

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
DI DALAM WILAYAH PERSEKUTUAN, MALAYSIA  
(BAHAGIAN DAGANG)  
GUAMAN CIVIL NO.: WA-22NCC-251-06/2020

ANTARA

**AFFIN BANK BERHAD**

(NO. SYARIKAT: 25046-T)

... **PLAINTIF**

DAN

**DINESH KANAVAJI A/L KANAWAGI**

(NO. K/P: 781121-07-5119)

... **DEFENDAN**

DAN

1. **RHB TRUSTEES BERHAD**

(NO. SYARIKAT: 573019-U)

**SEBAGAI PEMEGANG AMANAH LINGGIU  
VALLEY ORANG ASLI (JAKUNS) TRUST**

2. **DATUK BANDAR KUALA LUMPUR**

... **CADANGAN PIHAK-  
PIHAK KETIGA**

**JUDGMENT**

**(Enclosure 60)**

- [1] This was an application by the Defendant by way of Notice of Application dated 18.5.2021 (**Enclosure 60**) for leave to issue third party notice to the Proposed Third Parties pursuant to Order 16 Rule 1 of the Rules of Court 2012 ("**ROC**") ("**this Application**").



[2] In this Application the Defendant sought leave to issue a third party notice for the following Orders contained in the Draft Third Party Notice annexed to this Application:

- i. Pihak-pihak Ketiga membuat **indemniti dan / atau sumbangan** penuh dan lengkap berkenaan dengan apa-apa pencarian dan / atau pengagihan liabiliti yang ditetapkan memihak kepada Plaintiff terhadap Defendan;
- ii. Pihak-Pihak Ketiga untuk **menanggung rugi atau menyumbang** berkaitan dengan apa-apa jumlah yang Defendan mungkin bertanggungjawab untuk membayar atau bersetuju untuk membayar kepada Plaintiff untuk ganti rugi, faedah-faedah dan I atau kos-kos atau apa-apa yang lain; dan
- iii. Pihak-Pihak Ketiga **menanggung rugi atau menyumbang** dan kos yang ditanggung oleh Defendan untuk membela tuntutan Plaintiff di dalam ini dan I atau kos yang ditanggung oleh Defendan dalam prosiding- prosiding pihak Ketiga terhadap pihak Ketiga.”

(own emphasis added)

[3] Through the Draft Third Party Notice the Defendant also sought for the following questions or issues to be determined by the Court:

“(a) Sama-ada **Plaintif** adalah Penerima Penyerahhak (Assignee) yang sah kepada 12 unit-unit Hartanah yang dinyatakan berikut:

No.	Nombor Parcel	Alamat Penyampaian Unit	Keluasan (Kaki Persegi)
1.	9-12B-A dengan (1) tempat letak kereta sebagai aksesori	Unit No. E-19A-2, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	1,112
2.	9-12B-H dengan (1) tempat letak kereta sebagai aksesori	Unit No. E-13A-7; Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	1,193
3.	9-17-D dengan (1)	Unit No. E-17-1* Lanai Gurney Condominium, 1, Jalan Bukit Keramat,	947



	tempat letak kereta sebagai aksesori	Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	
4.	9-18-G dengan (1) tempat letak kereta sebagai aksesori	Unit No. E-18-6J, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	732
5.	8-1 5-A dengan (1) tempat letak kereta sebagai aksesori	Unit No. D-15-7, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	1,118
6..	9-17-G, dengan (1) tempat letak kereta sebagai aksesori	Unit No. E-17-6, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	732
7.	9-17-F, dengan (1) tempat letak kereta sebagai aksesori	Unit No. E-17-9, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	947
8.	9-16-G, dengan (1) tempat letak kereta sebagai aksesori	Unit No. E-16-6, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	947
9.	9-15-A, dengan (1) tempat letak kereta sebagai aksesori	Unit No. E-15-2, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	1,112
10.	2-19-A, dengan (1) tempat letak kereta sebagai aksesori	Unit No. A-19-4, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	1,408
11.	9-18A-D, dengan (1) tempat letak kereta sebagai aksesori	Unit No. E-19-1, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	947
12.	9-18-D, dengan (1) tempat letak kereta sebagai aksesori	Unit No. E-18-1, Lanai Gurney Condominium, 1, Jalan Bukit Keramat, Off Jalan Padang Tembak,. 54000 Kuala Lumpur.	947

- (b) Sama-ada **hak dan kepentingan** pihak **Plaintif** sebagai Pemegang Penyerahhak ke atas dua belas (12) unit-unit hartanah tersebut adalah terpelihara walaupun satu Penghakiman Mahkamah bertarikh 22.12.2016 telah diberikan kepada Defendan Kedua.
- (c) Sama-ada pihak Ketiga RHB Trustee Sdn Bhd atau iaitu mana-mana pihak yang memegang dan menyimpan salinan asal Geran Hakmilik individu unit-unit Hartanah tersebut harus menyerahkannya kepada



**Plaintif** dalam tempoh tujuh (7) hari selepas Perintah ini disampaikan;

- (d) Sama-ada **hak dan kepentingan Plaintif** sebagai Penerimaahak (Assignee) atau unit-unit Hartanah tersebut harus disempurnakan melalui Pendaftaran gadaian atas nama Plaintif ke dalam Geran Hakmilik individual unit-unit Hartanah tersebut ;
- (e) Sama-ada Datuk Bandar Kuala Lumpur telah memungkiri tanggungjawab contract/tort dengan memberikan Geran Hakmilik individu unit-unit Hartanah tersebut kepada RHB Trustee Sdn Bhd atau Penerima dan Pengurus dan bukan menyerahkannya kepada **Plaintiff**.
- (f) Sama-ada RHB Trustee sebagai **SEBAGAI PEMEGANG AMANAH LINGGIU VALLEY ORANG ASLI (JAKUNS) TRUST** telah mendapat pengayaan yang tidak adil atau bertentangan dengan prinsip “*nemo debet locupletari jactura aliena*”

(own emphasis added)

**[4]** As this Application was served on the Plaintiff and the issues stated in the Draft Third Party Notice involve the Plaintiff, I had on 15.6.2021, during the Case Management of this Application, invited learned counsel for the Plaintiff to submit at the hearing of this Application. I also allowed the Plaintiff to file its affidavit in respect of this Application.

**[5]** The Plaintiff did file an Affidavit In Reply (**Enclosure 84**) to oppose this Application as well as Written Submissions.

## **A] SALIENT BACKGROUND FACTS**

### **Chronology of Proceedings**

**[6]** Before I deal with the issues in this Application I must first and foremost set out the chronology of proceedings to give proper context to this Application.



- [7] The Plaintiff had previously filed two applications as follows:
- i) Notice of Application dated 2.10.2020 pursuant to Order 14 ROC for leave to enter Summary Judgment against the Defendant in respect of the reliefs sought by the Plaintiff in its Statement of Claim (**Enclosure 14**);
  - ii) Notice of Application dated 18.12.2020 pursuant to Order 14A Rule 1 ROC for the Defendant's Counterclaim to be determined by way of three questions that were posed to the Court (**Enclosure 27**).
- [8] Enclosures 14 and 27 were heard on **1.4.2021** and the decision for both Enclosures were originally fixed for decision on **22.4.2021** but on 22.4.2021 the decision date was changed to **28.5.2021** as I was on leave on that day.
- [9] By letter dated **16.4.2021** (**Enclosure 57**) the Defendant wrote to Court, inter alia, informing the Court that the Defendant is intending to file a third party notice and requested for a postponement of the decision on Enclosures 14 and 27 until its intended third party notice is disposed.
- [10] The Plaintiff's solicitors replied to Enclosure 57 vide their letter to Court dated **19.4.2021** (**Enclosure 58**), inter alia, objecting to the Defendant's request for a postponement and stating that it is too late for the Defendant to apply for a postponement of the decision on Enclosures 14 and 27 (and the proposed third party application the Defendant intends to file) as the Court has reserved its decision to 22.4.2021. The Plaintiff's solicitors also stated in Enclosure 58 that the Defendant's request for a postponement (and the proposed third party notice) is an afterthought as the Plaintiff's counsel at the hearing of Enclosures 14 and 27 had raised the issue that the Defendant did not name the Trust (the 1<sup>st</sup> Proposed Third Party) as a party to this action.
- [11] On **16.5.2021** this Application was filed by the Defendant.



[12] On **28.5.2021** I delivered my decision on Enclosures 14 and 27 where both the said Enclosures were allowed. My Grounds of Judgment can also be seen in **Affin Bank Bhd v. Dinesh Kanavaji A/L Kanawagi [2021] MLJU 2073; [2021] 1 LNS 1692.**

[13] The chronology of proceedings leading to the filing of this Application is important as it goes to the *bona fides* of this Application. I will deal with this later in this Judgment.

### **The Plaintiff's Claim**

[14] The Plaintiff's claim for which Summary Judgment was entered was essentially for 12 banking facilities ("**the Facilities**") which were granted to the Defendant ("**the Loans**") and the default of repayment of the Loans by the Defendant.

[15] The Loans were to finance the purchase of 12 properties being the same properties stated in the Draft Proposed Third Party Notice listed in paragraph 3 of this Judgment ("**the 12 Properties**").

[16] On 28.5.2021 Summary Judgment was entered against the Defendant where the Defendant was ordered to pay the Plaintiff the following (**Enclosure 72**):

“(a) jumlah sebanyak RM1,511,003.46 setakat pada 30 November 2019 dengan faedah ke atasnya pada kadar 3.5% setahun di atas Kadar Pinjaman Asas Plaintiff atas kiraan bulanan dari 1 Disember 2019 hingga tarikh penyelesaian penuh; dan

(b) kos sebanyak RM10,000.00, tertakluk kepada bayaran fi alokatur.”

### **The Defendant's Counterclaim**

[17] The Defendant's purchase of the 12 Properties that were part-financed by the Plaintiff is a part of a total of 30 properties that were purchased by the Defendant ("**the 30 Properties**").



[18] The Defendant obtained loans for the purchase of the said 30 Properties from three banks, the brief details of which are as follows:

- i) Malayan Banking Berhad (“**Malayan Banking**”) – 16 properties;
- ii) The Plaintiff (Affin Bank Berhad) – 12 properties; and
- iii) CIMB Bank Berhad (“**CIMB Bank**”) – 2 properties.

[19] Malayan Banking provided loans for 16 properties while the Plaintiff provided 12 loans and CIMB Bank provided 2 loans.

[20] The 30 Properties were originally owned by Datuk Bandar Kuala Lumpur (“**DBKL**”) (the 2<sup>nd</sup> Proposed Third Party).

[21] Through a series of transactions and dealings, the facts of which are not material to the Applications, the 30 Properties were assigned by DBKL to one Idaman Spectra Sdn Bhd (“**Idaman Spectra**”), a company that had purchased the 30 Properties.

[22] Idaman Spectra then sold the 30 Properties to the Defendant.

[23] The Plaintiff released the loan sum under the Facilities to Idaman Spectra in respect of the Defendant’s purchase of the 12 Properties.

[24] Sometime in September, 2011, an entity known as Linggiu Valley Orang Asli (Jakuns) Trust (“**the Trust**”) which was managed by a Receiver and Manager commenced a suit in the Johore Bahru High Court, the particulars of which are as follows:

*“DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU  
GUAMAN NO. 23NCVC-106-07/2012  
(dahulunya dikenali sebagai Guaman. MTKL - 22NCC–1512-09/2011)*

ANTARA



Linggiu Valley Orang Asli (Jakuns) Trust  
(Bertindak melalui Penerima dan Pengurus yang dilantik  
Ng Eng Kiat (No. K/P : 531016-10-5919))

... PLAINTIF

DAN

1. **KU AZHAR BIN KU ABDUL RAZAK**  
(No. K/P : 700305-02-5493)
2. **DINESH KANAVAJI A/L KANAWAGI**  
(No. K/P : 781121-07-5119)
3. **KANAWAGI A/L SEPERUMANIAM**  
(No. K/P : 450112-07-5241)
4. **TETUAN KHANA & CO**  
(didakwa sebagai firma)
5. **RIZA MAKHZAN ARI FIN**  
(No. K/P: 730201-03-5221)  
(Mengamal sebagai Peguambela & Peguamcara  
di bawah nama dan gelaran Tetuan Sharifah & Associates)
6. **PUTERI INTAN NURUL ARZIAN BT ABDUL AZIZ**  
(Mengamal sebagai Peguambela & Peguamcara  
di bawah nama dan gelaran Tetuan Sharifah & Associates)
7. **MAMPU JAYA SDN BHD (Dalam Penggulangan)**  
(No. Syarikat: 128556-D) ... DEFENDAN-DEFENDAN”

**(“Trust’s JBHC Suit”)**

**[25]** The Trust’s JBHC Suit was against, amongst others, the Defendant for, inter alia, a declaration that the Trust was the rightful owner of certain properties including the 30 Properties (which includes the 12 Properties).

**[26]** The Trust’s JBHC Suit was allowed and, inter alia, the following Orders were made on 22.12.2016 by the High Court:

- “2. Bahawa **Plaintif diisytiharkan sebagai tuan punya** dan/atau berhak kepada segala kepentingan, manfaat yang diterima atau berbangkit daripada **30 Unit Tambahan Apartmen di Lanai Gurney Heights Condominium, No. 1, Jalan Padang Tembak, Off Jalan Bukit Keramat, 50450 Kuala Lumpur**”

.....



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\*\*Note : Serial number will be used to verify the originality of this document via eFILING portal



- “4. Satu **deklarasi** bahawa **Defendan-Defendan Pertama sehingga Ke-7** telah **secara tidak jujur membantu Defendan Pertama** menghasilkan keuntungan rahsia, komisyen, insentif, aset dan manfaat lain yang tak sah yang timbul dari milikan dan kawalan yang tidak sah dan salah mereka atas 27 Unit dan **30 Unit Tambahan** tersebut.
5. Satu deklarasi bahawa **Defendan-Defendan Pertama sehingga Ke-5** adalah **pemegang amanah konstruktif** bagi Plaintiff berkenaan dengan semua wang yang diterima mereka melalui keuntungan rahsia, komisyen, insentif, aset dan manfaat lain yang tak sah yang timbul dari milikan dan kawalan yang tidak sah dan salah mereka atas 27 Unit dan **30 Unit Tambahan** tersebut.
6. Satu deklarasi bahawa **Defendan-Defendan Pertama sehingga Ke-7 telah memungkiri kewajipan-kewajipan fidusiari, kontrak dan amanah konstruktif** yang mereka masing-masing mempunyai terhadap Amanah itu dan/atau bahawa Defendan-Defendan adalah penyerta-penyerta bersama dan telah secara tidak jujur membantu satu sama yang lain dalam melakukan kemungkiran kewajipan-kewajipan itu.
7. Satu deklarasi bahawa **Defendan-Defendan Pertama sehingga Ke-7 telah melakukan suatu fraud dan berkomplot** antara satu sama lain dengan maksud utama untuk membawa kerugian kepada Plaintiff dan/atau bahawa Defendan-Defendan tersebut adalah penyerta-penyerta bersama dan telah secara tidak jujur membantu satu sama lain dalam melakukan fraud dan komplot itu terhadap Plaintiff.

### **Perintah-Perintah Injunksi**

8. Bahawa **Defendan-Defendan Pertama sehingga Ke-7** yang dinamakan di sini samada secara sendiri atau ejen atau pengkhidmat mereka atau mana-mana dari mereka atau sebaliknya dalam apa jua cara **dilarang** dan suatu injunksi dikeluarkan untuk melarang mereka dari **menjual, menyerah, membebaskan melalui cagaran atau sebaliknya, mencampur tangan dengan penyewaan-penyewaan masa kini, menggadai, menggadai-janji, menyerahhak, menyandarkan (pledging), memindahmilik, berurusan, menghabiskan, melupuskan, menyingkirkan (removing), menyembunyikan, merendahkan nilai atau membinasakan** dalam apa cara jua 27 Unit dan **30 Unit**



**Tambahan** tersebut atau wang-wang yang diperolehi darinya samada Unit-unit sedemikian berada dalam nama mereka secara tunggal (solely) atau dipegang bersama dengan atau oleh orang-orang lain termasuk nominee-nominee mereka atau bagi pihak mereka dan/atau atas amanah bagi pihak mereka.

9. Bahawa **Defendan-Defendan Pertama sehingga Ke-7** atau mana-mana dari mereka yang diserahkan dengan perintah yang akan dibuat di sini akan dengan serta-merta dan **bersetuju melakukan semua tindakan** dan perkara yang perlu **untuk membolehkan Plaintiff mendapatkan milikan** dan kawalan ke atas 27 Unit dan **30 Unit Tambahan** itu atau sebarang wang atau aset lain yang telah diperolehi atau dibeli dengan penggunaan dan manfaat dana Plaintiff.

### Perlaksanaan Spesifik

10. Bahawa **Defendan-Defendan Pertama sehingga Ke-5** dengan serta-merta memajukan kepada Plaintiff semua dokumen-dokumen asal yang **membuktikan pembelian 30 Unit Tambahan tersebut termasuk Suratikatan Penyerahhakan (melalui Pemindahmilik)** untuk yang sama masing-masing, yang telah disempurnakan dengan sewajarnya dan dengan setem duti ad valorem dibayar atasnya.
11. Bahawa **Defendan-Defendan Pertama sehingga Ke-5 menyerahkan kawalan** dan milikan 27 Unit dan **30 Unit Tambahan** tersebut dan pengurusanannya kepada Plaintiff bersama dengan semua dokumen sokongan relevan dan yang diperakui yang membuktikan pengurusan yang sama dan sekiranya dokumen sedemikian tidak di dalam milikan mereka, mereka diperintahkan mendapatkan salinan yang sama daripada orang-orang relevan dan mematuhi perintah yang dibuat di sini.
12. Bahawa **Defendan-Defendan Pertama sehingga Ke-5 dan Defendan Ke-8 memastikan bahawa suratan hakmilik strata** bagi 27 Unit dan **30 Unit Tambahan** tersebut dipohon dan bila dikeluarkan oleh Pihak Berkuasa Tanah, **diserah kepada Plaintiff** bersama dengan borang pindahmilik pejabat tanah yang telahpun ditandatangani dengan sempurna memihak Plaintiff bagi 27 Unit dan 30 Unit Tambahan tersebut.”

(own emphasis added)



- [27] The Defendant appealed to the Court of Appeal against the High Court's decision in the Trust's JBHC Suit ("**Defendant's Appeal**").
- [28] The Trust, through its Receiver and Manager, threatened committal proceeding against the Defendant and this resulted in the Defendant handing over the 12 Properties to the said Receiver and Manager.
- [29] After being notified of the decision in the Trust's JBHC Suit, on 7.8.2018 the Plaintiff filed an action vide Kuala Lumpur High Court Suit No. WA-22NCC-340-08/2018 against the Defendant, the Trust (acting through its Receiver and Manager) and the Director General of Insolvency as the Liquidator of Mampu Jaya Sdn Bhd (in liquidation) ("**Plaintiff's KLHC Suit**").
- [30] The reliefs sought by the Plaintiff in the Plaintiff's KLHC Suit are, inter alia, as follows:
- (a) Satu Deklarasi **bahawa Plaintiff adalah Penerima Penyerahhak (Assignee) yang sah kepada 12 unit-unit Hartanah** yang dinyatakan berikut;
  - (b) Satu Perintah bahawa **hak dan kepentingan pihak Plaintiff** sebagai Pemegang Penyerahhak ke atas **dua belas (12) unit-unit hartanah** tersebut adalah **terpelihara** walaupun satu Penghakiman Mahkamah bertarih 22,12.2016 telah diberikan kepada Defendan Kedua;
  - (c) Suatu Perintah bahawa **Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga** iaitu mana-mana pihak yang memegang dan menyimpan **salinan asal Geran Hakmilik Individu** unit-unit Hartanah tersebut untuk **menyerahkannya kepada Plaintiff** dalam tempoh Tujuh (7) hari selepas Perintah Mahkamah ini di sampaikan;
  - (d) Satu Perintah bahawa **hak dan kepentingan Plaintiff** sebagai Penerimaahak (Assignee) atas unit-unit Hartanah tersebut **disempurnakan melalui Pendaftaran gadaian** atas nama Plaintiff ke dalam Geran Hakmilik Individual unit-unit Hartanah tersebut;



- (e) Secara **alternatif** kepada perenggan (b) dan (c) diatas adalah supaya **Defendan Pertama atau Defendan Kedua menjelaskan segala keberhutangan** Defendan Pertama kepada Plaintiff **dan menebus unit-unit hartanah tersebut daripada pihak Plaintiff**”

(own emphasis added)

- [31] On 17.1.2019 the Court of Appeal dismissed the Defendant’s Appeal and affirmed the decision of the High Court in the Trust’s JBHC Suit as well as the Orders that were made by the High Court.
- [32] The Defendant then filed an application for leave to appeal to the Federal Court against the said decision of the Court of Appeal (“**Defendant’s Leave Application**”).
- [33] According to the Plaintiff, on 20.3.2019 the Plaintiff’s KLHC Suit was struck out with liberty to file afresh as the Plaintiff did not obtain leave of the Court before commencing proceedings against the Receiver and Manager of the Trust who was an officer of the Court. However, the Defendant claims the Plaintiff’s KLHC Suit was dismissed with no provision for liberty to file afresh.
- [34] After the Plaintiff’s KLHC Suit was struck out, the Plaintiff’s then solicitors, Messrs. Sidek Teoh Wong & Dennis, vide their letter dated 25.9.2019, wrote to the Trust’s then solicitors, Messrs Rosley Zechariah, to enquire with regard to the Trust’s position in relation to the 12 Properties that had been ordered by the Courts to be transferred to the Trust.
- [35] On 25.2.2020, the Plaintiff, through its solicitors, issued letters to the Defendant, declaring that events of default had occurred, the Facilities had been terminated, and all outstanding balances under the Facilities were immediately due and payable by the Defendant to the Plaintiff.
- [36] On 21.8.2020 the Federal Court dismissed the Defendant’s Leave Application. It was reported that the Honourable Chief Justice



made the following statement when the Defendant's Leave Application was dismissed:

*"The High Court judgement was well reasoned and was upheld by the Court of Appeal"*

[37] On 28.8.2020 the Defendant filed its Defence and Counterclaim in this action.

[38] The Defendant, inter alia, admits to have ceased repayment of the Facilities by reason that the Plaintiff failed to secure the 12 Properties (paragraph 14 of the Defence and Counterclaim).

[39] The crux of the Defendant's Defence to the Plaintiff's claim is contained in the following paragraphs of the Defence and Counterclaim:

"53. **By virtue of the High Court orders given in Johore Bahru High Court Suit No. 23NCVC-106-07/2012 and affirmed by the Court of Appeal, the Agreements and the Assignments entered between the Plaintiff and the Defendant were frustrated and null and void.**

54. By reasons of the matter aforesaid above, the issues in this action are res judicata and the Plaintiff is **estopped from raising the same issues.**

55. The Defendant avers that the Plaintiff's action herein is **an abuse of the Court process and/or the Plaintiff is estopped from filing this action as the Plaintiff had filed Kuala Lumpur High Court Suit No. WA-222NCC-340-08/2018 for the same relief against the Defendant** and this action was dismissed without liberty to file afresh and therefore the issues in this action are res judicate and the Plaintiff is estopped from raising the same issues."

(own emphasis added)

[40] Therefore, the Defendant's Defence can be summarised as follows:



- i) The Plaintiff's claim is frustrated and is null and void because of the decisions of the High Court and Court of Appeal (which was also affirmed by the Federal Court) in the Trust's JBHC Suit which essentially declared the Trust as the rightful owner of the 30 Properties which includes the 12 Properties being the subject matter of this action;
- ii) The issues in the Plaintiff's action are *res judicata* and the Plaintiff is estopped from raising the same issues which were raised in the Trust's JBHC Suit; and
- iii) The Plaintiff is further estopped from filing this action as the Plaintiff had sought the same relief against the Defendant in the Plaintiff's KLHC Suit and thus the issues in this action are also *res judicata* and the Plaintiff is estopped from raising the same issue here.

[41] The Defendant's Counterclaim is premised upon the above defence or arguments and this can be seen from the following paragraphs of the Counterclaim:

“60. However, **the Plaintiff had failed, neglected and/or refused to take any action to protect their rights, title and interest in the said properties** thereby **refusing** the Defendant the **right to redeem** the said **12 properties**.”

61. **Further by the decision of the Johore Bahru High Court given on 22.12.2016 and affirmed by the Court of Appeal on 17.01.2019**, the aforesaid Agreements and Assignments entered between the Plaintiff and the Defendant **were frustrated**, the effect of which **the Plaintiff has to now return all monies paid by the Defendant to the Plaintiff.**”

(own emphasis added)

[42] The reliefs sought by the Defendant in his Counterclaim are essentially as follows:



- “(1) For an order that the **12 Facilities Agreement dated 9.02.2011, and the 12 Deeds of Assignment** dated 9.02.2011 entered between the Plaintiff and the Defendant were **frustrated as a result the Order dated 22.12.2016** given in Johore Bahru High Court Suit No. 23NCVCC-106-07/2012 and confirmed by the Court of Appeal on 17.01.2019;
- (2) For an Order that the **Plaintiff pays the Defendant the sum of RM1,401,504.00** being the total monthly loan payments for the said 12 properties paid by the Defendant to the Plaintiff from 9.02.2011 until September, 2019;
- (3) Damages suffered by the Defendant in the lost of the 12 Properties be paid by the Plaintiff;”

(own emphasis added)

**[43]** Thus, the crux of the Defendant’s defence to the Plaintiff’s claim and the Defendant’s Counterclaim against the Plaintiff is premised upon the Defendant’s allegation that the Plaintiff had failed to protect the Plaintiff’s rights, title and interest in the 12 Properties. This is essentially the main issue in the Defence and Counterclaim.

**[44]** I had determined the Defendant’s Counterclaim by way of Enclosure 27 on 28.5.2021 and made the following Orders (**Enclosure 75**):

- “a) Soalan-soalan yang dibentangkan di Lampiran A di sini diputuskan oleh Mahkamah Yang Mulia ini menurut Aturan 14A Kaedah-Kaedah Mahkamah, 2012;
- b) Soalan-soalan yang dibentangkan di Lampiran A di sini diputuskan memihak kepada Plaintiff, iaitu
- i. Soalan1 di Lampiran A di sini dijawab dalam **afirmatif**;
  - ii. Soalan 2 di Lampiran A di sini dijawab dalam **negatif**; dan
  - iii. Soalan 3 di Lampiran A di sini dijawab dalam **negatif**;
- c) Tuntutan Balas Defendan terhadap Plaintiff di sini ditolak; dan



- d) Kos sebanyak RM10,000.00 dibayar oleh Defendan kepada Plaintiff, tertakluk kepada bayaran fi alokatur.”

(own emphasis added)

**[45]** The questions in Lampiran A of Enclosure 75 are as follows:

**“Lampiran A**

1. Sama ada kewajipan-kewajipan hutang Defendan kepada Plaintiff di bawah sepuluh (10) Surat-Surat Tawaran bertarikh 5.5.2010 dan dua (2) Surat-Surat Tawaran bertarikh 22.6.2010, dan dua belas (12) Perjanjian- Perjanjian Kemudahan bertarikh 9.2.2011, yang ditandatangani antara Plaintiff dan Defendan (secara kolektif, “Perjanjian-Perjanjian Pinjaman”), adalah berasingan dan bebas daripada dua belas (12) Suratikatan-Suratikatan Penyerahhakan bertarikh 9.2.2011 (“Suratikatan-Suratikatan Penyerahhakan”) yang berkenaan dengan dua belas (12) unit-unit kondominium di No. 1, Jalan Bukit Keramat, Off Jalan Padang Tembak, 54000 Kuala Lumpur, termasuk status dua belas (12) unit-unit kondominium tersebut?
  - a) Jika afirmatif, sama ada Defendan adalah masih berkewajipan untuk membayar balik kepada Plaintiff, kemudahan-kemudahan di bawah Perjanjian-Perjanjian Pinjaman, walaupun dua belas (12) unit-unit kondominium tersebut telah diperintahkan untuk dikembalikan kepada Linggiu Valley Orang Asli (Jakuns) Trust?
2. Sama ada Perjanjian-Perjanjian Pinjaman dan/atau Suratikatan-Suratikatan Penyerahhakan telah dikecewakan oleh Perintah Mahkamah Tinggi Johor Balun bertarikh 22.12.2016 dan Perintah Mahkamah Rayuan bertarikh 17.1.2019?
3. Memandangkan Perintah Mahkamah Tinggi Johor Bahru bertarikh 22.12.2016, Perintah Mahkamah Rayuan bertarikh 17.1.2019 dan Perintah Mahkamah Persekutuan bertarikh 21.8.2020, sama ada Defendan boleh mengekalkan dan/atau berjaya dalam tuntutan balas beliau, yang timbul daripada tindakan-tindakan beliau yang haram dan/atau menyalahi undang-undang?”

**[46]** It is necessary for me to set out the relevant facts surrounding this Application as it forms the basis for my decision.





**B] THE PRINCIPLES GOVERNING AN APPLICATION FOR LEAVE TO ISSUE THIRD PARTY NOTICE**

**[47]** Order 16 Rule 1 provides as follows:

***"1. Third party notice (O. 16 r. 1)***

*(1) Where in any action a defendant who has entered an appearance-*

- (a) claims against a person **not already a party** to the action any **contribution or indemnity**;*
- (b) claims against such a person any **relief or remedy relating to or connected** with the **original subject matter** of the action and substantially the **same as some relief or remedy claimed by the plaintiff**; or*
- (c) **requires that any question or issue** relating to or connected with the **original subject matter** of the action should be determined **not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action**,*

*then, subject to paragraph (2), the defendant may issue a notice in Form 18 or 19, whichever is appropriate (which is referred to as a "third party notice" in this Order), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined."*

*(2) A defendant to an action may not issue a third party notice without the leave of the Court unless he issues the notice before serving his defence on the plaintiff.*

*(3) Where a third party notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (which is referred to as a "third party" in this Order), with the same rights in respect of his defence against any claim made against him*



*in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued.*

(own emphasis added)

**[48]** The granting of leave to issue third party notice is a discretionary power of the Court and it is trite that the Defendant must make out a *prima facie* case that brings the matter within the parameters of Order 16 Rule (1) ROC. This principle can be seen in the following cases:

- i) **Dato' Abul Hasan bin Mohamed Rashid v. Multi-Code Electronics Industries & Anor [2012] 5 MLJ 176** where the Court of Appeal held as follows

*[4] The second defendant is seeking leave to bring third party proceedings for **indemnity and contribution** against the six directors of the first plaintiff. **But before leave to issue a third party notice is granted to the second defendant, he must show a prima facie case.***

*[6] "..... The second defendant in filing the third party application for indemnity and contribution, has to satisfy the court that **there is a question proper to be tried** as to the liability of the six directors **to provide indemnity and make a contribution, be it in whole or in part.** To put it differently, the second defendant has to show a prima facie case."*

(own emphasis added)

- ii) **Muhamad Saleh Bin Hashim & Ors v. Percon Corp Sdn Bhd [2003] 6 ML J 483** at page 489D-F of the report where it was held:

*"It is **trite law** that **before leave to issue a third party notice is granted** to the defendant as against the first proposed third party, the defendant **must show a prima facie case.** This principle of law can be distilled from the case of Punca Klasik Sdn Bhd. v Liza James*



& Ors [1996] MLJU 315; [1996] 3 CLJ 932 where at p 936 of the CLJ report, the court said:

*Secondly, on the authority of Furness, Withy & Co Limited v Pickering (1908) 2 Ch 224, Ungku Aziz must show a prima facie case before leave to issue a third party notice would be issued and he failed to do that.*

***This principle of law must be put in the forefront of my mind in the course of deliberating encl 29 which was an offshoot of encl 13.***

(own emphasis added)

- iii) **Punca Klasik Sdn Bhd. v Liza James & Ors [1996] MLJU 315; [1996] 3 CLJ 932** which was referred to in **Muhamad Saleh** (supra) on the same principle of law regarding the requirement for the defendant to show a *prima facie* case before leave to issue a third party notice can be given.

## **C] WHETHER A *PRIMA FACIE* CASE HAS BEEN SHOWN BY THE DEFENDANT**

**[49]** I begin by highlighting that the third party notice that the Defendant sought leave of this Court to issue is based on **both** indemnity and contribution (either one or both). I pause here to make the following observations:

**[50]** There are two separate Forms in the ROC with regards to third party notice as follows:

- i) **Form 18** is in respect of a claim for indemnity or contribution; and;
- ii) **Form 19** is where the defendant seeks the Court to determine a question of issue.



- [51] This Application is in fact for a claim of indemnity and contribution as well as for the Court to determine six questions or issues. Therefore, the Application is a **combination** of Forms 18 and 19 ROC.
- [52] Whilst neither learned counsel for the Plaintiff nor the Defendant submitted on this issue, the glaring question is whether both Forms 18 and 19 ROC can be combined into one single Form. The ROC does not provide for it but neither does the ROC state that it cannot be done. If both Forms 18 and 19 needs to be issued based on the Defendant's claim for indemnity and contribution against the Proposed Third Parties as well as the questions or issue he sought this Court to determine then arguably both Forms 18 and 19 ought to be issued separately.
- [53] However, I am of the view that this would not be practical, especially when the directions for the entering of appearance for in situations (Form 18 and Form 19) are the same. It would not be practical for a third party to enter appearance at different times especially when two separate third party notices (Form 18 and Form 19) are issued at different times.
- [54] Nevertheless, to my mind the separate Forms are intended to cater for two **separate situations**. A defendant can still seek an indemnity or contribution under Form 19 but that will depend on the questions he seeks the Court to determine and the consequences of the answers to those questions. Meanwhile Form 18 is specifically for indemnity or contribution or both. Presumably it does **not** require a specific question to be determined first as the defendant has **identified** his claim and cause of action against the third party. For example, where a plaintiff claims against a defendant for defective work done by the defendant under a contract between the plaintiff and the defendant, which work was in turn sub-contracted by the defendant to the third party. The defendant in this example would claim for an indemnity or contribution from the third party against the plaintiff's claim.
- [55] The reason I have raised this is because the Defendant is claiming for indemnity or contribution or both against the Proposed Third Parties, however, it would appear that the Defendant is not able to identify his cause of action against the Proposed Third Parties.



[56] Having considered the Defendant's grounds in support of this Application, I find that this Application is not *bona fide* for the following reasons:

- i) As can be seen from the Chronology of Proceedings set out earlier in this Judgment the Defendant stated in his letter in Enclosure 57 that he wanted to file this Application **before** the Court delivered its decision on Enclosures 14 and 27. He reiterated this position during the Case Management on 22.4.2021 (the date originally fixed for decision of Enclosures 14 and 27). Therefore, based on the Defendant's own statement, this Application was **not** predicated or based on the decisions on Enclosures 14 and 27. However, the Defendant took a contrary position at the hearing of this Application, both orally and based on his written submissions (**Enclosure 89**) where at paragraph 9 of Enclosure 89 the Defendant submits as follows:

“9. The **question and answer that is relevant to this 3rd party proceeding arises from the answer by this Honourable Court in relation to Enclosure 27** wherein the court answered the Plaintiff's question in the negative:

Whether the Loan Agreements and/or the Deeds of Assignments were frustrated by the Johor Bahru High Court Order dated 22.12.2016 and the Court of Appeal Order dated 17.1.2019?

The court answered this question in the negative.”

(own emphasis added)

- ii) If this Application is not based on the decision on Enclosures 14 and 27 then there would be **no** need to refer the decision of the Court in respect of Enclosures 14 and 27 in this Application. Based on the position taken by the Defendant this Application is independent of the Court's decision on Enclosures 14 and 27.



- iii) Further, at the hearing of this Application on 20.1.2022 the Defendant informed the Court that Defendant will not be proceeding with issues (a) and (b) of the Draft Third Party Notice as these issues have been decided in the Court's decision on Enclosure 27.
- iv) Therefore, it seems to me that this Application is very much based on the decisions on Enclosures 14 and 27 which the Defendant had anticipated.
- v) The Defendant had plenty of time and opportunity to file this Application much earlier but failed to do so and waited until the Court was just about to deliver its decision on Enclosures 14 and 27 to inform the Court of the Defendant's intention to file this Application. This Application was only filed on 16.5.2021, about 12 days before the decision on Enclosures 14 and 27 was delivered.
- vi) Hence, I agree with the learned counsel for the Plaintiff's submission that this Application is an afterthought and would further add that I do not find it to be *bona fide*.
- vii) In this regard I refer to the following passages by the Court of Appeal in **Dato' Abul Hasan** (supra) which is directly on point:

*"[15] We have also considered the argument that the second defendant has the right to bring a separate action against his fellow directors later. **We noted that prior to the filing of the third party notices, the second defendant had not made any demand against the proposed third parties — the six directors of the first plaintiff. And such lackadaisical attitude points to a case of an afterthought on the part of the second defendant. It must be emphasised that the second defendant is not barred under limitation or jurisdiction for that matter from bringing a separate action against the proposed third parties. And it must also be emphasised that the second defendant is not prevented from filing a fresh action against the proposed third parties on the allegations as alluded to by the second defendant in his third party notices.***



.....

[17] *We cannot overlook the principle that company directors have co-ordinate liability to the company (FBI Foods Ltd-Les Aliments FBI Ltee v Irving Glassner and Cadbury Schweppes Inc and Cadbury Beverages Canada Inc [2001] BCSC 151). Perhaps a derivative action is the best solution for the second defendant to consider. But how could the second defendant commence a derivative action now in the name of the first plaintiff company when the first plaintiff is already suing several parties for the alleged losses of RM44,188,262.22 — a colossal figure? **At this stage, the issues of res judicata and multiplicity of proceedings might be raised.***

(own emphasis added)

[57] I also find that this Application does not comply with or satisfy Order 16 Rule 1(1) ROC in particular Order 16 Rule 1(1)(c), my reasons are as follows:

- i) As the Defendant is seeking for certain questions or issues to be determined in the Draft Third Party Notice, this Application falls directly within the requirement Order 16 Rule 1(1)(c) ROC as well as Form 19 ROC. The material words of Order 16 Rule 1(1)(c) ROC and Form 19 are as follows:

#### **Order 16 Rule 1(1)(c)**

*“(c) **requires** that any question or issue relating to or connected with the original subject matter of the action **should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action,**”*

#### **Form 19**

*“The defendant requires that the following question or issue, viz., (state the question or issue required to be determined) **should be determined not only as between the plaintiff and the***



***defendant but also as between either or both of them and yourself.***

(own emphasis added)

- ii) The Draft Third Party Notice also uses the same words as per Form 19 ROC above.
- iii) Based on the wording and especially the highlighted words in Order 16 Rule 1(1)(c) ROC and Form 19 there are several requirements that need to be satisfied before leave to issue the Draft Third Party Notice can be given (i.e. for the Court to determine the questions posed) and they are as follows:
  - a) There must be a **pending** or **live** issue (*lis pendens*) for the Court to determine. The pending or live issue here includes the issues between the Plaintiff and the Defendant in the present case. After Enclosures 14 and 27 were decided there are **no** pending or live issues between the Plaintiff and the Defendant or vice versa.
  - b) The words, “**requires**” the question or issue to be determined “**not only**” as between the Plaintiff and the Defendant “**but also as between either or both of them and**” the third party requires there to be a pending or live issue involving the Plaintiff to exist.
  - c) The word “**requires**” is also in the present tense which means it must be a pending or live issue. It is only logical for there to be a pending or live between the Plaintiff and the Defendant if not there is no purpose for asking the Court to determine the issue in the third party notice which must be connected in some way to the main action. Though third party proceedings are considered independent proceedings between the respective parties (**Mat Abu bin Man v. Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226**), however, they are undeniably still connected to the main action.





- d) In this regard questions (a), (b), (d) and (e) in Draft Third Party Notice specifically involve the Plaintiff. These issues cannot be reventilated as they are *res judicata* based on issues that were actually decided and also on the broader principle of *res judicata* on issues which should have or ought to be raised (**Joseph Paulus Lantip & Ors v. Unilever Plc [2012] 7 CLJ 693; Henderson v. Henderson [1843] 3 Hare 100, 67 ER 313; Asia Commercial Finance (M) Bhd v. Kawai Teliti Sdn Bhd [1995] 3 MLJ 189**).
- iv) Whilst in **Dato' Abul Hasan** (supra) it is held that “*an application for third party directions may even be made after judgment is given*”, however, that does **not** necessarily mean **leave to issue** third party notice can be given **after** the main suit has been decided and certainly not in the present case where the Draft Third Party Notice is for the determination of questions or issues which has already been determined in the main suit.
- v) I would venture to add that an application for leave to issue a third party notice ought rightly be made while the main suit, that is the suit between the Plaintiff and Defendant are still pending. That is also the rationale behind the Third Party Notice Directions under **Order 16 Rule 4 ROC** where the Court gives directions, inter alia, whether leave is to be given to the third party to defend the action, either alone or jointly with any defendant or to appear at the trial (between the plaintiff and the defendant) and to take part therein (**Order 16 Rule 4(4) ROC**).

**[58]** In addition to the above, notwithstanding that the Plaintiff's claim and the Defendant Counterclaim has been finally determined by this Court via Enclosures 14 and 27, with respect, I also find this Application to be fundamentally flawed for the following reasons:

- i) The Plaintiff's claim against the Defendant is essentially a debt recovery action for repayment of the Loans. Therefore, the



questions and issues in the Draft Third Party Notice is totally irrelevant to the Plaintiff's claim and main action.

- ii) In so far as the Defendant's Counterclaim is concerned, the reliefs sought by the Defendant is essentially for an order that the Facilities for the Loans and the Deeds of Assignment between the Plaintiff and Defendant were frustrated as a result of the Order dated 22.12.2016 in the Trust's JBHC Suit and also for the Plaintiff's to refund the total monthly repayments of the Loans that were made by the Defendant. However, in the Draft Third Party Notice it would appear that the Defendant sought to **enforce the Deeds of Assignment**, the very Deeds they sought to **invalidate** in the Defendant's Counterclaim. Bearing in mind that the Defendant, being dissatisfied with the Court's decisions on Enclosures 14 and 27, have filed appeals to the Court of Appeal against those decisions. The Defendant is approbating and reprobating, and in doing so contradicts itself continuously. This seriously questions the *bona fides* of this Application.

### **Res Judicata**

**[59]** Specifically on the issue of *res judicata*, I am in agreement with the following points advanced on behalf of the Plaintiff:

- i) The questions raised in the Draft Third Party Notice are irrelevant and in this regard in determining Enclosures 14 and 27 herein, this Court has decided at paragraphs 99(vi) and 100(ix) of the Grounds of Judgment (**Affin Bank Bhd v. Dinesh Kanavaji A/L Kanawagi [2021] MLJU 2073; [2021] 1 LNS 1692**) as follows:

*"[99](vi) The Loan Agreements are separate and independent of the status of the 12 Properties, including the Deeds of Assignment. In this regard, despite the 12 Properties being ordered to be returned to the Trust, the Defendant is still obligated to repay the Facilities under the Loan Agreements. The Plaintiff's arguments in respect of Question 1 are reiterated."*



*"[100](ix) The issues pertaining to the Plaintiff's KLHC Suit is not relevant here. These are matters which pertain to Questions 1 and have already been dealt with and decided earlier in this judgment in that the Loan Agreements are separate and independent of the Deeds of Assignment. The Plaintiff is entitled to pursue its claim against the Defendant for recovery of the amounts outstanding under the Facilities and this would not affect the Plaintiff separate right over the assigned 12 Properties."*

- ii) The Defendant does not have *locus standi* to ask the questions in the Draft Third Party Notice Defendant to be determined by the Court as the Defendant does **not** have any interest or right in the 12 Properties.
- iii) In the Trust's JBHC Suit, the High Court had inter alia declared that the Defendant had committed fraud (paragraph 7 of the High Court Order dated 22.12.2016). This was upheld by the Court of Appeal. Both the High Court and the Court of Appeal had also found, inter alia, that monies belonging to the Trust were misused by the Defendant to purchase the 12 Properties (as well as the other Properties) and hence ordered the 12 Properties (and the other Properties) to be returned to the Trust, declaring the Trust to be the rightful owner of the 30 Properties (paragraph 166 of the Court of Appeal judgment in **Tetuan Khana & Co v. Sating Lau Bee Chiang & Ors And Other Appeals [2019] 3 CLJ 56**). This was upheld by the Federal Court.
- iv) To allow the Defendant leave to issue the Draft Third Party Notice and for the questions stated therein to be determined by this Court is tantamount to relitigating the same issues which were decided in the Trust's JBHC Suit which was upheld on appeal to the Court of Appeal and further affirmed by the Federal Court when leave to appeal was dismissed.

**[60]** Therefore, based on the aforesaid the Defendant has failed to show a prima facie case for leave to be given for the issuance of the third party notice.



## D] CONCLUSION

[61] For the reasons stated above, I dismissed this Application and after hearing arguments on costs from both parties, awarded costs of RM5,000.00 in favour of the Plaintiff.

Dated this 5<sup>th</sup> day of July, 2022

-SGD-

**(WAN MUHAMMAD AMIN BIN WAN YAHYA)**  
Judicial Commissioner  
High Court of Malaya,  
Kuala Lumpur  
(Commercial Division (NCC 3))

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## **DEFENDANT (ACTING IN PERSON)**

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## **LEGISLATION / RULES CITED**

### **Rules of the Court 2012**

- Order 16 Rule 1
- Order 16 Rule (1)
- Order 16 Rule 1(1)(c)
- Order 16 Rule 4
- Order 16 Rule 4(4)
- Form 18
- Form 19

## **CASES CITED**

1. Affin Bank Bhd v. Dinesh Kanavaji A/L Kanawagi [2021] MLJU 2073; [2021] 1 LNS 1692
2. Asia Commercial Finance (M) Bhd v. Kawai Teliti Sdn Bhd [1995] 3 MLJ 189
3. Dato' Abul Hasan bin Mohamed Rashid v. Multi-Code Electronics Industries & Anor [2012] 5 MLJ 176



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4. Henderson v. Henderson [1843] 3 Hare 100, 67 ER 313
5. Joseph Paulus Lantip & Ors v. Unilever Plc [2012] 7 CLJ 693
6. Mat Abu bin Man v. Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226
7. Muhamad Saleh Bin Hashim & Ors v. Percon Corp Sdn Bhd [2003] 6 MLJ 483
8. Punca Klasik Sdn Bhd. v Liza James & Ors [1996] MLJU 315; [1996] 3 CLJ 932
9. Tetuan Khana & Co v. Sating Lau Bee Chiang & Ors And Other Appeals [2019] 3 CLJ 56



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