development in the form of rental charges. The rental charges collected from the students occupying the Accommodation will be used to, inter alia, repay the Financing Facilities secured by Redha to carry out the Development. In order to ensure the Development undertaken by Redha is commercially viable, it is crucial to ensure that the rental charges collected are sufficient for Redha to repay the Financing Facilities, operate, manage and maintain the Accommodation and Student Centre. Towards this end it is important that the occupancy rate (which provides revenue in the form of rental charges) reached the level (during the operational period) as determined in the Concession Agreement. For the purpose of implementing the Development on the Land, MAIS as the registered owner of the Land granted to Redha a lease over the Land for a period equivalent to the Concession Period (clause 3 of the Concession Agreement). The Lease over the Land will be terminated upon the termination or expiry of the Concession Period.

[34] It is pertinent to note by privatising the Development, the Defendants are relieved of the financial burden of having to provide funding to construct and complete, operate, manage and maintain the Development throughout the Concession Period. In fact there is no direct financial obligation on the part of the Defendants in relation to the concession granted to Redha during the Concession Period. In so far as the Concession Agreement is concerned the obligations of KUIS (in relation to the Accommodation and Student Centre) and MAIS (as registered owner of the Land) are set out mainly in clauses 6 and 7 respectively.

[35] A crucial obligation on the part of KUIS is provided in clause 4.3 of the Concession Agreement where KUIS has agreed to guarantee the occupation rate of the Accommodation shall be 100% during any academic year. Recognising that such obligation is crucial to the viability and feasibility of the Development, it was agreed by the parties that KUIS will procure a letter of assurance from the State Government of Selangor to support KUIS's obligations in guaranteeing the 100% occupancy rate for the Accommodation ("Letter of Assurance"). However it was subsequently agreed that such letter will not be issued by the State Government of Selangor and in place of such letter the Payment Guarantee Agreement was executed (see paragraph F of the

preamble to the Payment Guarantee Agreement). Subsequently pursuant to the Supplemental Agreement dated 25 July 2005 it was agreed between the Defendants and Redha that the guaranteed 100 % occupancy rate of the Accommodation during academic year is extended to the Inter Semester Break period and the Semester Break period.

[36] As stated above the Defendants submit the guarantee given by the Defendants under the Payment Guarantee Agreement only relates to situation as provided in clause 2.1 and 2.2 of the same. Clause 2.1 of the Payment Guarantee Agreement basically summarise clause 18.2.1 of the Concession Agreement in relation to anticipatory events of default on the part of Redha during the Construction Period. In the event Redha failed to remedy the default after the issuance of a Default Notice and Rectification Notice by KUIS within the time stipulated therein, KUIS is entitled to terminate the Concession Agreement. Consequential to the termination, KUIS is obliged to pay Redha the value of the Construction Works (as defined in the Concession Agreement) completed by Redha and certified by the Project Architect. Under clause 2.1 (c) of the Payment Guarantee Agreement, KUIS's obligation to pay the value of the Construction Works to Redha is unconditionally and irrevocably guaranteed by MAIS to the effect if KUIS failed to pay the said value,

MAIS agrees to pay all monies due to Redha from KUIS and the payment shall be made directly to the Plaintiff as the Security Agent.

[37] Clause 2.2 of the Payment Guarantee Agreement summarise clause 19.1.1 of the Concession Agreement which deals with breaches by KUIS and MAIS during the Concession Period. In so far as default relating to KUIS's obligation to make payment under the Concession Agreement, should KUIS failed to remedy such default after the issuance of the required notice, MAIS has agreed to unconditionally and irrevocably guaranteed such payment and that MAIS will make such payment directly to the Plaintiff.

[38] As correctly pointed out by the Defendants, the facts as gathered from the evidence of the witnesses shows clause 2.1 and 2.2 of the Payment Guarantee Agreement was not invoked either by Redha (during Construction Period) nor the Defendants (during the Concession Period) as the pre-requisite notices required under the said clause were never issued. Accordingly the said clauses are not relevant for purpose of determining the issues between the parties.

[39] In any event it is the Plaintiff's pleaded case that their action against the Defendants is premised on clause 7 of the Payment Guarantee Agreement which provides as follows –

*CONTINUING SECURITY*

*This Agreement shall not be considered as revocable or satisfied by any intermediate payment of any part of the monies owing and payable by KUIS but shall be a continuing guarantee and **shall extend to cover any sum or sums of money which shall from time to time constitute the balance due from KUIS to the Concessionaire under the Concession Agreement until such time when the whole of the concession proceeds shall have been fully paid.***

(emphasis added)

[40] The Plaintiff contends the term “concession proceeds” must necessarily refer to the proceeds from the rental charges paid by the occupiers of the Accommodation which is utilised to pay the principal sum and the profit under the Financing Facilities provided to Redha.

[41] Whereas the Defendants' took the position the term “concession proceeds” in clauses 3 and 7 refers to the rental charges paid by the students for the duration commencing 20 February 2017 until 21 December 2017. Thus Redha (by extension the Plaintiff) is only entitled to the said payment under the Concession Agreement. The significance of the dates – 20 February 2017 was the date when the CCC was issued

and 21 December 2017 was the date when the Concession Agreement was declared void via the Shah Alam Order. Clause 3 of the Payment Guarantee Agreement reads –

*Notwithstanding anything contained to the contrary, MAIS, KUIS and the Concessionaire agrees and acknowledge that this Agreement given by MAIS shall be irrevocable for the tenure of the Concessionaire's Facilities with the Financiers (whichever is the later) and that the Financiers are extending the Facilities to the Concessionaire on this basis.*

*MAIS, KUIS and the Concessionaire further agrees and acknowledge that the rights of the Security Agent to all concession proceeds shall subsist and continue to subsists notwithstanding the issue and/or service of a demand for payment of any monies intended to be hereby secured and shall be applicable both before and after judgment and notwithstanding that the relationship between the Security Agent, KUIS and the Concessionaire as the case may be shall have ceased for any reason or cause whatsoever.*

(emphasis added)

[42] Based on clauses 3 and 7 of the Payment Guarantee Agreement it is clear that the Plaintiff is entitled to “concession proceeds” and this is not disputed by both parties. The issue which requires determination is the meaning of “concession proceeds” and whether under the Payment Guarantee Agreement the payment of such proceeds under the Concession Agreement is guaranteed by the Defendants. The said provisions may be summarised as follows –

(a) clause 3

- (i) MAIS's agreement under the Payment Guarantee Agreement is irrevocable for the tenure of the Financing Facilities granted by the Plaintiff to Redha;
- (ii) the Plaintiff grants the Financing Facilities to Redha on the basis as stated in paragraph (i) above; and
- (iii) the rights of the Plaintiff to all concession proceeds shall subsist and continue to subsists notwithstanding the relationship between the Plaintiff, KUIS and Redha (as the case may be) ceases for any reason or cause whatsoever.

(b) clause 7 –

- (i) the Payment Guarantee Agreement is not revocable or satisfied by reason of any intermediate payment of monies owing and payable by KUIS;
- (ii) the Payment Guarantee Agreement is a continuing guarantee; and
- (iii) the Payment Guarantee Agreement cover any sum or sums of money which constitute the balance due from KUIS to Redha under the Concession Agreement until the whole of the concession proceeds have been fully paid.



[43] Having considered clauses 2, 3 and 7 of the Payment Guarantee Agreement this court is of the view the Defendants' argument that the guarantee that is provided under the Payment Guarantee Agreement only relate to the circumstances specified under clause 2 is not tenable. No doubt clause 2 relates to guarantee in respect of payment of value of Construction Works (for default during Construction Period) and payment of all monies due to Redha from KUIS (for default during Concession Period). However clause 7 is not confined to payment mentioned in clause 2.1 and 2.2. Instead it refers to *“monies owing and payable by KUIS and shall extend to cover any sum or sums of money which constitute the balance due from KUIS to the Concessionaire [Redha] under the Concession Agreement until such time when the whole of the concession proceeds shall have been fully paid”*.

[44] If it is intended that the scope of the Payment Guarantee Agreement covers only the payment by MAIS and / or KUIS in respect of the value of Construction Works referred to in clause 2 of the same (as contended by the Defendants), then clause 3 and clause 7 would have expressly stated so. However both clauses 3 and 7 refers to payment of the “concession proceeds” and the parties, in particular MAIS and KUIS, agree that the Plaintiff has a right to the said concession proceeds even

if the contractual relationship between the Plaintiff, KUIS and Redha ceased.

[45] Thus the scope of the guarantee under the Payment Guarantee Agreement relate to the following –

- (a) payment under clause 2.1 and 2.2 by KUIS or MAIS to Redha;
- (b) monies owing and payable by KUIS and money which constitute the balance due from KUIS to Redha under the Concession Agreement (clause 7); and
- (c) concession proceeds to the Plaintiff (clauses 3 and 7).

*What is “concession proceeds” in the context of the Payment Guarantee Agreement?*

[46] The Payment Guarantee Agreement is not a stand alone contract. It comes into being as a result of the execution of the Concession Agreement where Redha was granted the concession to implement the Development at its own cost and expense. The Recitals to the Payment Guarantee Agreement sets out the history which led to the execution of the Payment Guarantee Agreement which is as follows –

- (a) that the execution of the Concession Agreement between MAIS, KUIS and Redha was for the implementation of the Development;
- (b) under the Concession Agreement KUIS was to procure the Letter of Assurance from the State Government of Selangor to support KUIS's obligations to ensure that the Accommodation is 100% occupied. However State Government of Selangor decided not to issue the said Letter of Assurance. Instead the Banks has agreed to waive the said requirement on the condition MAIS executes the Payment Guarantee Agreement;
- (c) Redha has obtained the Syndicated Islamic Financing Facility up to RM 87,400,000.00 from the Plaintiff and Bank Rakyat and the Bai' Al-Inah Facility up to RM 38,400,000.00 from Bank Pembangunan to part finance the Development; and
- (d) the Plaintiff was appointed as the Security Agent for the Banks in respect of the facilities and enters into the Payment Guarantee Agreement for and on behalf of the Banks.

Accordingly the Payment Guarantee Agreement must be read together with, inter alia, the Concession Agreement.

[47] As stated above, the scope of the guarantee under the Payment Guarantee Agreement relate to –

- (a) payment by KUIS or MAIS to Redha under clause 2.1 and 2.2;
- (b) monies owing and payable by KUIS and money which constitute the balance due from KUIS to Redha under the Concession Agreement (clause 7); and
- (c) concession proceeds to the Plaintiff (clauses 3 and 7).

[48] The pertinent question is what are monies which is categorised as “monies owing and payable by KUIS”, “the balance due from KUIS to Redha” and “concession proceeds” under the Concession Agreement?. Under clause 4.6 of the Concession Agreement KUIS is obliged to pay to Redha for the duration of the Concession Period –

- (a) the charges levied on the students at the rate stated in Schedule B of the Concession Agreement (clause 4.1); and

- (b) the utility deposit and rental deposit imposed by Redha on the students occupying the Accommodation and Student Centre (clause 4.5).

[49] Under clause 4.7 of the Concession Agreement Redha is entitled to the rental charges and deposits imposed on the students. Besides the rental charges and deposits, Redha is also entitled to all profit derived from letting out the Accommodation to individual or corporation during the semester holiday. Thus under the Concession Agreement Redha is entitled to the rental charges and deposits imposed on the students and profit from renting out the Accommodation.

[50] As evidently clear from the Concession Agreement Redha is obliged to secure its own financing for purpose of implementing the Development throughout the Concession Period. This is due to the fact that the owner of the project (in the instant case MAIS and / or KUIS) is not prepared or not in the position to fund the project and accordingly privatised it to another entity which is considered to be in the position (technically and financially) to carry out and complete the project without recourse to the owner. On the part of the financial institutions, in order to ensure the financing granted is repaid, certain conditions are normally imposed to secure the repayment of the financing granted. This

includes, inter alia, some form of guarantee (by the concessionaire and / or the entity at whose instant the project / development is carried out) in respect of the financial obligations of the concessionaire to repay the financing including assignment of proceeds of the concession.

[51] Clause 3 of the Payment Guarantee Agreement expressly states that the parties (in particular MAIS and KUIS) agree that the Banks had extended the Syndicated Financing Facility and Bai' Al-Inah Facility to Redha on the basis that MAIS's agreement under the Payment Guarantee Agreement is irrevocable for the tenure of Financing Facilities obtained by Redha to finance the Development.

[52] Pursuant to clause 7 of the Payment Guarantee Agreement, guarantee for the payment of monies owing and payable by KUIS and the balance due from KUIS to Redha under the Concession Agreement is a continuing guarantee until such time the whole of the concession proceeds have been fully paid. By virtue of clause 3 of the Payment Guarantee Agreement, it is agreed by all parties that the Plaintiff has a contractual right over the concession proceeds. Importantly it was expressly agreed by the parties that the said contractual right is to subsist and continue to subsist notwithstanding the relationship between the Plaintiff and KUIS or Redha has ceased for any reason whatsoever.

This is in essence PW 2's explanation of clauses 3 and 7 of the Payment Guarantee Agreement (see PW 1's evidence in chief at Q & A 16 – 18). This court is of the view PW 1's oral testimony relate closely to the relevant surrounding facts at the material time in relation to the purpose of the Payment Guarantee Agreement and therefore admissible in assisting this court to ascertain the nature and extent of the Payment Guarantee Agreement (*Lee Wag Bank Ltd v Ng Kim Lek & Ors* [1979] 1 MLJ 21).

[53] On this basis alone, the Defendants' contentions that the Plaintiff is only entitled to the rental charges paid by the students for the duration commencing 20 February 2017 (date CCC issued) until 21 December 2017 (date the Concession Agreement and Supplemental Agreement declared void) is not tenable as it is clearly against the clear words of the Payment Guarantee Agreement. This court is not in the position to improve the terms agreed earlier by the parties or make it fairer or more reasonable. To do so would amount to rewrite the terms of the said agreement. The intention of the parties is to be construed from the terms of the Payment Guarantee Agreement which was agreed upon at the time when the said agreement was executed and not in the light of what happened years or even days later (*National Coal Board v WmNeill & Son (St Helens) Ltd* [1984] 1 All ER 555).

[54] Reading the Payment Guarantee Agreement as a whole and with the Concession Agreement, the concession proceeds to which the Plaintiff is entitled would reasonably means all monies due and payable under the Concession Agreement from KUIS to Redha. The monies due and payable under the Concession Agreement relates to payment of the items stated in paragraph 46 above which is intended to be utilised by Redha to pay the Plaintiff for the Financing Facilities obtained from the Banks. This supports the evidence of PW 1 who said the repayment of the Financing Facilities by Redha is through the rental charges collected from the students and other tenants of the Accommodation. The rental charges is paid directly to the Plaintiff.

[55] This is further fortified by the execution of the Assignment of the Concession Agreement dated 3 August 2007 whereby in consideration of the Financing Facilities, Redha irrevocably and absolutely assign to the Plaintiff (as Security Agent) all its rights, benefits and interest under the Concession Agreement together with all the monies assured or to be payable under the Concession Agreement. Pursuant to clause 6.4 of the said Assignment of the Concession Agreement, Redha issued an Irrevocable Letter of Instruction to Deposit Rental Payments dated 1 August 2007 to KUIS authorising and instructing KUIS to deposit, all present and future rental payment in relation to the Accommodation



arising under the Concession Agreement which is due and payable by KUIS to Redha, in the designated Project Revenue Account with the Plaintiff. On 3 August 2007 KUIS through its Rector has acknowledged and agree for the said rental payment to be made directly to the Plaintiff. Via letter dated 9 August 2007 Redha notified KUIS of the Assignment of the Concession Agreement and irrevocably authorise and instruct KUIS to pay when due all amounts whatsoever due and owing to Redha to the designated Project Revenue Account upon being notified by the Plaintiff that an event of Default has occurred. On 13 August 2007 KUIS confirmed, inter alia, its consent to the assignment and that it will procure the payments will be made in accordance with the authority and instruction given by Redha. This is confirmed by PW 1 in his evidence in chief by reference to the documents at page 107 – 109 and 307 – 310 of Bundle B 1. Thus by consenting to the said assignment, KUIS at all material times know that the rental charges is utilised for the repayment of the Financing Facilities.

[56] Recognising that the rental charges collected is crucial to the viability of the Development, under the Concession Agreement KUIS gives its guarantee that the Accommodation shall be 100% occupied at all material time. In furtherance thereto, pursuant to the Payment Guarantee Agreement, MAIS agrees to irrevocably guarantee the

payment of the concession proceeds to the Plaintiff for the duration of the Financing Facilities (21 years) which Redha obtained from the Plaintiff. Surely the tenure of the Financing Facilities as the determinant factor of the tenure of the guarantee is very telling – that the concession proceeds which is essentially the rental charges is the only source available to Redha to service the repayment of the Financing Facilities without which the Accommodation and Student Centre would not be able to be constructed and completed. Thus the contractual requirement for KUIS to guarantee 100% occupancy of the Accommodation throughout the Concession Period and MAIS's guarantee for the repayment of the concession proceeds (under the Concession Agreement) for the duration of the Financing Facilities.

[57] Premised on the above, the Defendants' argument that the Payment Guarantee Agreement made no reference to the Syndicated Financing Facility and Bai' Al-Inah Facility obtained by Redha from the Banks is misplaced. The Defendants' position that MAIS and KUIS do not guarantee Redha's indebtedness is not tenable and misconstrued.

[58] The evidence (discussed below) adduced shows the contemporaneous conduct on the part of MAIS and KUIS is consistent

with their contractual obligations to guarantee the payment of the concession proceeds.

[59] In his evidence in chief PW 1 testified various meetings between the Defendants, Redha and the Plaintiff were held between 18 April 2012 to 24 April 2013 to discuss, among others, the delay of rental payment by KUIS to Redha, KUIS's failure to meet the 100% occupancy rate as guaranteed by KUIS under the Concession Agreement the revised business plan of KUIS and the proposed re-structuring of the Financing Facilities. The pertinent point to note, as highlighted by PW 1, is MAIS's request to the Banks for the payment of the principal portion in relation to the Financing Facilities to be deferred for 12 months. There were also requests made by MAIS to the Plaintiff for the payments of profit in relation to the Financing Facilities made by KUIS is to be treated for the payment of the principal amount. According to PW 1 the Banks has never agreed to the request. Instead the Banks agreed for the payment of the principal amount to be deferred for 12 months.

[60] PW 1 has also testified that there were discussions carried out between the Banks, KUIS and MAIS with regards to MAIS request for a "hair cut" on the profit imposed by the Banks in relation to the Financing Facilities (refer to Q & A 25 of PW 1's Witness Statement). The relevant

part of MAIS's letter dated 2 May 2013 (page 324 Bundle B 2) to the Plaintiff states as follows –

*... memandangkan MAIS bukanlah syarikat yang mengejar keuntungan dan merupakan badan bukan kerajaan yang ditubuhkan untuk membantu mengawasi harta umat Islam, maka dengan hormatnya saya mengharapkan agar YB Dato' dapat memberikan pengurangan ke atas jumlah keuntungan yang dikenakan oleh pihak bank selaras dengan konsep mualamat yang berteraskan syariah demi kebaikan ummah kita bersama.*

Via letter dated 29 May 2013 (page 326 of Bundle B 2) the Plaintiff's response was as follows –

...

*4. Justeru, pihak Bank telah bersetuju memberi kelonggaran kepada pihak RRSB [Redha] dengan membenarkan penangguhan bayaran pokok (principal) untuk tempoh masa 6 bulan (bermula 31 Mei 2013 sehingga 31 Disember 2013) dengan syarat bayaran keuntungan secara berkala (suku tahunan) mestilah dijelaskan. Tempoh penangguhan tersebut adalah seiring dengan sasaran yang telah ditetapkan oleh pihak MAIS untuk menyelesaikan proses pengambilalihan Konsesi.*

[61] At the request of MAIS a meeting was held on 10 October 2013 to discuss the restructuring of the Financing Facilities. According to PW 1, in principle the Banks agree with the Defendants' proposal to restructure the Financing Facilities. In fact via letter dated 28 November 2013 (page 342 Bundle B 2), PW 1 pointed out that MAIS notified the Plaintiff that

they are waiting for the letter of offer from the Plaintiff in relation to the restructuring the Financing Facilities. As part of the terms of the proposed restructuring KUIS has agreed to pay to the Plaintiff RM 7 million per year for a certain period of time. Pursuant to that, a Joint Letter of Offer dated 5 May 2014 (page 354 Bundle B 2) was issued by the Banks to KUIS. However DW 1 testified that the offer was not accepted by MAIS and KUIS.

[62] Be that as it may the Defendants' various attempts and actions to engage the Plaintiff in negotiations to settle the demand made by the Plaintiff (through the Letter of Demand issued by the Plaintiff's solicitor) goes to show that the Defendants at all material time considered themselves obliged as guarantor under the Payment Guarantee Agreement to make payment of all monies owing and due by KUIS under the Concession Agreement to the Plaintiff. There were no evidence to show that Defendants has, prior to the Shah Alam High Court Suit, categorically deny their obligations and liabilities under the Payment Guarantee Agreement in relation to the Plaintiff's claim for the repayment of the Financing Facilities. In fact through DW 1's evidence it is established that the Defendants had never raised the issue of Redha's failure to obtain the CCC and Redha's failure to get the building plan approved with the Plaintiff as it was agreed by DW 1 such issues does

not concern the Plaintiff. Further, there were no evidence to show that the Defendants has voiced their grievances with the Plaintiff in relation to the Plaintiff's purported negligence in disbursing the Financing Facilities without the approved building plan and the CCC.

[63] It is indeed irony that the Defendants are using the non-issuance of the CCC to deny Redha (and by extension the Plaintiff) of the payment of the rental charges on the ground that it is an offence to allow building without CCC to be occupied when the Defendants had all along consciously allow the Accommodation to be occupied by KUIS's students after they took over the Accommodation in December 2012 until the CCC is issued in 2017. Above all, rental charges were collected from the students and retained by KUIS for the period the said building were without CCC.

[64] Premised on the provisions of the Payment Guarantee Agreement and having regards to the surrounding facts in particular the contemporaneous conduct of the Defendants and the related documents thereto, this court is of the view the true substance of the Payment Guarantee Agreement is for the guarantee of the concession proceeds by MAIS for the duration of the Financing Facilities. In the context of the Payment Guarantee Agreement read with the Concession Agreement,

the concession proceeds is the rental charges which is supposed to be collected from the 100% occupancy of the Accommodation guaranteed by KUIS and to be utilised for the repayment of the Financing Facilities obtained by Redha to carry out and complete the Development for the benefit of MAIS and KUIS. As such the Defendants are liable to pay the concession proceeds and therefore estopped from denying their obligations under the Payment Guarantee Agreement. Accordingly the concession proceeds received and retained by the Defendants are held in trusts for the Plaintiff.

### **The Defendants' indebtedness**

[65] It is argued on behalf of the Defendants that the Plaintiff failed to provide supporting documents to prove KUIS's indebtedness as required under clause 8 of the Payment Guarantee Agreement. It is also argued that the said clause refers to "a written statement" which may also be issued by Redha as the guarantee given under clause 2 of the Payment Guarantee Agreement relates to payment in respect of the value of construction works (certified by the Project Architect).

[66] Clause 8 of the Payment Guarantee Agreement reads –

*A written statement from the Concessionaire and / or Security Agent with the relevant supporting documents as to the amount due and owing by KUIS shall be accepted by MAIS as conclusive evidence that the amount thereby appearing is due from KUIS to the Concessionaire.*

As stated above, the scope of the Payment Guarantee Agreement not only covers the payment guaranteed under clause 2 but also monies owing and payable by KUIS and money which constitute the balance due from KUIS to Redha under the Concession Agreement. Thus for purpose of clause 8 of the Payment Guarantee Agreement, whether the written statement is issued by Redha or the Plaintiff would necessarily depend on the claim made by the Plaintiff. If the claim is in relation to Redha's default under clause 2 of the Payment Guarantee Agreement which relate to payment of the value of the Construction Works completed by Redha, such written statement would have to be issued and certified by Redha who would have to obtain the certification from the Project Architect. In the instant case the claim is in relation to the concession proceeds, which as stated above relate to monies owing and payable by KUIS and money which constitute the balance due from KUIS to Redha under the Concession Agreement. Under such



circumstance, the written statement would have to be issued by the Plaintiff in its capacity as the Security Agent.

[67] On 5 January 2016, via Court of Appeal Civil Appeal No.: B-02(IM)(MUA)-1355-08/2015 (page 1 Bundle A) judgment was entered against the Defendants for the total sum RM 326,669,571.59 is for a total sum of RM 326,669,571.59, via the certificate of indebtedness Exhibit P 8, the Plaintiff through PW 1 certifies the indebtedness of the Defendants, which includes inter alia the total sum of RM 326,669,571.59, to the Banks as at 30 September 2014. PW 1 testified that the said sum remain outstanding and this is not challenged by the Defendants.

[68] In this respect this court agrees with the Plaintiff's contentions that the judgment of the Court of Appeal supports the Plaintiff's claim in the instant case for the same amount as the amount payable by MAIS pursuant to the Payment Guarantee Agreement. The Defendants' allegations that the operation and maintenance cost ought to be deducted from the payment to the Plaintiff is not substantiated with proof. The statement of accounts prepared by DW 2 remains as ID 10 as the said documents were not prepared by her and the maker of the said documents were not called. The Defendants failed to show there

are manifest error in the certificate of indebtedness Exhibit P 8 in order to disprove the Plaintiff's claim. Accordingly the certificate of indebtedness represents the conclusive evidence of the Defendants' indebtedness to the Plaintiff (*Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544).

*Whether the Plaintiff's claim is barred by the principle of res judicata and duplicity of proceedings*

[69] As stated above the Shah Alam High Court Suit was filed by the Defendants against Redha and the Plaintiff seeking for, among others, declaratory relief that the Concession Agreement and the Payment Guarantee Agreement be declared void. According to the Defendants the Shah Alam High Court Suit and the instant case relate to the same issues and facts.

[70] In *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783 the Supreme Court held parties are not permitted to litigate once more matters that has been adjudicated by Court as there should be finality in litigation and that no one ought to be vexed twice for the same cause of action.

[71] In *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors (And Other Appeals)* [2003] 4 CLJ 505 the Court of Appeal held –

6(1) *When the plea of res judicata is raised it is necessary to identify with precision the issue that was decided in the earlier proceedings. In Tong Lee Hwa & Anor v. Lee Yoke San [1979] 1 MLJ 24, [1981] 1 MLJ 54 Chang Min Tat FC held that to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in Kok Hoong v. Leong Cheong Kweng Mines Ltd [1964] MLJ 49 ‘necessarily and with precision’ determine the point in issue.*

[72] As such it is incumbent on the Defendants to identify with precision the issues that had already been decided in the Shah Alam High Court Suit which is also issue to be determined by this court in the instant case. Based on the principle set forth in the case of *Farlim Properties*, it is not sufficient for the Defendants to plead in general res judicata without identifying precisely the issues that has been ventilated and adjudged in the Shah Alam High Court Suit and therefore cannot be raised and re-litigated again in the instant case. This the Defendants has failed to do.

[73] It must be noted that the basis of the Plaintiff’s claim in the instant case is premised on the contractual relationship between the Plaintiff and the Defendants under the Payment Guarantee Agreement. The

Defendants' pleaded case in the Shah Alam High Court Suit against the Plaintiff is as follows –

22. *Defendan Kedua telah secara tidak wajar dan/atau salah melepaskan pembayaran pembiayaan di bawah Syndicated Islamic Financing Facility secara berperingkat kepada Defendan Pertama kerana kelulusan bagi Pelan Bangunan tersebut masih belum dikeluarkan oleh pihak berkuasa yang berkenaan.*
23. *Defendan Kedua juga telah secara salah melepaskan pembayaran pembiayaan di bawah Syndicated Islamic Financing Facility secara berperingkat kepada Defendan Pertama kerana Perjanjian Pajakan masih belum disempurnakan kerana pajakan tersebut tidak didaftarkan di Pejabat Tanah dan Galian Selangor. Pembayaran pembiayaan dilepaskan tanpa apa-apa pajakan daripada Defendan Pertama. Ini adalah sesuatu yang berlawanan dengan amalan biasa perbankan. Oleh kerana Perjanjian Pajakan belum disempurnakan, Perjanjian Jaminan Pembayaran juga terbatal.*
24. *Pihak MPKJ telah membuat pengiraan kasar bahawa sekiranya permohonan CCC dibuat sekarang ia akan melibatkan jumlah yang besar iaitu lebih kurang RM12,026,155.91 tetapi ini bukanlah satu kos yang muktamad kerana ia bergantung kepada keadaan sebenar di tapak. Defendan Pertama perlu menanggung kos ini dan bukan bertindak lepas tangan memandangkan adalah kewajipan Defendan Pertama untuk mendapatkan CF/CCC. Tindak tanduk Defendan Pertama seolah-olah bertujuan mendapat keuntungan semata-mata daripada pembinaan Bangunan tersebut dan seterusnya memperolehi keuntungan daripada operasi Bangunan tersebut dan apabila tamatnya tempoh konsesi akan memberikan Plaintiff-Plaintif bangunan haram yang boleh dirobuhkan oleh pihak Berkuasa Tempatan bila-bila sahaja*

*memandangkan Pelan Bangunan tersebut tidak pernah mendapat kelulusan daripada pihak berkuasa yang berkenaan.*

[74] Thus the Defendants complaint against the Plaintiff is the alleged wrongful disbursement of the Financing Facilities because the building plan was not approved and the Lease Agreement was not executed. The relief sought by the Defendants for the Payment Guarantee Agreement to be declared void was dismissed. Thus contrary to the Defendants' argument, the Payment Guarantee Agreement is valid, binding and enforceable by the parties to the said agreement.

[75] In the instant case, as can be seen from the discussion above, the pertinent issue in dispute is the Defendants' guarantee under the Payment Guarantee Agreement and in particular whether the Defendants are liable to pay to the Plaintiff the sum RM 326,669,571.59 being the judgment sum obtained by the Plaintiff against Redha in Civil Action No. 22M-18-11/2014. It is not shown that such issues concerning the Payment Guarantee Agreement was ventilated and determined in the Shah Alam High Court Suit. In fact the Defendants failed to have the Payment Guarantee Agreement declared void.

[76] It was pointed out by the Defendants that the relief sought by the Plaintiff in the instant case is the same relief sought by Redha in the Shah Alam High Court Suit, namely –

*Perintah bahawa MAIS dan KUIS bertanggung membayar kembali kesemua jumlah pembiayaan untuk Projek Pembinaan 10 blok Bangunan Asrama dan Pusat Pelajar kepunyaan KUIS, termasuk faedah/keuntungan dan denda kepada BMMB, Bank Pembangunan Malaysia Berhad dan Bank Kerjasama Rakyat Malaysia Berhad yang jumlah sebenarnya seperti yang akan dikemukakan oleh bank-bank berkenaan.*

[77] Although the above represent the relief sought by Redha there is no evidence to show that the issues relating to the relief sought is the same issues as in the instant case. The Defendants further emphasised that the above relief was dismissed by the court. However it is not shown that the said dismissal is a result of issues relating to the Defendants' liability under the Payment Guarantee Agreement in relation to the Financing Facilities being ventilated and adjudged.

[78] The Defendants also contends that issues relating to the Payment Guarantee Agreement and the Assignment of Concession Agreement was raised in the Shah Alam High Court Suit where it was pointed out by the Defendants that the Plaintiff (as the second defendant) has pleaded as follows –

5. *Seterusnya, Defendan Kedua menyatakan Defendan Pertama melalui perjanjian Assignment of Concession Agreement bertarikh 3.8.2007 telah membuat penyerahan hak kepada Defendan Kedua ke atas kesemua hak dan faedah (tidak termasuk obligasi) Defendan Pertama di bawah Concession Agreement bertarikh 7.3.2006 tersebut. Defendan Pertama telah pun memberikan notis penyerahan hak kepada Plaintiff Kedua melalui notis bertarikh 9.8.2007 Plaintiff Kedua telah pun memberikan persetujuan terhadap penyerahan hak tersebut kepada Defendan Kedua melalui notis bertarikh 13.8.2007.*
  
7. *Perenggan 9 Pernyataan Tuntutan Pindaan diakui setakat bahawa Plaintiff-Plaintiff dan Defendan Pertama telah menandatangani Payment Guarantee Agreement bertarikh 3.8.2007 tersebut.*

[79] With respect, the above are the relevant facts pleaded by the Plaintiff in its pleadings. However it is not known what were the issues arising from the said paragraphs which were ventilated and the judgment, if any, made in relation to the issues. It could well be related to the issue in dispute in this instant case, but without any credible evidence to show that it is so, it is merely speculative on the part of the Defendants to assert as such.

[80] As stated above the Defendants' action against the Plaintiff in the Shah Alam High Court Suit is premised on wrongful release of the Financing Facilities to Redha without the approved building plan and

before the Lease Agreement was registered. Thus the Defendants' alleged the Plaintiff was negligent. However the issues in this instant action relate to the Defendants' guarantee obligations (discussed above) under the Payment Guarantee Agreement. Although the Defendants sought for a declaration that the Payment Guarantee Agreement be declared void, the basis of such relief was made on the basis that the Concession Agreement is void due to Redha's failure to obtain the CCC. Evidence was adduced to show that such relief was dismissed and the Defendants did not appeal against the said decision. However the issues in this instant action relate to the Defendants' obligations as guarantor (discussed above) under the Payment Guarantee Agreement which remains valid and binding on the Plaintiff and Defendants.

[81] As such the Plaintiff is entitled to pursue its claim against the Defendants under the Payment Guarantee Agreement for the sum RM 326,669,571.59 which is the balance due and outstanding from Redha pursuant to the judgment obtained against Redha in Suit 22M-18-11/2014. Given the circumstances it is the considered view of this court there is no duplicity of proceedings in the instant case and the Shah Alam High Court Suit.



[82] As pointed out by the Plaintiff, the Defendants have previously filed 2 interlocutory applications (enclosure 7 and enclosure 60) to strike out the Plaintiff's Statement of Claim under Order 18 rule 19 (a) – (d) of the Rules of Court 2012.

(a) Enclosure 7

The said application was filed on 24 May 2017 which was after the Shah Alam High Court Suit was filed but before judgment pronounced. It was contended by the Defendants the instant action is barred by the doctrine of res judicata and duplicity of proceedings on the following grounds –

- (i) the instant case is premature as the Shah Alam High Court Suit is still pending;
- (ii) the Shah Alam High Court Suit relate to the same facts and issues;
- (iii) the Plaintiff did not filed a counterclaim against the Defendants in the Shah Alam High Court Suit; and
- (iv) the Plaintiff is not entitle to payment under the Concession Agreement due to failure to obtain CCC.

(b) Enclosure 60

The said application was filed on 13 February 2018 after the Shah Alam Order was pronounced. In view of the said order the Defendants argued that –

- (i) this instant action is barred by doctrine of res judicata and duplicity of proceedings;
- (ii) Plaintiff is claiming double remedy as the Shah Alam Order had ordered for the market value of the Accommodation and Student Centre to be paid by Redha to the Plaintiff.

[83] Both enclosures 7 and 60 were heard by Has Zanah Mehat J who dismissed the both applications. The Defendants appealed against dismissal of enclosure 7 but it was subsequently withdrawn. No appeal was filed against dismissal of enclosure 60.

[84] It is without doubt the grounds submitted by the Defendants to support enclosure 60 are the same grounds submitted again after full trial to disprove the Plaintiff's claim. On the basis of res judicata, it is the Plaintiff's position that the Defendants themselves are barred from raising, again, the same issues. Although the Defendants' applications

to strike out the Plaintiff's claim was dismissed, applying the principles established in the case of *Farlim Properties* this court is not in the position to say for certain that res judicata applies as the reasoning for such dismissal is not available for this court to ascertain definitively that *"the earlier judgment must 'necessarily and with precision' determine the point in issue"*.

[85] With regards to the Defendants' contentions that the Plaintiff ought to have pursued its instant claim against the Defendants in the Shah Alam High Court Suit by filing a counterclaim, this court is of the view that since the claim under the Payment Guarantee Agreement is a separate and independent action all together and the claim sought is monetary relief in relation to payment under the Financing Facilities by Redha and guaranteed by the Defendants as opposed to the declaratory relief for the Payment Guarantee Agreement to be declared void due to Redha's breach under the Concession Agreement to which the Plaintiff is not a party, the Plaintiff is entitle to bring this instant action against the Defendants. As such the issue of this instant action is an abuse of the process of court does not arise. To shut out the Plaintiff from recovering the concession proceeds which KUIS has collected and retained and continue to collect and retain the same without regards to their obligation

under the Payment Guarantee Agreement would be unjust and inequitable.

[86] The Plaintiff's claim is for money due and payable by Redha under the Financing Facilities which is the amount specified in the Summary Judgment in Suit 22M-18-11/2014. The repayment is supposed to be made from Redha's revenue derived from operating and maintaining the Accommodation and Student Centre which is substantially the rental charges collected from KUIS's students occupying the Accommodation. The Development was completed in 2008 and in December 2012 KUIS took over the management of the Accommodation and Student Centre. DW 1 in his evidence in chief testified (Q & A 21) that after the takeover KUIS stopped making payments when the Defendants were informed that CCC for the building and the building plan has yet to be obtained and approved. However the Defendants has allowed since the takeover, for students to occupy the Accommodation and continue to collect rental charges as confirmed by DW 1 during cross examination –

*PP*                      *Ok dan sebelum atau pada 2008, antara 2008 sehingga 2014, pihak yang membenarkan penghuni-penghuni menghuni bangunan asrama sama ada dari segi pelajar atau penyewa lain, kedai-kedai atau sebagainya adalah pihak Redha betul?*

SD1 *Betul.*

PP *Bila Redha keluar daripada .... Tidak lagi menjadi pemegang concession?*

SD1 *Pada hasil persetujuan bersama pada 1.12.2012.*

PP *Jadi, dari 2012 sehingga 2014 bila KUIS failkan tuntutan di Mahkamah Tinggi Shah Alam, KUIS yang membenarkan pihak-pihak menghuni bangunan hostel, betul?*

SD1 *Ya.*

PP *Dan bila masuk mahkamah tahun 2012 sampai ke hari ini, KUIS adalah pihak yang membenarkan penghuni-penghuni masuk dan menghuni hostel, betul?*

SD1 *Betul.*

...

PP *Dan saya sahkan KUIS sehingga kini masih mengutip yuran-yuran penginapan daripada pelajar-pelajar dan penyewa-penyewa, setuju?*

SD1 *Betul.*

[87] As provided in the Payment Guarantee Agreement, MAIS has irrevocably agree to guarantee the payment of the concession proceeds

by KUIS to Redha under the Concession Agreement notwithstanding the contractual relationship between KUIS and Redha may have ceased. As stipulated in clause 7 of the Payment Guarantee Agreement, the Defendants' agreement under the Payment Guarantee Agreement is not to be considered irrevocable or satisfied by any intermediate payment of any part of the monies owing and payable by KUIS to Redha. As such even though Summary Judgment may have been entered against Redha and that the value of the building is ordered to be paid to the Plaintiff, such payment does not in any way prejudice the Plaintiff's right under the Payment Guarantee Agreement against the Defendants. Thus the issue of double remedy does not arise. This is especially so when the Defendants are currently collecting and retaining the rental charges without regards whatsoever to their obligations under the Payment Guarantee Agreement as guarantor for the repayment of the Financing Facilities which was utilised by Redha to carry out and complete the Development which the Defendants are currently utilising and enjoying. Besides that, the Defendants themselves are disputing the assessment of damages award made pursuant to the Shah Alam Order by filing a notice of cross appeal.

## Conclusion

[88] Based on the aforesaid reasons it is the considered view of this court that the Plaintiff has proven its case on balance of probabilities. The Plaintiff's claim at paragraph 28 (a) – (f) of the Amended Statement of Claim was accordingly allowed with costs of RM40,000.00.

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

DATED 27 MAY 2019

### Counsel:

Plaintiff : Dato' Muhammad Adam Abdullah and together with Adlina Atika Zainal Abidin of Adam Abdullah & Mani

Defendants : Muhammad Fairuz and together with Nurul Muhaniza Hanafi and Sharifah Kalsom Syed Sidki of Messrs Abu Zahar Syed Mohd Fuad & Partners