IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY OF MALAYSIA

SUIT NO: 22NCC-269-07/2014

BETWEEN

MOK YII CHEK

(NRIC No: 780828-05-5053) ... PLAINTIFF

AND

1. **SOVO SDN BHD**
   (Company No: 975181-T)
2. **RAY HONG**
   (NRIC No: 750407-08-5265)
3. **D. CHARANJIT SINGH A/L JAGIR SINGH**
   (NRIC No: 761001-10-5557) … DEFENDANTS

JUDGMENT

A. Introduction

1. This is a judgment after the trial of a claim (**This Suit**) based on –

(a) breach of contract;

(b) total failure of consideration; and/or

(c) unjust enrichment

(**3 Causes of Action**).

2. The interesting feature of this case is that the plaintiff (**Plaintiff**) obtained a judgment in default against the second defendant (**2nd Defendant**) and the 2nd Defendant testified as a witness for the Plaintiff against the first defendant company (**1st Defendant**) and third defendants (**3rd Defendant**). Ironically, the 1st and 3rd Defendants subpoenaed the 2nd Defendant's wife, Ms. Sara Tsoi Shoi San (**SD1**) to give evidence for the 1st and 3rd Defendants!

B. Parties

3. The Plaintiff is an individual who is a businessman.

4. The 1st Defendant is a private limited company which is involved in the business of renting out fully renovated and outfitted office units known as "*SOVO*" (*small office virtual office*) (**SOVO**). At the material time, the 1st Defendant had 99,996 shares, of which -

(a) the 2nd Defendant owned 39,998; and

(b) the 3rd Defendant had the majority shareholding of 59,998;

5. The 2nd Defendant is an individual who was a director of the 1st Defendant at the time of the transactions which were the subject matter of This Suit.

6. The 3rd Defendant is the majority shareholder of the 1st Defendant (by virtue of 3rd Defendant's ownership of 59,998 shares) and its director. At the material time, the 1st Defendant had only 2 directors, namely the 2nd and 3rd Defendants.

C. <u>This Suit</u>

7. The Plaintiff filed This Suit based on the 3 Causes of Action against the 1st to 3rd Defendants.

8. On 19.8.2014 the Plaintiff has entered a default judgment against the 2nd Defendant for the sum of RM1,599,018.28 with interest on that sum and costs (**Default Judgment against 2nd Defendant**).

9. At the trial of This Suit –

(a) the Plaintiff testified himself and called the following witnesses in support of This Suit -

(i) Ms. Toh Mei Ling (**SP2**); and

(ii) the 2nd Defendant; and

(b) the following persons testified on behalf of the 1st and 3rd Defendants –

(i) SD1;

(ii) the 3rd Defendant gave evidence on behalf of the 1st Defendant and himself; and

(iii) Mr. Danesh Pannirselvam (**SD3**).

D. Plaintiff's case

10. The Plaintiff testified as follows:

(1) the Plaintiff knew the 2nd Defendant;

(2) some time in December 2012, the 2nd Defendant introduced to the Plaintiff the SOVO business concept which involved letting out fully renovated and outfitted office units. Subsequently, some time in January 2012, the 2nd Defendant asked the Plaintiff to invest RM1 million in the SOVO

business of the 1st Defendant in exchange for a 5% shareholding in the 1st Defendant. According to the 2nd Defendant, the 2nd and 3rd Defendants were shareholders and directors of the 1st Defendant. The Plaintiff did not invest the RM1 million;

(3) some time in early March, 2013 –

(a) the 2nd Defendant informed the Plaintiff that the 1st Defendant had rented part of a building called "*Logan Heritage*" in Georgetown, Penang (**Premises**), for 3 years beginning on 1.4.2013 (**Main Tenancy**). The 1st Defendant would renovate the Premises and provide outfitting work to convert the Premises into small offices. Thereafter, the 1st Defendant would rent out the small offices in the Premises to third parties;

(b) the 2nd Defendant stated that the 1st Defendant had got Tokio Marine Life Insurance Malaysia Bhd. (**Tokio Marine**) as the 1st Defendant's anchor tenant for the Premises;

(c) the 2nd Defendant asked the Plaintiff again to invest RM1 million in the 1st Defendant's SOVO business; and

(d) the Plaintiff was interested in the 2nd Defendant's proposal and the Plaintiff requested for more information

regarding the costing and the projected expenses and returns;

(4) the 2nd Defendant arranged a meeting at the 1st Defendant's office at Level 12, Amcorp Tower, Petaling Jaya, on 22.3.2013 (**Meeting on 22.3.2013**). The Meeting on 22.3.2013 was attended by the Plaintiff, SP2, 2nd Defendant, 3rd Defendant and SD3. At the Meeting on 22.3.2013 –

(a) the 2nd and 3rd Defendants informed the Plaintiff and SP2 that the 3rd Defendant was already running a business which was very similar to the SOVO business but under a different brand name. The 2nd and 3rd Defendants were going to rebrand their existing business under the name "*SOVO*";

(b) the 2nd and 3rd Defendants proposed that the Plaintiff invest in and run the SOVO business at the Premises. According to the 2nd and 3rd Defendants, Tokio Marine and Intelligence Business Network (M) Sdn. Bhd. would be the anchor tenants of the Premises for the SOVO business; and

(c) the Plaintiff was interested to invest in the SOVO business conducted at the Premises;

(5) after the Meeting on 22.8.2013, the 3rd Defendant sent an email dated 26.3.2013 to SP2 which was copied to the

Plaintiff, 2nd Defendant and SD3 (**3rd Defendant's Email dated 26.3.2013**). The 3rd Defendant's Email dated 26.3.2013 stated that the 3rd Defendant was the "*Chief Executive Officer*" (**CEO**) of the 1st Defendant. Forms 24, 44 and 49 and other documents regarding the 1st Defendant were attached to the 3rd Defendant's Email dated 26.3.2013;

(6) there was an oral agreement between the Plaintiff, 1st to 3rd Defendants (**Oral Contract**) that -

(a) the Plaintiff would invest RM1.3 million in the SOVO business at the Premises (**Plaintiff's Investment**) and the Plaintiff's Investment would be used for the following purposes -

(i) to pay rent for the Premises to the Premises' landlord;

(ii) to pay for all renovation and outfitting work (**Works**) to convert the Premises into small and virtual offices so as to let out these offices to third parties (**SOVO Business**); and

(iii) to support the daily operations of the SOVO Business until December 2013;

(b) a new company (**Newco**) would be set up where the Plaintiff would hold at least 80% of Newco's shares while the 1st Defendant would hold the other shares in Newco;

(c) the Plaintiff's Investment would be made in Newco whereby Newco would pay all the contractors and suppliers in respect of the Works (**1st Defendant's Creditors**);

(d) Newco would operate the SOVO Business;

(e) the Main Tenancy of the Premises would be "*transferred*" from the 1st Defendant to Newco;

(f) all deposits received by the 1st Defendant from the tenants of the Premises (**Tenants**) would be paid to Newco; and

(g) Newco's shareholders would enter into a shareholders' agreement (**SHA**) which would include the above terms of the Oral Contract;

(7) pursuant to the Oral Contract, Green Sovo Sdn. Bhd. (**GSSB**) was incorporated on 9.4.2013 with the following shareholders –

(a) each of the Plaintiff and SP2 has 4 shares; and

(b) the 1st Defendant has 2 shares.

The Plaintiff and SP2 are the only directors of GSSB;

(8) the 2nd and 3rd Defendants requested for the Plaintiff's Investment to be used as a temporary loan to the 1st Defendant (**Plaintiff's Temporary Loan to 1st Defendant**). The Plaintiff's Temporary Loan to 1st Defendant would be used to pay the 1st Defendant's Creditors as the 1st Defendant's Creditors had to start the Works immediately and the 1st Defendant's Creditors required initial payments. The Plaintiff agreed to the Plaintiff's Temporary Loan to 1st Defendant based on the assurance of the 2nd and 3rd Defendants that once GSSB was set up, the Oral Contract would be complied with and the SHA would be signed (**Assurance by 2nd and 3rd Defendants**). The Assurance by 2nd and 3rd Defendant is corroborated by the 2nd Defendant's email dated 29.3.2013 to the Plaintiff and SP2 which was copied to the 3rd Defendant and SD3 (**2nd Defendant's Email dated 29.3.2013**). Attached to the 2nd Defendant's Email dated 29.3.2013 was a draft agreement to evidence the Plaintiff's Temporary Loan to 1st Defendant (**Loan Agreement**);

(9) SD3 sent an email dated 29.3.2013 to SP2 which was copied to the Plaintiff, the 2nd and 3rd Defendants regarding the 1st Defendant's payment schedule with the 1st Defendant's

Creditors (**SD3's Email dated 29.3.2013**). SD3's Email dated 29.3.2013 was sent by SD3 as the 1st Defendant's "*Chief Strategic Officer*" (**CSO**);

(10) the 3rd Defendant sent an email dated 1.4.2013 to SP2 which was copied to the Plaintiff, the 2nd Defendant and SD3 regarding the 1st Defendant's payment schedule with the 1st Defendant's Creditors (**3rd Defendant's Email dated 1.4.2013**). The 3rd Defendant's Email dated 1.4.2013 requested for the Plaintiff's full name and National Registration Identity Card (**NRIC**) number;

(11) Ms. Sa, the finance manager of the Plaintiff's companies, sent an email dated 2.4.2013 to the 3rd Defendant which was copied to SP2 (**Ms. Sa's Email dated 2.4.2013**). Ms. Sa's Email dated 2.4.2013 stated that the following documents would be sent to the 3rd Defendant's office by 12 pm, 3.4.2013 -

(a) 2 cheques for the payments to 1st Defendant's Creditors;

(b) 2 sets of the Loan Agreement to be signed by the 3rd Defendant; and

(c) 2 sets of application forms for GSSB's shares to be signed by the 3rd Defendant;

(12) SD3 sent email dated 10.4.2013 to the Plaintiff and SP2 which was copied to the 2nd and 3rd Defendants (**SD3's Email dated 10.4.2013**) to, among others, update the Plaintiff in respect of the status of the Works and payments by the Plaintiff to 1st Defendant's Creditors;

(13) the 3rd Defendant sent an email dated 10.4.2013 to SP2 which was copied to the Plaintiff, the 2nd Defendant and SD3 (**3rd Defendant's 1st Email dated 10.4.2013**). The 3rd Defendant's 1st Email dated 10.4.2013, among others, requested for preparation of a cheque to pay one of the 1st Defendant's Creditors. SP2 replied to the 3rd Defendant's Email dated 10.4.2013 by way of an email dated 10.4.2013 (**SP2's Email dated 10.4.2013**) stating, among others, that SP2 would bring the cheque to the 3rd Defendant's office. The 3rd Defendant sent a second email dated 10.4.2013 to SP2 thanking SP2 in respect of the cheque to be brought by SP2 (**3rd Defendant's 2nd Email dated 10.4.2013**);

(14) on 14.4.2013 the Loan Agreement was signed by the Plaintiff and the 1st Defendant. The 2nd and 3rd Defendants signed the Loan Agreement on behalf of the 1st Defendant. The Loan Agreement provided, among others –

(a) clause 1.1 – the Plaintiff has agreed to advance RM1.3 million to the 1st Defendant totally free of interest until the Newco and SHA are "*established*" (**Clause 1.1**);

(b) clause 1.2 – the Plaintiff and 1st Defendant agreed that the RM1.3 million is a loan from the Plaintiff to the 1st Defendant in lieu of the Plaintiff's Investment towards the "*Design, Build and Management*" of SOVO located at the Premises until the "*establishment*" of Newco whose new shareholders are the Plaintiff as the 80% shareholder and the 1st Defendant as the 20% shareholder (**Clause 1.2**);

(c) clause 1.5 – the Plaintiff and 1st Defendant agreed that once Newco has been "*established*", the SHA shall supercede the Loan Agreement (**Clause 1.5**);

(d) clause 1.6 – the Plaintiff and 1st Defendant agreed that the RM1.3 million shall be "*converted*" to be investment upon the "*establishment*" of Newco by the Plaintiff for the "*establishment*" of SOVO at the Premises (**Clause 1.6**); and

(e) clause 5.1 – the Loan Agreement "*constitutes the entire agreement between the parties hereto as to the subject matter hereof and any and all representations, covenants, undertakings, warranties and agreements whether verbal or in writing prior hereto are hereby rescinded nullified and superceded*" (**Clause 5.1**);

(15) the Newco was GSSB;

(16) up to end of January 2014, a total of RM1,599,018.28 (**Plaintiff's Total Payment**) had been paid from the joint bank accounts of the Plaintiff and SP2 as well as from the bank accounts of the Plaintiff's companies, for, among others, the following purposes –

(a) the 1st Defendant's Creditors in respect of the cost of the Works;

(b) deposits and rental in respect of the Main Tenancy of the Premises;

(c) to cover the shortfall in the operating expense of the 1st Defendant's SOVO Business at the Premises; and

(d) the 2nd Defendant's claims relating to the 1st Defendant's business which was due from the 1st Defendant to the 2nd Defendant.

There were many emails from the 3rd Defendant requesting for the Plaintiff to pay the 1st Defendant's Creditors with the relevant price quotes, purchase orders, bills, invoices and payment schedules (**3rd Defendant's Emails Requesting For Plaintiff's Payments**). The Plaintiff's Total Payments were evidenced by cheques, payment vouchers from the Plaintiff's companies and emails from SP2 or Ms. Sa;

(17) SD3 sent an email dated 29.4.2013 to SP2 which was copied to the 2nd and 3rd Defendants (**SD3's Email dated 29.4.2013**). The first draft of SHA [**1st Draft (SHA)**] was attached to SD3's Email dated 29.4.2013;

(18) the 1st Draft (SHA) was discussed at a meeting on 30.5.2013 (**Meeting on 30.5.2013**) and consequently, Ms. Sa sent an email dated 31.5.2013 to the 3rd Defendant and SD3 which was copied to SP2 (**Ms. Sa's Email dated 31.5.2013**). Ms. SA's Email dated 31.5.2013 stated that –

(a) parties had agreed to the amendments to the 1st Draft (SHA) at the Meeting dated 30.5.2013 and the agreed amended draft SHA [**2nd Draft (SHA)**] was attached to Ms. SA's Email dated 30.5.2013; and

(b) "*prompt action*" from the 3rd Defendant would be "*highly appreciated*";

(19) SD3 sent an email dated 5.6.2013 to SP2 and Ms. Sa which was copied to the 2nd and 3rd Defendants (**SD3's Email dated 5.6.2013**). Attached to SD3's Email dated 5.6.2013 was an amended copy of SHA [**3rd Draft (SHA)**];

(20) Ms. Sa sent an email dated 10.6.2013 to the 3rd Defendant which was copied to the Plaintiff, SP2, 2nd Defendant and

SD3 (**Ms. Sa's Email dated 10.6.2013**). Ms. Sa's Email dated 10.6.2013 –

(a) proposed amendments to the SHA [**4th Draft (SHA)**]. The 4th Draft (SHA) was attached to Ms. Sa's Email dated 10.6.2013; and

(b) stated that the finalisation of SHA had been delayed for "*so long*" and it would be appreciated if the 3rd Defendant could agree to the 4th Draft (SHA);

(21) the 3rd Defendant and SD3 met the Plaintiff and SP2 on 8.7.2013 (**Meeting on 8.7.2013**) wherein the 3rd Defendant and SD3 showed the 5th draft of the SHA [**5th Draft (SHA)**] to the Plaintiff and SP2. The Plaintiff agreed to the 5th Draft (SHA) and Ms. Sa sent an email dated 8.7.2013 to the 3rd Defendant which was copied to the Plaintiff, SP2, 2nd Defendant and SD3 (**Ms. Sa's Email dated 8.7.2013**) to confirm the Plaintiff's agreement with the 5th Draft (SHA). Ms. Sa's Email dated 8.7.2013 requested the 3rd Defendant to prepare the SHA and to arrange the SHA to be signed;

(22) the 1st Defendant did not sign the SHA despite the following reminders from Ms. Sa –

(a) Ms. Sa's email dated 10.9.2013 to the 3rd Defendant and SD3 which was copied to the Plaintiff and SP2 (**Ms. Sa's Email dated 10.9.2013**);

(b) Ms. Sa's email dated 10.1.2014 to the 1st Defendant's employee, Cik Nur Ain Muhammad Yusuf (**Cik Ain**) which was copied to the Plaintiff, SP2 and the 3rd Defendant (**Ms. Sa's Email dated 10.1.2014**). Cik Ain replied to Ms. Sa's Email dated 10.1.2014 by way of email dated 13.1.2014 (**Cik Ain's Email dated 13.1.2014**). Cik Ain's Email dated 13.1.2014 stated that Cik Ain was not aware of SHA and requested for a copy of the SHA to be forwarded to the 3rd Defendant for signing. Ms. Sa forwarded a soft copy of the agreed SHA by way of email dated 23.1.2014 to Cik Ain (**Ms. Sa's Email dated 23.1.2014**). Ms. Sa's Email dated 23.1.2014 referred to Ms. Sa's Email dated 10.1.2014 regarding the parties agreement on the SHA; and

(c) Ms. Sa's email dated 27.1.2014 to Cik Ain (**Ms. Sa's Email dated 27.1.2014**) which inquired when the SHA could be signed by the Plaintiff as there had been a delay of 3 to 4 months;

(23) the 1st to 3rd Defendants breached the Oral Contract when –

(a) the 1st Defendant failed to "*transfer*" the 1st Defendant's Main Tenancy of the Premises and the tenancies of the

Premises' Tenants (**Tenancies**) to GSSB despite the following requests -

(i) Plaintiff's 2 "*WhatsApp*" messages dated 12.5.2014 to the 3rd Defendant (**2 "*WhatsApp*" Messages dated 12.5.2014**); and

(ii) Plaintiff's email dated 21.5.2014 to SD3 (**Plaintiff's Email dated 21.5.2014**).

In fact, the complete list of Tenants was not given despite the following emails from Ms. Sa to the 3rd Defendant –

(ia) Ms. Sa's Email dated 8.7.2013; and

(ib) Ms. Sa's email dated 22.8.2013 (**Ms. Sa's Email dated 22.8.2013**);

(b) the 1st Defendant did not hand over to GSSB the rental deposits collected by the 1st Defendant from the Tenants (**Tenants' Rental Deposits**) despite Ms. Sa's email dated 20.9.2013 to Cik Ain which was copied to SP2 and the 3rd Defendant; and

(c) GSSB was not given the SOVO Business by the 1st Defendant. Nor was GSSB and the Plaintiff given access to any information regarding the SOVO Business by the 1st Defendant;

(24) Ms. Sa sent an email dated 19.3.2014 stating that the Plaintiff's cheque would not be released until the meeting between the Plaintiff and the 3rd Defendant. The 3rd Defendant replied by email on the same day to Ms. Sa (copied to the Plaintiff and SP2) which stated, among others, "*SOVO @ Penang will stop* ***operation with immediate effect*** *until we have the meeting on next week Wednesday [26.3.2014]. Kindly take note of the repercussion from here moving forward.*" (**3rd Defendant's Email dated 19.3.2014**);

(25) despite the 3rd Defendant's Email dated 19.3.2014, the 3rd Defendant did not turn up at the meeting with the Plaintiff, SP2 and the 2nd Defendant on 26.3.2014 (**Meeting on 26.3.2014**). The 3rd Defendant met the Plaintiff in a meeting on 21.4.2014 where, among others, the 3rd Defendant requested from the Plaintiff for more time to hand over the SOVO Business to GSSB (**Meeting on 21.4.2014**). Notwithstanding the 3rd Defendant's above request conveyed in the Meeting on 21.4.2014, the 1st Defendant did not hand over the SOVO Business to GSSB;

(26) the 3rd Defendant and SD3 met the Plaintiff on 6.5.2014 (**Meeting on 6.5.2014**). At the Meeting on 6.5.2014, it was agreed that the 1st Defendant would hand over the SOVO Business to GSSB in a few weeks but once again, this did not

materialize. The Plaintiff sent 3 "*WhatsApp*" messages dated 9.5.2014, 10.5.2014 and 12.5.2014 to the 3rd Defendant to request for the 1st Defendant to hand over the SOVO Business to GSSB but to no avail; and

(27) the Plaintiff alleged that he was cheated by the 1st to 3rd Defendants as the Plaintiff's Total Payment had been totally used by the 1st Defendant but the SHA was not signed and the 1st Defendant did not hand over to GSSB, among others, the SOVO Business, the Main Tenancy of the Premises, Tenancies (in respect of the offices at the Premises rented out by the 1st Defendant) and the Tenants' Rental Deposits.

11. SP2 and the 2nd Defendant gave detailed witness statements (**WS**) to corroborate the Plaintiff's above testimony. More importantly, the 2nd Defendant testified as follows:

(a) the 2nd Defendant has his own company, Wit Ink Creating Sdn. Bhd. (**WICSB**) which has done advertising work and has lent money to the 1st Defendant;

(b) around October 2013, the 2nd Defendant's relationship with the 3rd Defendant turned sour because –

(i) the 1st Defendant owed money to WICSB and the 2nd Defendant;

(ii) the 2nd Defendant had stopped financing the 1st Defendant's business as the 1st Defendant was losing money; and

(iii) the 3rd Defendant has agreed to purchase the 2nd Defendant's shares in the 1st Defendant for RM200,000. Consequently, the 2nd Defendant's shares in the 1st Defendant had been transferred to a third party and the 2nd Defendant had resigned as a director of the 1st Defendant. However, the 3rd Defendant has yet to pay for the 2nd Defendant's shares in the 1st Defendant;

(c) the 2nd Defendant has agreed to give evidence in This Suit because the Plaintiff has agreed not to make the 2nd Defendant a bankrupt despite the Default Judgment against 2nd Defendant; and

(d) during cross-examination, the 2nd Defendant informed the court of the following –

(i) the 3rd Defendant "*had a role in every aspect of the business*" of the 1st Defendant; and

(ii) the Plaintiff's Total Payment was not for the benefit of GSSB.

E. <u>Case for 1st and 3rd Defendants</u>

12. The 3rd Defendant and SD3 did not dispute –

(a) the Plaintiff's Total Payment had been actually made by the Plaintiff; and

(b) the authenticity of all the emails tendered by the Plaintiff in This Suit. The 3rd Defendant did not deny the genuineness of the "*WhatsApp*" messages exchanged between the Plaintiff and the 3rd Defendant.

13. The 3rd Defendant gave the following evidence:

(a) the 2nd Defendant introduced the Plaintiff to the 3rd Defendant;

(b) in the 3rd Defendant's WS, the 3rd Defendant stated that the 3rd Defendant introduced the SOVO business concept to the Plaintiff. During cross-examination, the 3rd Defendant changed his evidence and testified that both the 2nd and 3rd Defendants introduced the SOVO business concept to the Plaintiff. The 3rd Defendant admitted during cross-examination that his WS was wrong in this respect;

(c) with effect from 20.1.2014, the 2nd Defendant had resigned as a director of the 1st Defendant and was no longer its shareholder because the 2nd Defendant had "*health problems*";

(d) the 3rd Defendant did not have any intention to give up the SOVO Business at the Premises to any party;

(e) the 3rd Defendant denied any knowledge on the 1st Defendant's ownership of 2 shares in GSSB. According to the 3rd Defendant, GSSB was set up "*to manage the profit sharing of the business in SOVO Penang branch. The SOVO Penang branch is managed solely by*" the 1st Defendant. During cross-examination, the 3rd Defendant strenuously denied that GSSB's purpose was to take over the SOVO Business at the Premises. The 3rd Defendant was adamant that GSSB would only share the profits of the SOVO Business at the Premises. The 3rd Defendant admitted during cross that sub-paragraph 21(f) of the Defence (for the 1st and 3rd Defendants) wrongly stated that GSSB operated "*SOVO Express*";

(f) the 3rd Defendant did not sign the SHA because the terms of the SHA had not been finalized. When the 3rd Defendant was cross-examined on the emails regarding the SHA, the 3rd Defendant claimed that he could not remember such emails. The 3rd Defendant however admitted that he did not send any email, "*WhatsApp*" message or written document to the Plaintiff to inform the Plaintiff that the terms of the SHA had not been finalized. During re-examination, the 3rd Defendant claimed that the draft SHA was handled by the 2nd Defendant and SD3 because he was very busy setting up the SOVO "*branch*" in Penang. In the words of the 3rd Defendant, the 2nd Defendant and SD3 "*were in charge of the commercial terms*" of the draft SHA; and

(g) during cross-examination –

(i) the 3rd Defendant firstly testified that he had only 1 share in the 1st Defendant as stated in his WS. Later, the 3rd Defendant stated that he had "*no idea*" regarding his present

shareholding in the 1st Defendant and his WS regarding his shareholding in the 1st Defendant was wrong. When shown the print-out (dated 30.6.2014) of the 1st Defendant's records with Suruhanjaya Syarikat Malaysia (**SSM**), the 3rd Defendant finally admitted that he owned 160,000 shares in the 1st Defendant!;

(ii) the 3rd Defendant admitted that the Plaintiff's Total Payment was needed by the 1st Defendant to renovate the Premises and in return, the Newco would be formed to distribute the profits and to formalize the relationship between the Plaintiff and the 1st Defendant. The 3rd Defendant confirmed that Newco was GSSB;

(iii) the 3rd Defendant admitted that his WS stating that all the Plaintiff's payments were made directly to the 1st Defendant's Creditors, was wrong; and

(iv) the 3rd Defendant disagreed with the statement put to him by Mr. Sarjeet Singh Sidhu, the Plaintiff's learned counsel (**Mr. Sarjeet Singh**), that the 1st Defendant had benefited from the Plaintiff's Total Payment.

14. SD3's WS stated as follows:

(a) SD3 is an "*advisor*" to the 1st Defendant;

(b) the 2nd Defendant was no longer a shareholder in the 1st Defendant; and

(c) SD3 had no knowledge regarding the Oral Contract, Assurance by 2nd and 3rd Defendants as well as the SHA. Nor did SD3 have any knowledge that the 1st Defendant had executed the Loan Agreement.

15. During SD3's cross-examination –

(a) SD3 admitted that his WS stating that he had only met the Plaintiff once, was not correct as he had met the Plaintiff "*several times*";

(b) SD3 agreed with Mr. Sarjeet Singh that based on, among others, Ms. Sa's Email dated 10.6.2013, the terms of the SHA had been finalized. SD3 further agreed that there were various emails from the "*Plaintiff's side*" requesting for the 1st Defendant to execute the SHA and there was no reply by the 1st Defendant. SD3 conceded that the 1st Defendant did not send any email to the Plaintiff to state that the 1st Defendant would not execute the SHA because the terms of the SHA had not been finalized; and

(c) SD3 agreed with Mr. Sarjeet Singh that the 1st Defendant had benefited from the Plaintiff's Total Payment.

16. When SD3 was re-examined by Ms. Bhavani Vadivelu (**Ms. V. Bhavani**), learned counsel for the 1st and 3rd Defendants, SD3 testified that there was a lot of "*verbal communication*" and "*numerous meetings*" between the 2nd and 3rd Defendants "*for and on behalf*" of the 1st Defendant with the Plaintiff regarding the terms of the SHA but there were "*little, little issues that needed to be ironed out*". Hence, there was no SHA.

17. SD1 was only asked a few questions by learned counsel for the 1st and 3rd Defendants. I will discuss later in this judgment on whether SD1 could testify in This Suit according to s 120(1) of the Evidence Act 1950 (**EA**) as well as the effect of marital privilege under s 122 EA (regarding communication between the 2nd Defendant and his wife, SD1).

F. Issues

18. The following questions for the determination of this court have been raised by the evidence adduced in This Suit and the parties' written submission:

    (a) whether the Plaintiff had invested in the 1st Defendant or lent money to the 1st Defendant;

(b) whether the 1st Defendant was liable to the Plaintiff in respect of the Plaintiff's Total Payment;

(c) whether the 1st Defendant's corporate personality should be pierced so as to render the 2nd and 3rd Defendants personally liable for the acts and omission of the 1st Defendant; and

(d) irrespective of the 1st Defendant's liability, is the 3rd Defendant personally liable to the Plaintiff for breach of Oral Contract and/or Assurance by 2nd and 3rd Defendants?

G. Parties' contentions

19. In support of This Suit, Mr. Sarjeet Singh submitted, among others, as follows:

(a) the 3 Causes of Action are supported by documentary evidence in the form of various emails and "*WhatsApp*" messages. In contrast, the 1st and 3rd Defendants did not adduce any documentary evidence to rebut the Plaintiff's claim in this case;

(b) the 3rd Defendant and SD3 are not credible witnesses; and

(c) Ms. V. Bhavani did not put to the Plaintiff, SP2 and 2nd Defendant during the cross-examination of these 3 witnesses that there was no –

(i) Oral Contract;

(ii) Assurance by 2nd and 3rd Defendants; and

(iii) payment by the Plaintiff.

As such, Mr. Sarjeet Singh contended that the 1st and 3rd Defendants could not raise the above matters to resist This Suit.

20. Ms. V. Bhavani prayed for This Suit to be dismissed with costs on the following grounds:

(a) the Loan Agreement provided for the Plaintiff to invest in the 1st Defendant and there was a time frame of 36 months "*maturity period*" for any return for the Plaintiff;

(b) as the 36 months "*maturity period*" has not expired, the 1st Defendant has not breached the Loan Agreement;

(c) the Plaintiff has failed to prove that the Assurance by 2nd and 3rd Defendants has indeed been made;

(d) the terms of the SHA have not been finalized and hence, the Plaintiff cannot sue based on the SHA. Reliance was placed on the following cases –

(i) the Federal Court's judgment in **Ho Kam Phaw v Fam Sin Nin** [2000] 3 CLJ 1;

(ii) the Supreme Court case of **Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd** [1994] 3 CLJ 133; and

(iii) the Supreme Court's decision in **Kam Mah Theatre Sdn Bhd v Tan Lay Soon** [1994] 1 MLJ 108;

(e) the 1st Defendant has never intended for GSSB to take over the SOVO Business at the Premises from the 1st Defendant. It was intended by the 1st Defendant for GSSB was to share only in the profit of the SOVO Business at the Premises. The 1st Defendant had provided consideration by proceeding and continuing with the SOVO Business at the Premises despite the Plaintiff's "*backing out*" from his investment in the SOVO Business before the expiry of the 36 months "*maturity period*". Accordingly, there was no failure of consideration on the part of the 1st Defendant; and

(f) the Plaintiff could not claim for unjust enrichment because the Plaintiff had breached the Loan Agreement by "*backing out*" from his "*investment*" in the SOVO Business before the expiry of the 36 months "*maturity period*".

H. <u>Admissibility of emails and "*WhatsApp*" messages</u>

21. Before deciding the merits of This Suit, I need to address the question of admissibility of the emails and "*WhatsApp*" messages tendered by the Plaintiff in this case.

22. Print-outs of emails and "*WhatsApp*" messages fall within the wide meaning of "*document*" in s 3 EA. The part of the definition of "*document*" in s 3 EA which is relevant to this case, reads as follows:

> " ***"document" means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article****, including any matter embodied in a disc, tape, film, sound-track or other device whatsoever,* ***by means of*** *–*
>
> *(a)* ***letters, figures****, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;*
>
> *…*
>
> *(d)* ***a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c)****,*
>
> ***or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter****;*
>
> ***ILLUSTRATIONS***
>
> *A writing is a document.*

***Words printed**, lithographed or photographed **are documents**.*

…

A matter recorded, stored, processed, retrieved or produced by a computer is a document;"

(emphasis added).

23. In the pre-trial case management of this case, all parties have agreed to mark the print-outs of emails and "*WhatsApp*" messages as "*Part B*" documents (**Part B Documents**) pursuant to Order 34 rule 2(2)(e)(i) of the Rules of Court 2012 (**RC**). This is because all the parties in This Suit only dispute the contents and the weight of Part B Documents but not their authenticity. In civil suits, parties can agree under s 58(1) and (2) EA to any fact, including Part B Documents – please see **KTL Sdn Bhd & Anor v Leong Oow Lai and 2 other cases** [2014] AMEJ 1458, [2014] 1 LNS 427, at paragraphs 32-37.

24. Even if a party disputes the genuineness of a print-out of an email and "*WhatsApp*" message (**Disputed Print-out**), namely that party insists on the Disputed Print-out to be marked as a "*Part C*" document (**Part C Document**) under Order 34 rule 2(2)(e)(ii) RC, the Disputed Print-out may be admitted as evidence if the following criteria are met:

    (a) the party adducing the Disputed Print-out has the onus to prove that the Disputed Print-out fulfils either one of the 2 requirements in s 5 EA, namely -

(i) the Disputed Print-out concerns the existence or non-existence of "*fact in issue*". Section 3 EA defines a "*fact in issue*" as "*any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows*". The phrase of "*fact in issue*" has been explained by Ong Hock Thye FJ (as his Lordship then was) in the Federal Court case of **How Paik Too v Mohideen** [1968] 1 MLJ 51, at 52; **or**

(ii) the Disputed Print-out is relevant under ss 6 to 55 (contained in Chapter 2 EA which is entitled "*Relevancy of facts*"). Section 3 EA explains that a fact is relevant when "*one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of [EA] relating to the relevancy of facts*"; **and**

(b) the Disputed Print-out is a document produced by a "*computer*" (defined widely in s 3 EA). Explanation 3 to s 62 EA provides that a document produced by a computer is primary evidence and such primary evidence may be adduced pursuant to s 64 EA. As the Disputed Print-out is a document produced by a computer, the party adducing such a document must fulfil one of these 3 alternative conditions –

(i) there is oral evidence that the Disputed Print-out is produced by the computer in the course of the ordinary use of the computer - please see the judgment of Shaik Daud JCA in the Court of Appeal case of **Gnanasegaran a/l Perarajasingam v Public Prosecutor** [1997] 3 AMR 2841,

at 2852-2853, which has been affirmed by the Federal Court's judgment given by Zulkefli Makinudin FCJ (as his Lordship then was) in **Ahmad Najib v Public Prosecutor** [2009] 2 CLJ 800, at 823-826 and 830;

(ii) there is a certificate given under s 90A(2) EA (**Section 90A Certificate**) by a person responsible for –

(1) the management of the operation of the computer; **or**

(2) the conduct of the activities for which the computer is used

- that the Disputed Print-out is produced by the computer in the course of the ordinary use of the computer.

According to s 90A(3)(a) EA, the Section 90A Certificate may state a matter to the best of the knowledge and belief of the person stating it. Where a Section 90A Certificate is given, s 90A(4) EA presumes that the computer in question "*was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced*"; **or**

(c) if the Disputed Print-out is not produced by a computer in the course of its ordinary use, s 90A(6) EA deems such a document "*to be produced by the computer in the course of its ordinary use*" if a party adducing the Disputed Print-out can prove the following 2 cumulative conditions –

(i) the computer in question was in good working order; **and**

(ii) the computer was operating properly in all respects throughout the material part of the period during which the document was produced

- please see the Federal Court case of **Ahmad Najib**, at 826-830, which has approved Augustine Paul JCA's (as his Lordship then was) judgment in the Court of Appeal case of **Hanafi Mat Hassan**, at p. 306. It is to be noted that according to s 90C EA, s 90A EA "*shall prevail and have full force and effect notwithstanding anything inconsistent therewith, or contrary thereto, contained in any other provision of [EA], or in the Bankers' Books (Evidence) Act 1949, or in any provision of any written law relating to certification, production or extraction of documents or in any rule of law or practice relating to production, admission, or proof, of evidence in any criminal or civil proceeding*".

25. It is to be noted that for criminal cases, s 90A(7) EA does not allow an accused person to adduce a document printed from a computer when he or she is –

(a) responsible for the management of the operation of the computer;

(b) responsible for the conduct of the activities for which the computer is used; **or**

(c) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

I. Effect of marital privilege under s 122 EA

26. SD1 testified during examination-in-chief as follows:

(a) SD1 knew the Plaintiff, the 1st and 3rd Defendants;

(b) SD1 knew that the Plaintiff and the 2nd Defendant were friends and had "*entered into a business*"; and

(c) SD1 had no knowledge about GSSB and the "*investment in this project*"

(**SD1's Testimony**).

27. Sections 118, 120(1) and 122 EA provide as follows:

"*Who may testify*

118. ***All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind****.*

Parties to civil suits and wives and husbands

120(1) ***In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses****.*

Communications during marriage

122. ***No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other****.*"

(emphasis added).

28. It is clear that SD1 is a witness who is competent to testify within the meaning of ss 118 and 120(1) EA. This was the reason why I allowed Ms. V. Bhavani to call SD1 as a defence witness. I rely on the following cases:

(a) James Foong J's (as his Lordship then was) decision in the High Court case of **Public Prosecutor v Abdul Majid a/l Md Haniff** [1994] 1 CLJ 172, at 174. I will discuss more about **Abdul Majid** later in this judgment; and

(b) the provisions of Singapore's Evidence Act (**SEA**) are *in pari materia* with our ss 118, 120(1) and 122 EA. Hence, Singapore cases on marital privilege are persuasive. I refer to LP Thean JA's judgment on behalf of the Singapore Court of Appeal in **Lim Lye Hock v Public Prosecutor** [1995] 1 SLR 238, at 246-247, as follows -

> "*In* ***Ghouse bin Haji Kader Mustan*** *v R [1946] MLJ 36, McElwaine CJ held that the wife of an accused was a compellable witness. …On appeal to the High Court it was argued, inter alia, that under s 121(2) of the then Evidence Ordinance (corresponding to s 122(2) [SEA]), she could not be compelled to testify against him. This argument was rejected. In the course of his judgment, McElwaine CJ said, at p 37:*
>
> > *Under s 123 [corresponding to s 124 (SEA)], a spouse may be compelled to disclose a communication made during marriage if it is relevant in a prosecution for any crime committed against the other.*
>
> ***We have two observations on this proposition. First, it was said clearly in obiter****. It is not clear from the report precisely what evidence she gave that was objected to, but it seems to us that the evidence could not be that of any communication between husband and wife, and disclosure of such communication could not have arisen and probably did not arise in that case. The husband was charged with the offence of kidnapping, which was committed prior to the marriage, and the relevant evidence which the wife could give must be in relation to events or matters concerning the kidnapping. Under s 121(2) she was a competent witness and there was nothing in the Ordinance which said that she was not compellable to give such evidence.* ***Secondly, the Chief Justice's proposition pertaining to s 123, with respect, was not correct****. Under s 123, the wife was not permitted, without the consent of the accused, to disclose communication made to her by the*

accused during the marriage. In the later part of his judgment, the learned Chief Justice clarified the position. He said thus, at p 37:

> ***If a witness in this colony is 'competent' and has been summoned he is bound to give evidence, and to answer all relevant questions. There is no class of witness who can be called a 'compellable witness.' The word 'compellable' when used in the Evidence Ordinance relate not so much to a witness as to a type of evidence; and in my opinion a witness may be compelled to give any relevant evidence unless a section enacts that he shall not be compelled to give it. Such sections are 122-127 and 130****.*

The above pronouncement, if we may respectfully say so, is correct*.*

This decision was followed by the Supreme Court of Sarawak, North Borneo and Brunei in ***Gimbu bin Sangkaling v R*** *[1958] SCR 114 . There, the accused was charged for the murder of one Samidal. At the trial, the accused's wife was called as a witness for the prosecution and her evidence incriminated the accused. He was convicted. On appeal, the conviction was upheld. One of the main arguments raised on appeal was that the wife's evidence was not admissible as she was not a compellable witness. That argument was rejected on the basis that the wife was a competent and compellable witness under the Evidence Ordinance, which was in pari materia with our Evidence Act. Smith Ag CJ, after referring to ss 118 and 120 of the Ordinance (corresponding respectively to ss 120 and 122(2) of our Evidence Act) said, at p 118:*

> ***The general rule in North Borneo is that all persons within the ambit of s 118 of Cap 43 are competent to testify. There is no distinct category of 'compellable witnesses' as that term was understood at common law. Although all persons***

within s 118 are competent, certain sections of the Evidence Ordinance (eg ss 121, 122, 124, 125 and 129) set out specific instances where such competent witness cannot be compelled to give evidence relating to specified matters. These instances must presuppose the existence of the rule that all competent witnesses are bound to give evidence. Nowhere is it stated in this or any other Ordinance that a wife is not bound to give evidence in criminal proceedings against her husband. A wife is not compelled to disclose communications during marriage - s 122; surely if the legislature intended that she should not be bound to give evidence in criminal proceedings against her husband, this would be clearly stated in the law. It seems to this court that a wife is in no different position from any other competent witness. A court may summon her to give evidence, just as it may summon anyone else likely to be acquainted with the facts of the case - see s 176 of the Criminal Procedural Code (Cap 30) of the Laws. Unless the wife can point to any exception in the law relieving her from the obligation to give evidence, then she is bound to give evidence.

In our opinion, that is also the position in Singapore. All persons falling within the ambit of s 120 of the Act are competent and compellable to testify as a witness in any proceedings. Under s 122, a husband or wife is competent to testify as a witness in any proceedings against his or her spouse. The Act does not differentiate a spouse from any other witness; the spouse is in the same position as any other witness."

(emphasis added).

29. Before I decide on whether SD1's Testimony is barred by s 122 EA or otherwise, I need to ascertain the scope of s 122 EA. Section 122 EA

contains a semi-colon. The importance of a punctuation mark is explained in the following appellate decisions:

(a) in **Dato Mohamed Hashim Shamsuddin v Attorney-General, Hongkong** [1986] 2 MLJ 112, at 122, Abdoolcader SCJ in the majority judgment of the Supreme Court, held as follows -

> "***In answer to me as to the significance of the comma after the words 'letters of request' in paragraph (1) of section 16 [Courts of Judicature Act 1964] he [Mr. RR Sethu, learned counsel for the appellant] says it does not in any way affect the position. I wholly reject this contention. Its punctuation forms part of any statutory enactment and may be used as a guide to interpretation. The day is long past when the courts would pay no heed to punctuation in any written law*** *[**Hanlon v Law Society** [1981] AC 124 (at pages 197–198 per Lord Lowry)], and the presence or absence of a comma may be highly significant [**Re Steel (deceased), Public Trustee v Christian Aid Society** [1979] Ch 218; **Marshall v Cottingham** [1981] 3 All ER 8 (at page 12)].* ***Section 16(1) of the 1964 Act must in my view be read disjunctively in the light of the comma I have referred to which is significantly followed by the conjunction 'and'***."

(emphasis added); and

(b) the Supreme Court in a judgment given by Eusoff Chin SCJ (as his Lordship then was) in **Prithipal Singh v Datuk Bandar, Kuala**

Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener) [1993] 3 MLJ 336, at 340-341, explained as follows -

> ***"We note that a punctuation mark, namely a comma is inserted by Parliament after the words 'the Secretary General of the Ministry of the Federal Territory,' in s 4(7) of the Federal Capital Act 1960.***
>
> ***Normally, to determine the intent of the law the court would look at a sentence from a purely grammatical point of view so that in construing a statute, the court will disregard a punctuation or will re-punctuate it if that be necessary, in order to arrive at the true purpose and natural meaning of the words employed. We find that Parliament had deliberately inserted a comma after the words 'Federal Territory' and the significance cannot be ignored because without the comma, the words 'Secretary General' and 'public officer' must be read conjunctively, but with the comma, these words must be read disjunctively***."
>
> (emphasis added).

30. "*The Shorter Oxford English Dictionary*", 3rd Edition (1986), Volume 2, at p. 1936, explains a "*semicolon*" as follows:

> "*In its present use [semicolon] is the chief stop intermediate in value between comma and the full stop.*"

31. It is to be noted that EA, despite its name, is a code of law which is intended to be comprehensive - please see the Privy Council's opinion given by Lord Diplock on appeal from Malaysia in **Public Prosecutor**

v Yuvaraj [1969] 2 MLJ 89, at 90. To construe a codified provision of law, I refer to the following judgment of Gopal Sri Ram JCA (as his Lordship then was) in the Court of Appeal case of **Ibrahim Ismail** v **Hasnah Puteh Imat** [2004] 1 CLJ 797, at 805-806:

> *"**It is a cardinal guide of statutory interpretation that when a statute lays down a specific code or formula to meet a particular mischief of the common law, it is not open to the courts to treat themselves as at liberty to continue to apply the common law in disregard of statute. The point was made in as plain language as can be by Lord Herschell in Bank of England v. Vagliano Bros** [1891] AC 107 (at p. 144):*
>
> > ***I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.***
> >
> > ***If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was***

enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was*, ...*"

(emphasis added).

32. Considering the placement of a semi-colon in s 122 EA by the legislature and its significance as well as taking into account the literal meaning of the codified provision in s 122 EA, I am of the following view regarding s 122 EA:

(a) there are 2 limbs in s 122 EA as follows -

(i) no person who is or has been married shall be "*compelled*" to disclose any communication made to him or her during marriage by his or her spouse (**1st Limb**); and

(ii) a person is not "*permitted*" to disclose any communication made to him or her during marriage by his or her spouse (**2nd Limb**) except in any of these 3 sets of circumstances –

(1) the person who has made the communication (**Maker**) or the Maker's representative in interest consents to the disclosure of marital communication (**1st Exception**);

(2) the marital communication may be disclosed in suits between married persons (**2nd Exception**); **or**

(3) the marital communication may be disclosed in proceedings in which one married person is prosecuted for any crime committed against the other (**3rd Exception**); and

(b) the 1st Limb only applies to a situation when a spouse does not wish to divulge marital communication. This is clear from the use of the word "*compel*" in the 1st Limb. Such a meaning of the 1st Limb is fortified when the 1st Limb is contrasted with the 2nd Limb which employs the term "*permit*". The 2nd Limb envisages the situation when a witness is willing to testify on marital communication, the witness can only do so in any of the circumstances prescribed in the 1st to 3rd Exceptions.

33. My above view is based on the following cases:

(a) the High Court's decision in **Abdul Majid**, at p. 174-175, as follows –

"***Section 122 [EA] however, has reference to the issue of compellability by stating that****:*

> *No person who is or has been married shall be* ***compelled*** *to disclose any communication made to him during the marriage ...*
>
> *(Emphasis is mine)*

By inserting the word "compelled" into this section of the Evidence Act, legislature must have pre-accepted the general principle that, a competent witness is also a compellable witness otherwise, there is no necessity for the inclusion of this word*. If the legislators' intention was otherwise, s. 122 would read just as well and without any ambiguity if the word "compelled" is not inserted therein. The reading would be better and its meaning direct as can be seen as follows:*

> *No person who is or has been married shall disclose any communication, made to him during marriage ...*

Therefore, there must have been a special purpose for the inclusion of this word "compelled" into s. 122 and, what more could it be than a direct reference to the compellability of all spouse witnesses to give evidence with the exception of communications from one spouse to another except with consent. *This must be the intention of the legislature otherwise, the learned law makers would not have stated what is more than necessary. There are great reasonings for the adoption of this principle of compellability and, to my mind besides those stated by the learned Judges in* ***Ghouse's*** *and* ***Gimbu's****, they are best expressed by Lord Justice Lane (as he then was) in* ***R v. Lapworth*** *as follows:*

> *It must be borne in mind that the Court of trial in circumstances such as this where violence is concerned .. is not dealing merely with a domestic dispute between husband and wife, but it is investigating a crime. It is in the interests of the state and members of the public that where that is the case, evidence of that crime should be freely available to the Court which is trying the crime.*

> *It must be noted that though Lord Lane's reasoning above was commented upon and rejected by Lord Salmon in* ***Hoskyn's*** *case in the House of Lords (at page 498 of [1979] AC), I am unable to find much justification in the reasons for its rejection. I find Lord Lane's reasoning sound and most applicable to our Malaysian society and attitude which is very much different from that of the United Kingdom. Having that established, I shall now turn to the decision of the learned Magistrate on this issue. I find that the said Magistrate has erred in adopting the ruling in* ***Hoskyn's*** *case as law for this country. I therefore order the learned Magistrate to proceed with the enquiry and to record the evidence of Syarifah, and if she is unwilling to testify, to compell [sic] her to do so.* ***However, in the course of her testimony, if there had been any communication by the accused to her, such communication cannot be compelled to be disclosed by her unless the consent of the accused is obtained as provided for under s. 122 of the Evidence Act.***"

(emphasis added);

(b) in **Palldas a/l Arumugam v PP** [1988] 2 CLJ (Rep) 95, at 99-100, Mustapha Hussain J decided in the High Court as follows -

"***Section 122 [EA] prohibits a spouse from giving evidence against the other spouse and shall not be permitted to disclose any such communication unless the spouse who made the communication consents thereto or except in suits between them or in proceedings where a crime has been committed by one against the other.***"

(emphasis added); and

(c) the Singapore Court of Appeal's judgment in **Lim Lye Hock**, at p. 248, as follows –

"*We now come to s 124 [our s 122 EA] which provides as follows:…*

It is to be noted that this section has two limbs: under the first limb, a witness is not compellable to disclose any communication made to him (or her) by his (or her) spouse during the marriage, and the second limb contains a prohibition on the disclosure of any such communication unless the spouse, who made the communication, or his (or her) representative in interest, consents to the disclosure*. Subject to such consent, this prohibition is absolute except in two types of proceedings (which are not relevant here). For simplicity, we shall refer to the communication between husband and wife made during their marriage as 'marital communication'.*

Pausing at s 124, the position is this. ***Although the husband or wife of a person against whom proceedings are brought is a competent and also a compellable witness, he or she is not compellable to disclose any marital communication made to him or her by his or her spouse. Further, even if he***

> ***or she is prepared to disclose such communication, he or she is not permitted to do so without the consent of his or her spouse. It follows from this that the spouse of an accused can give evidence against him of any fact but is not compellable to disclose any marital communication made by the accused, and if she is prepared to disclose such communication, she is not permitted to do so without his consent.*** *For instance, if the wife has seen her husband committing the offence or returning home with blood stains on his clothes, in proceedings brought against the husband she is both competent and compellable to testify on what she saw. On the other hand, if the husband has confessed to her that he committed the offence or has explained to her how the blood stains were splattered on his clothes or has written to her a note or letter to that effect, she is not compellable to disclose such communication or produce the note or letter and, if she is prepared to disclose such communication or produce the note or letter, she is not permitted to do so, unless he consents to such disclosure.*"
>
> (emphasis added).

34. I am mindful that the above interpretation of s 122 EA is inconsistent with **Ghouse**, at p. 37, wherein McElwaine CJ applied the 3rd Exception to the 1st Limb. The Singapore Court of Appeal has commented on this *dictum* in **Ghouse** and I associate myself with such comments.

35. Based on the above interpretation of s 122 EA, I adopt the following approach:

    (a) if the witness gives evidence which does not concern marital communication, neither the 1st Limb nor the 2nd Limb applies to

exclude such evidence. In such an instance, the consent of the witness' spouse to such evidence, is not relevant; or

(b) if the witness gives evidence regarding marital communication –

(i) if the 2nd or 3rd Exception applies, there is no marital privilege under s 122 EA and the witness in question must disclose marital communication as evidence, even if the witness' spouse does not consent to the disclosure of the marital communication as evidence; or

(ii) if the 2nd and 3rd Exceptions do not apply –

(1) if the witness' spouse consents to the disclosure of marital communication as evidence, the witness may give such evidence by reason of the 1st Exception; or

(2) if the witness' spouse does not consent to the disclosure of marital communication as evidence, the witness is barred by the 2nd Limb from giving evidence on marital communication, even if there is no objection by learned counsel for the witness' spouse. This is clear from the following cases -

(2A) the High Court's decision in **Palldas**, at 99-100, as follows -

"*From the record of appeal, the appellant's wife Gudi Kaur (PW3) had, in examination-in-chief, given quite a lengthy evidence of all communications between herself and her husband. Though some of the evidence relates purely to acts, as distinct from words spoken, i.e., what she saw appellant was doing, it is so inextricably interwoven with what appellant had said to her, that to separate each act from words spoken by the appellant to her would be extremely difficult, if not impossible. Even if extricable and rejecting the words spoken, one would have their prejudicial effect still lingering.*

Even though objection was not taken by the defence, this silence cannot convert what the law says is inadmissible evidence to be admissible. One would expect the wife's evidence to be led in such a way as to confine such evidence to what she saw the appellant doing. The wife should have been stopped the moment she started uttering what her husband said to her. From the record it would seem that nobody ever bothered about this s. 122."

(emphasis added); and

(2B) Abdul Malek Ahmad J (as his Lordship then was) decided as follows in the High Court case

of **Ibrahim Awang Mat v Ibrahim Dollah** [1988] 1 CLJ (Rep) 587, at 589 –

> ***"The next witness (PW3) was the ex-wife of the defendant who stated that defendant had told her that the land was mortgaged by the deceased to the defendant for RM200. In view of the defence counsel's objections as regards its admissibility and after hearing arguments from both sides, I ruled that she was not permitted to disclose the communication made by the defendant in view of the second limb (the emphasis is mine) of s. 122 [EA]*** *which reads:*
>
> *…*
>
> ***although under s. 120 of that Act, the husband or wife of any party to a suit shall be competent witnesses. Her evidence on this matter was therefore disregarded***."

(emphasis added).

36. Based on the above interpretation of s 122 EA, SD1's Testimony does not constitute marital communication between the 2nd Defendant and SD1. Accordingly, SD1's Testimony is not barred by s 122 EA and is admissible as evidence. The 2nd Defendant's consent to SD1's Testimony is not relevant. Despite admitting SD1's Testimony as

evidence, I find that such evidence does not assist any party in This Suit.

J. Whether Plaintiff had invested or lent money to 1st Defendant?

37. As the Plaintiff and the 1st Defendant have signed the Loan Agreement, I am guided by the following consideration:

    (a) according to ss 91 and 92 EA, no evidence can be adduced by the Plaintiff, 1st and 3rd Defendants to contradict, vary, add to or subtract from the terms and conditions of the Loan Agreement – please see Chang Min Tat FJ's judgment in the Federal Court case of **Tindok Besar Estate Sdn Bhd v Tinjar Co** [1979] 2 MLJ 229, at 227-228. Furthermore, the Loan Agreement contains Clause 5.1, an "*entire agreement clause*". I will discuss the effect of Clause 5.1 later in this judgment; and

    (b) the interpretation of the Loan Agreement is a question of law to be decided by the court and not by witnesses through their oral evidence – please see the Court of Appeal's judgment in **NVJ Menon v The Great Eastern Life Assurance Company Ltd** [2004] 3 CLJ 96, at 103-104.

38. Clauses 1.1 and 1.2 in their ordinary and natural meaning showed that both the Plaintiff and 1st Defendant had manifestly intended for the Plaintiff to lend RM1.3 million to the 1st Defendant. Accordingly, based

on Clauses 1.1 and 1.2, I hereby reject the contention by the 1st and 3rd Defendants that Plaintiff merely invested and did not lend money to the 1st Defendant.

K. Did Loan Agreement provide for 36 months "*maturity period*"?

39. With respect, I am unable to accept Ms. V. Bhavani's submission that there was a 36 months "*maturity period*" before the Plaintiff is entitled to any return in this case. This is because, firstly, the Loan Agreement does not provide for 36 months "*maturity period*" of the Plaintiff's "*investment*", either expressly or by necessary implication. Secondly, ss 91 and 92 EA bar the addition of any term or condition of 36 months "*maturity period*" in the Loan Agreement. Lastly, by reason of Clause 5.1, there cannot be any representation, covenant, undertaking, warranty and agreement, whether written or oral, outside the Loan Agreement. I cite the following cases regarding the effect of an "*entire agreement clause*" such as Clause 5.1:

(a) Nik Hashim JCA (as his Lordship then was) in the Court of Appeal case of **Master Strike Sdn Bhd v Sterling Heights Sdn Bhd** [2005] 2 CLJ 596, at 607-608, held that an entire agreement clause "*constitutes a binding agreement between [the parties] with regard to all matters mentioned in the contract and … the contract does not permit any term to be implied or import any other consideration not in the contract*". The Court of Appeal in **Master Strike Sdn Bhd** followed the High Court's decision in **Macronet Sdn Bhd v RHB Bank Bhd** [2002] 4 CLJ 729; and

(b) in **Macronet Sdn Bhd**, at p. 735-736, the plaintiff alleged certain pre-contractual representations. Abdul Aziz J (as his Lordship then was) held at p. 742-743, that the existence of an entire agreement clause precluded the plaintiff's reliance on pre-contractual representations.

In view of the "*entire agreement clause*" in Clause 5.1, the 1st Defendant cannot contend that there is a 36 month "*maturity period*" which bars the Plaintiff from enforcing the Loan Agreement against the 1st Defendant. It is to be emphasized that the 1st and 3rd Defendants have not sent any email, letter or document alleging that the Plaintiff is bound by a 36 month "*maturity period*". Nor is there any demand or counterclaim by the 1st and 3rd Defendants that the Plaintiff has breached the Loan Agreement by "*backing out*" from the Plaintiff's investment in the 1st Defendant before the expiry of the 36 month "*maturity period*".

L. Effect of Clause 1.6

40. Clause 1.6 provides that the RM1.3 million shall be "*converted*" to be investment upon the "*establishment*" of Newco by the Plaintiff for the "*establishment*" of SOVO at the Premises. Clause 1.6 clearly intended Newco, namely GSSB, to take over the SOVO Business at the Premises. The 2nd and 3rd Defendant who have signed the Loan Agreement on behalf of the 1st Defendant, cannot deny actual

knowledge of Clause 1.6. I will discuss later in this judgment the effect of Clause 1.6 on the 3rd Defendant's personal liability in This Suit.

M. Burden and standard of proof

41. It is clear that the Plaintiff has the legal burden to prove the 3 Causes of Action under s 101(1), (2) and 102 EA. To discharge this legal onus, the Plaintiff needs only to prove the 3 Causes of Action on a balance of probabilities.

N. Weight of emails and "*WhatsApp*" messages

42. As all the parties in this case have not disputed the admissibility of the emails and "*WhatsApp*" messages, the issue is what weight should be accorded to such evidence?

43. Section 90B EA provides as follows:

> "***In estimating the weight, if any, to be attached to a document, or a statement contained in a document, admitted by virtue of section 90A, the court*** –
>
> *(a) may draw any reasonable inference from circumstances relating to the document or the statement, including the manner and purpose of its creation, or its accuracy or otherwise;*

(b) ***shall have regard to*** **–**

(i) ***the interval of time between the occurrence or existence of the facts stated in the document or statement, and the supply of the relevant information or matter into the computer****; and*

(ii) *whether or not the person who supplies, or any person concerned with the supply of, such information or the custody of the document, or the document containing the statement, had any incentive to conceal or misrepresent all or any of the facts stated in the document.*"

(emphasis added).

Section 90C EA has provided that s 90B EA shall prevail over any inconsistent written law, rule of law or practice.

44. Considering s 90B(b)(i) EA, the time and date of emails and "*WhatsApp*" messages are contemporaneous with the events stated in those messages. In **Flinders Diamonds Ltd. v Tiger International Resources Inc and Others** [2003] 45 ACSR 575, at 585–587, the Supreme Court of South Australia considered the contents of email adduced in that case and gave due weight to it. It is to be noted that the Supreme Court of South Australia is the court of first instance in that state.

45. It is my finding that the emails and "*WhatsApp*" messages adduced by the Plaintiff, should be given great weight in this case for the following reasons:

(a) the contemporaneous nature of the emails and "*WhatsApp*" messages with the key events in this case. I rely on Siti Norma Yaakob JCA's (as her Ladyship then was) judgment in the Court of Appeal case of **Guan Teik Sdn Bhd v Hj Mohd Noor Hj Yakob & Ors** [2000] 4 CLJ 324, at 330, as follows -

> "***In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also encumbent [sic] upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. In this instance the learned trial judge discredited the evidence of the appellant, accepted the evidence of the respondents wholeheartedly and disregarded the contemporaneous documents totally. We say that he had erred as he had failed to direct his mind as to the probative effect of the contemporaneous documents. He should, after accepting the respondents' evidence, weighed it against the contemporaneous documents and evaluate whether such documents support the respondents' oral testimony. We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the contemporaneous documents speak of matters then existing at the time such documents, were issued.***"

(emphasis added); and

(b) documentary evidence, especially contemporaneous ones, is generally more reliable than oral evidence. In **Saminathan v Pappa** [1981] 1 MLJ 121, at 126-127, an appeal from Malaysia, the Privy Council affirmed the Federal Court's decision in an opinion given by Lord Diplock as follows -

> *"**The Federal Court rejected the learned judge's reasoning on this part of the case. They also considered that despite the conflict of oral evidence the documentary evidence was strong enough to justify them in making their own finding of fact that the purchase price had been paid in full before the transfer and had been paid punctually except as regards a sum of $1,700, part of the second instalment, which was paid three months late. Their Lordships, however, do not find it necessary to canvass the justification for that finding of fact by the Federal Court which the trial judge had refused to make**. Miss Pappa's failure to pay the purchase price in full and punctually, even if proved beyond reasonable doubt, could not in law amount to fraud or entitle the unpaid vendor to defeat the registered proprietor's title under section 340(2)(a)."*

(emphasis added).

O. Can emails and "*WhatsApp*" messages corroborate oral evidence?

46. Sections 73A(7) and 157 EA read as follows –

> *"73A(7)* ***For the purpose of any rule of law or practice requiring evidence to be corroborated, or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act***

shall not be treated as corroboration of evidence given by the maker of the statement*.*

Former statements of witness may be proved to corroborate later testimony as to same fact

157. ***In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved****.*"

(emphasis added).

47. Considering ss 73A(7) and 157 EA, the question that arises is whether the contemporaneous emails and "*WhatsApp*" messages in this case can corroborate the oral testimonies of the Plaintiff, SP2 and 2nd Defendant in support of This Suit.

48. I am aware that prior to the Federal Court's judgment in **Lim Guan Eng v Public Prosecutor** [2000] 2 MLJ 577, there are conflicting cases on whether a contemporaneous prior statement by a witness may corroborate the witness' oral evidence under s 157 EA. In **Lim Guan Eng**, at p. 593-597, Zakaria Yatim FCJ delivered the following judgment of the Federal Court:

"Mr Karpal Singh drew the attention of this court to s 6(1) of the Seditious Act. The section states that notwithstanding anything to the contrary contained in the Evidence Act, no person shall be convicted of an offence under s 4 on the uncorroborated testimony of one

witness. He submitted that under the section there could not be any conviction on the uncorroborated evidence of one witness. He said in the present case the police did not tape record the speech of the appellant. According to him the trial judge was wrong in convicting the appellant on the second charge on the basis of the uncorroborated evidence of Kpl Stanley Liew.

The Deputy Public Prosecutor, En Azhar bin Mohamad agreed with Karpal Singh that s 6(1) of the Act requires corroboration of the testimony of one witness. He submitted however that the evidence of Zakaria bin Budin and Inspector Kok Yok Choy corroborated the evidence of Kpl Stanley Liew. He said that P6 was an important evidence. He then referred to s 157 [EA], and said that that section allows a person to corroborate himself by his former statement. He accordingly submitted that P6 corroborated the evidence of Kpl Stanley Liew. It is clear that under s 6(1), the court cannot convict a person on the uncorroborated evidence of one witness.

…

***In considering the question of corroboration under the Sedition Act 1948, we shall first examine s 157 [EA]** …*

Mr Karpal Singh submitted that the learned deputy was wrong in saying that s 157 could be invoked for the purpose of corroboration in the present case. He referred to an article, 'Corroboration by former Statements' by S Augustine Paul published in the Malayan Law Journal, [1990] 2 MLJ xci. That article discussed the position of s157 [EA] in the light of s 73A which was added to the Act by virtue of PU (A) 261 of 1971. At p xcv, the author states:

> *Once it has been established that the first limb of s 73A(7) applies to the evidence of a particular witness of a specified class then the second limb of the said section will be automatically activated. This would mean that such a statement, though rendered admissible by the Evidence Act 1950, shall not be treated as corroboration of evidence given by the maker of the statement. This mandatory direction would apply, in particular, to statements admitted under s 157. The inevitable result is that s 73A(7) will now operate to exclude out-of-court statements admitted under*

s 157 from being of any corroborative value to the testimony of the maker. Section 157, the plague of the courts for decades, has been rendered nugatory.

Section 157 must now operate subject to s 73A(7).

The author concludes his article by stating, 'It is … submitted that … s 73A(7) has the statutory power to wipe out and nullify the effect of s 157 thus rendering the said section otiose.'

…

It is to be noted that sub-s (1) [s 73A EA] expressly states the admissibility of a statement made by a person in any civil proceedings. Subsection (2) also expressly states the admissibility of a statement in any civil proceedings. Subsection (3) states what type of statement is inadmissible. Subsection (4) describes how a statement is deemed to have been made by a person for the purpose of s 73A. Subsection (5) states that in order to decide whether or not a statement is admissible as evidence by virtue of sub-ss (1) to (4) the court may draw a reasonable inference. Subsection (6) refers to the weight to be attached to a statement rendered admissible. Subsection (7) states that a statement rendered admissibly as evidence under the Act shall not be treated as corroboration of evidence given by the maker of the statement.

In our opinion, s 73A should be read as a whole. The subsections should not be read in isolation of one another. After reading the section, we are satisfied that the whole section refers to the question of admissibility of a statement made by a person in civil proceedings.

…

***It is our view that under s 157, a former statement made by a witness is admissible in order to corroborate his testimony. The weight of such a statement for the purpose of corroboration depends on the facts of a particular case. This view is supported by a long line of decided cases. In Liew Wah Ming v PP** [1963] 2 MLJ 82, Thomson CJ, said at p 84:*

Section 157 is clear and unambiguous and there can be no doubt that in the circumstances laid down in that section a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency. But the weight or value of such a statement as corroboration must always be a question of fact … While, therefore, the former statement of an accomplice or … of a child is admissible to corroborate his testimony and to indicate consistency the weight to be attached to it must vary with the facts of each case.

See also ***R v Velayuthan*** *[1935] MLJ 277;* ***R v Koh Soon Poh*** *[1935] MLJ 120;* ***Mohamed Ali v PP*** *[1962] 2 MLJ 230;* ***Karthiyayani & Anor v Lee Leong Sin & Anor*** *[1975] 1 MLJ 119;* ***PP v Samsul Kamar bin Mohd Zain*** *[1988] 2 MLJ 252.*

We wish to add here that despite s 73A(7), s 157 applies to civil cases as well. In Karthiyayani & Anor v Lee Leong Sin & Anor *[1975] 1 MLJ 119, Raja Azlan Shah FJ, (as he then was), said at p 120:*

It is settled law that a person cannot corroborate himself but it would appear that section 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness' truthfulness, just as inconsistency is a ground for disbelieving him. As for myself, although the previous statement made under s 157 is admissible as corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the nature and extent of corroboration necessary in such a case must depend on and vary according to the particular circumstances of each case. What is required is some additional evidence

rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. If a witness is independent, ie, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinize all the infirmities in that evidence before deciding to act upon it.

The question to be considered here is whether s 157 applies to the present case. In our opinion it does because the provision contained in s 157 is not contrary to s 6(1) of the Sedition Act 1948. We, therefore, agree with the submission of the learned deputy that the statement (exh P6) corroborates Kpl Stanley Liew's evidence. The weight of the statement for the purpose of corroborating Kpl Stanley Liew's evidence is a question of fact."

(emphasis added).

49. I am of the following respectful view regarding **Lim Guan Eng**:

(a) as decided in **Lim Guan Eng**, s 73A(7) EA applies only to civil proceedings. Having said that, unlike criminal cases requiring corroboration of evidence of accomplice, victim of sexual offence and child of tender years, there is no "*rule of law or practice requiring evidence to be corroborated*" in civil cases. As such, I am unable to see how s 73A(7) EA can be actually applied in civil cases; and

(b) until our Federal Court re-visits **Lim Guan Eng**, I am bound by our apex court's decision in **Lim Guan Eng** to give effect to s 157 EA. Accordingly, I hold that the oral testimonies of the Plaintiff, SP2 and 2nd Defendant can and are corroborated by the contemporaneous emails and "*WhatsApp*" messages in this case.

P. Evaluation of 2nd Defendant's testimony

50. It is clear that the 2nd Defendant is a party who has an interest in the outcome of This Suit. This is clear from the following:

(a) the Plaintiff has obtained the Default Judgment against 2nd Defendant; and

(b) the 2nd Defendant has agreed to give evidence for the Plaintiff against the 1st and 3rd Defendants because the Plaintiff has agreed not to make the 2nd Defendant a bankrupt despite the Default Judgment against 2nd Defendant.

51. In addition to the 2nd Defendant's above interest in This Suit, the 2nd Defendant may have an axe to grind with the 1st and 3rd Defendants because -

(a) the 1st Defendant owed money to the 2nd Defendant and the 2nd Defendant's company, WICSB; and

(b) the 2nd Defendant has not been paid for the transfer of his shares in the 1st Defendant to a third party.

52. In **Karthiyayani & Anor v Lee Leong Sin & Anor** [1975] 1 MLJ 119, at 120, Raja Azlan Shah FJ (as His Royal Highness then was) held in the Federal Court as follows:

> "***If a witness is independent, i.e., if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it.***"

(emphasis added).

53. Based on **Karthiyayani**, the 2nd Defendant's oral evidence should be scrutinized with care as the 2nd Defendant is an interested party who is "*disgruntled*" with the 1st and 3rd Defendants. I must also bear in mind the risk, if not the probability, that the 2nd Defendant may give false evidence against the 1st and 3rd Defendants so as to –

(a) avoid bankruptcy proceedings which may be instituted by the Plaintiff against the 2nd Defendant; and

(b) take "*revenge*" against or to "*get even*" with the 1st and 3rd Defendants.

54. With the above consideration in mind, I have considered very carefully the 2nd Defendant's testimony and I accept such evidence to be the truth for the following reasons:

(a) the 2nd Defendant's evidence is corroborated by the contemporaneous emails and "*WhatsApp*" messages under s 157 EA (please see the above Part O);

(b) the Plaintiff and SP2 have given testimonies which corroborate the 2nd Defendant's evidence;

(c) the cross-examination of the 2nd Defendant does not show the 2nd Defendant to be untruthful; and

(d) before the 2nd Defendant was cross-examined by learned counsel for the 1st and 3rd Defendants, I have drawn the attention of the 2nd Defendant to the provision of s 132(1) EA. Section 132(1) EA reads as follows –

"*132(1)* ***A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to that question*** *will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it* ***will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance*** *of the Government of Malaysia or of any State or* ***of any other person****.*"

(emphasis added).

Before the commencement of the 2nd Defendant's cross-examination by Ms. V. Bhavani, this court had –

(i) explained to the 2nd Defendant that he was required by s 132(1) EA to tell the truth even if such evidence would establish his civil liability to "*any other person*", including the 1st and 3rd Defendants; and

(ii) warned the 2nd Defendant that if he had given false evidence, he might be charged by the Public Prosecutor for the offence of giving false evidence under s 193 of the Penal Code.

Q. <u>Credibility of Plaintiff and SP2</u>

55. I find that the Plaintiff and SP2 are credible witnesses. My finding is premised on the following reasons:

(a) the Plaintiff's evidence is corroborated by his contemporaneous conduct which is relevant under s 8(2) EA. Section 8(2) EA provides as follows -

> "*8(2)* ***The conduct of any party****, or of any agent to any party,* ***to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto****, and the conduct of any person an offence against whom is the subject of any proceeding,* ***is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto****.*"
>
> (emphasis added).

In **Tindok Besar Estate Sdn Bhd**, at p. 234, Chang Min Tat FJ held as follows in the Federal Court –

> "***For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did***

not account for the statements in his documents and writings."

(emphasis added).

The following contemporaneous conduct of the Plaintiff clearly supports his credibility in This Suit -

(i) the Plaintiff's Total Payment had been made by the Plaintiff;

(ii) the Plaintiff had not only caused the incorporation of GSSB but the Plaintiff had also given 2 shares in GSSB to the 1st Defendant without any payment by the 1st Defendant for those 2 shares; and

(iii) the Plaintiff attended the Meetings on 22.8.2013, 30.5.2013, 8.7.2013, 26.3.2014, 21.4.2014 and 6.5.2014;

(b) the oral evidence of the Plaintiff and SP2 is corroborated by the contemporaneous emails and "*WhatsApp*" messages under s 157 EA (please see the above Part O);

(c) the testimonies of the Plaintiff and SP2 are probable, considering that no reasonable investor or lender will invest or lend money for 36 months without any return. The following cases explain the

importance of the inherent probabilities or improbabilities of the evidence of a particular witness -

(i) in **Muniandy & Ors v Public Prosecutor** [1966] 1 MLJ 257, at 258, Ong Hock Thye FJ (as his Lordship then was) stated in the Federal Court as follows -

> "*In our view, being unshaken in cross-examination is not per se an all-sufficient acid test of credibility.* ***The inherent probability or improbability of a fact in issue must be the prime consideration.***"
>
> (emphasis added).

It is to be noted that when the Federal Court decided **Muniandy**, our highest court then was the Privy Council; and

(ii) the above *dictum* in **Muniandy** has been followed by the Federal Court (as our apex court) in **Dr. Shanmuganathan v Periasamy s/o Sithambaram Pillai** [1997] 3 MLJ 61, at 82;

(d) the evidence of the Plaintiff and SP2 mutually corroborates each other; and

(e) the 2nd Defendant's testimony lends assurance to the Plaintiff's case against the 1st and 3rd Defendants.

R. Has 1st Defendant breached Loan Agreement?

56. Clause 1.1 has expressly provided that the Plaintiff has agreed to lend RM1.3 million to the 1st Defendant free of interest until the occurrence of the following 2 events:

    (a) "*establishment*" of GSSB; and

    (b) "*establishment*" of SHA

    (**2 Events**).

57. There is no dispute that GSSB has been incorporated with the 1st Defendant owning 2 out of 10 shares in GSSB. As such, the first of the 2 Events has occurred in this case.

58. The following evidence clearly proved the happening of the second of the 2 Events (the terms of the SHA had been finalized) but the 1st Defendant, through the 3rd Defendant, had dishonestly delayed and prevaricated in signing the SHA:

    (a) Meetings on 30.5.2013 and 8.7.2013 had been held to discuss the terms and conditions of the SHA;

(b) Ms. Sa's Email dated 8.7.2013 [to which was attached the agreed 5th Draft (SHA)] clearly stated that all parties had agreed to the terms and conditions of the SHA;

(c) numerous reminders had been sent for the 1st Defendant to sign the SHA, such as Ms. Sa's Emails dated 10.9.2013, 10.1.2014 and 23.1.2014;

(d) there was no reason why the 1st Defendant should delay in signing the SHA, especially when the Plaintiff's Total Payment had been made and when the terms and conditions of the SHA have been agreed as early as stated in Ms. Sa's Email dated 8.7.2013; and

(e) both the 3rd Defendant and SD3 admitted that they did not send any email or written document to inform the Plaintiff, SP2 and/or Ms. Sa that the 1st Defendant had not finalized the terms and conditions of the SHA. If it were indeed true that the terms and condition of the SHA had not been finalized, the 1st Defendant would have sent an email or written document through the 2nd Defendant, 3rd Defendant and/or SD3 regarding such a fact.

59. In view of the above reasons, the 2 Events have occurred within the meaning of Clauses 1.1, 1.2 and 1.6. Consequently, the 1st Defendant is contractually bound by virtue of Clause 1.6 to hand over the SOVO Business at the Premises to GSSB.

60. Despite the occurrence of the 2 Events, the 1st Defendant has breached Clause 1.6 by failing to hand over the SOVO Business at the Premises to GSSB (**1st Defendant's Breach**). The 1st Defendant's Breach is evidenced by the following:

(a) 2 "*WhatsApp*" Messages dated 12.5.2014;

(b) Ms. Sa's Emails dated 8.7.2013 and 22.8.2013;

(c) 3rd Defendant's Email dated 19.3.2014 which "*threatened*" the Plaintiff that the 1st Defendant would stop the SOVO Business at the Premises "*with immediate effect*";

(d) at the Meeting on 21.4.2014, the 3rd Defendant requested for more time for the 1st Defendant to hand over the SOVO Business at the Premises to GSSB;

(e) the 3rd Defendant agreed in the Meeting on 6.5.2014 for the 1st Defendant to hand over the SOVO Business at the Premises to GSSB!; and

(f) Plaintiff's Email dated 21.5.2014.

61. In response to the cases cited by Ms. V. Bhavani, namely **Ho Kam Phaw**, **Ayer Hitam Tin Dredging Malaysia Bhd** and **Kam Mah Theatre Sdn Bhd** (**Defendant's Cases**) -

(a) there was no signed agreement in **Ayer Hitam Tin Dredging Malaysia Bhd** and **Kam Mah Theatre Sdn Bhd** which had provisions similar to Clauses 1.1, 1.2, 1.5, 1.6 and 5.1; and

(b) there were no contemporaneous emails and "*WhatsApp*" messages in the Defendant's Cases which could clearly prove the breach of contract.

62. In view of the above reasons, I hold that the Plaintiff has proved on a balance of probabilities the 1st Defendant's Breach when the 1st Defendant did not hand over the SOVO Business at the Premises to GSSB despite the occurrence of the 2 Events.

S. <u>Is there total failure of consideration in respect of Loan Agreement?</u>

63. Sections 40 and 56 of the Contracts Act 1950 (**CA**) are relevant to This Suit and are now reproduced:

> "***Effect of refusal of party to perform promise wholly***
>
> *40.* ***When a party to a contract has refused to perform, or disabled himself from performing, his promise in its***

entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Effect of failure to perform at fixed time, in contract in which time is essential

56(1) *When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*

Effect of failure when time is not essential

56(2) *If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.*

Effect of acceptance of performance at time other than that agreed upon

56(3) *If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at*

the time of the acceptance, he gives notice to the promisor of his intention to do so."

(emphasis added).

64. In **Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd** [2010] 1 MLJ 597, the following judgments had been given in the Federal Court:

(a) Zulkifli Makinudin FCJ (as his Lordship then was) held as follows at p. 604 -

"***As regards the law on rescission of contract which is the main issue to be decided in the present case, I am of the view on the factual matrix of the case that s 56(1) should be read together with s 40 [CA] in determining the question as to whether the appellant as the party that was obliged to perform its promise had refused to perform its promise in its entirety by not doing any of the things it promised to do within the time specified by the contract. A reference to ss 40 and 56(1) [CA] clearly showed that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration***."

(emphasis added); and

(b) Gopal Sri Ram FCJ decided as follows at p. 609, 610, 611 and 612 -

*"**In essence it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration**. In **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd** [1943] AC 32 at p 48, Viscount Simon LC said:*

> *… in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.*
>
> *If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled …*

[18] What has to be added to the learned Lord Chancellor view is the qualification:

> *… **that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract … but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due** (**Stocznia Gdanska SA v Latvian Shipping Co & Ors** [1998] 1 All ER 883 per Lord Goff of Chieveley).*

In other words, when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety*.*

…

In other words, where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party. But he can under no circumstances have his money returned and claim damages. And if the consideration has only partially failed, he may only claim damages*. What is important is that this limited common law right to rescind should never be equated with the equitable remedy of rescission earlier discussed. I may add for completeness that in this country the equitable remedy of rescission has received statutory force. See ss 34-37 of the Specific Relief Act 1950.*

…

Section 40 [CA] is a restatement of the English common law position.

…

In my judgment, s 56(1) should be read together with s 40 of the Act when determining whether a promisor has committed a breach of such a nature that goes to the root of the contract. This is sometimes described as a fundamental breach*.*"

(emphasis added).

65. Based on **Berjaya Times Square Sdn Bhd**, I need to ascertain the following questions:

(a) what was the 1st Defendant's promise under the Loan Agreement; and

(b) whether the 1st Defendant has breached its promise under the Loan Agreement in its entirey within the meaning of s 40 CA.

66. In this case, I arrive at the following findings:

(a) an objective construction of the Loan Agreement, in particular Clauses 1.1, 1.2, 1.5 and 1.6, shows that the 1st Defendant has agreed to hand over the SOVO Business at the Premises to GSSB upon the occurrence of the 2 Events (**1st Defendant's Promise**);

(b) despite the happening of the 2 Events, the 1st Defendant has failed to perform the 1st Defendant's Promise in its entirety. In other words, the 1st Defendant has committed a fundamental breach of the Loan Agreement under s 40 CA as the 1st Defendant's Breach has gone to the root of the Loan Agreement. Hence, there has been a total failure of consideration in respect of the Loan Agreement when the 1st Defendant failed to hand over the SOVO Business at the Premises to GSSB; and

(c) upon such a total failure of consideration –

(i) the Loan Agreement is voidable at the option of the Plaintiff. This means the Plaintiff is entitled to rescind the Loan Agreement; and

(ii) the Plaintiff has rescinded the Loan Agreement and may claim for the return of the Plaintiff's Total Payment from the 1st Defendant.

67. As a matter of *stare decisis*, I am bound to follow **Berjaya Times Square Sdn Bhd**. Having said that, Tan Sri Visu Sinnadurai expressed the following view in his treatise, "*Law of Contract*", 4th Edition (2011), at p. 1039 and 1042:

> "*The doctrine of total failure of consideration rightly belongs to the realm of the law of restitution (See Goff & Jones, The Law of Restitution (7th Edn). See also Chitty and Treitel above). …*
>
> *It is quite clear from the discussion above that the Federal Court in Berjaya Times Square went off tangent when it based its decision on the concept of total failure of consideration in a case dealing with the general principles of the laws of contract and not one on the law of restitution. …*
>
> *In conclusion it is submitted that the doctrine of total failure of consideration generally has no place in the area of breach of contract. It has limited application only in cases where the action is based on restitutionary relief, ie where an innocent party seeks recovery of monies paid and not in for a claim in damages for breach. In all other cases of breach, the traditional test as employed by Malaysian and English cases, ie 'fundamental breach', has no place*

in cases dealing with time such as Berjaya Times Square. It is hoped that the opportunity will soon arise for the Federal Court to revisit its decision in Berjaya Times Square and restate the correct position of the law. Uncertainties in the law cause discomfort to businessmen and lawyers alike."

T. Has 1st Defendant been unjustly enriched in this case?

68. As an alternative or in addition to the 1st Defendant's liability to the Plaintiff for –

(a) breach of the Loan Agreement; and/or

(b) the total failure of consideration of the Loan Agreement

- this court will now consider whether the 1st Defendant should return the Plaintiff's Total Payment by virtue of the doctrine of unjust enrichment embodied in s 71 CA. Section 71 CA is resorted to when there is no concluded contract. The heading of Part VI of CA (which contains s 71 CA) states "*Of Certain Relations Resembling Those Created By Contract*".

69. Section 71 CA reads as follows:

"*Obligation of person enjoying benefit of non-gratuitous act*

71. ***Where a person lawfully does anything for another person, or delivers anything to him, not intending to***

> ***do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.***"

(emphasis added).

70. I refer to the Privy Council's judgment on an appeal from Malaysia, **Siow Wong Fatt v Susur Rotan Mining Ltd & Anor** [1967] 2 MLJ 118. In **Siow Wong Fatt**, at p. 120, Lord Upjohn interpreted s 71 CA as follows:

> "***It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under section 71 [CA].***
>
> ***The doing of the act or the delivery of the thing referred to in the section:***
>
> ***(1) must be lawful***
>
> ***(2) must be done for another person***
>
> ***(3) must not be intended to be done gratuitously***
>
> ***(4) must be such that the other person enjoys the benefit of the act or the delivery.***"

(emphasis added).

71. I have no hesitation to decide that the 4 cumulative conditions for the application of s 71 CA in this case have been fulfilled –

(a) the Plaintiff's Total Payment was a lawful act performed by the Plaintiff;

(b) the Plaintiff's Total Payment was done for the 1st Defendant by way of payments to the 1st Defendant's Creditors;

(c) the Plaintiff's Total Payment was clearly not intended by both the Plaintiff and the 1st Defendant to be gratuitous; and

(d) the Plaintiff's Total Payment was made for the benefit of the 1st Defendant so as to enable the 1st Defendant to start and operate the SOVO Business at the Premises.

72. As the 4 conditions for the application of s 71 CA have been fulfilled in This Suit, the 1st Defendant has been unjustly enriched by the Plaintiff's Total Payment and the 1st Defendant is therefore liable to return the Plaintiff's Total Payment to the Plaintiff.

U. Should 1st Defendant's corporate veil be pierced so as to impose liability on 2nd and 3rd Defendants?

73. It is trite law that under s 16(5) of the Companies Act 1965 (**1965 Act**), a company is a legal entity with limited liability which is separate in law

from its shareholders, directors, employees, agents, holding company, subsidiaries and related companies. Exceptionally, Malaysian case law confers discretionary power on the court in certain limited circumstances to pierce a company's corporate veil so as to render the company's individual *alter ego* or controller to be personally liable for the company's liability, debts, acts and/or omission.

74. Before discussing the court's power to pierce a company's corporate personality in this case, I should clarify whether there is a difference in meaning and effect between the piercing of a corporate veil and a mere lifting of its corporate personality. Many cases and academicians have used both phrases inter-changeably. With respect, I am of the view that there should be a difference in meaning and effect between the piercing of a corporate veil and its lifting. I rely on the English Court of Appeal's judgment in **Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose) (No. 1)** [1991] 4 All ER 769. In **The Coral Rose (No. 1)**, at p. 779, Staughton LJ explained as follows:

> *"**(2) The corporate veil***
>
> *Like all metaphors, this phrase can sometimes obscure reasoning rather than elucidate it.* ***There are, I think, two senses in which it is used, which need to be distinguished. To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose****. The distinction can be seen in the illuminating judgment of Slade LJ*

*in **Adams v Cape Industries plc** [1991] 1 All ER 929 at 1024-1025, [1990] Ch 433 at 542-543."*

(emphasis added).

75. In **KTL Sdn Bhd & Anor v Leong Oow Lai and 2 other cases**, Kuala Lumpur High Court Civil Suit No. 22NCC-317-03/2013, [2014] AMEJ 1458, [2014] 1 LNS 427, at paragraph 67, I have opined that there is merit in distinguishing the court's power to pierce a company's legal personality and to lift its corporate veil.

76. The following Federal Court cases have explained when the court may exceptionally pierce or lift a company's corporate veil:

(a) in **Solid Investment Ltd v Alcatel Lucent (M) Sdn Bhd** [2014] 3 CLJ 73, at 92, Hasan Lah FCJ held as follows -

"***We agree with the Court of Appeal that the learned trial judge erred in lifting the corporate veil of the defendant to make the defendant liable to account to the plaintiff. The reason given by the learned trial judge was that it was in the interest of justice to prevent associated companies of Alcatel Group including the defendant from "darting in and out with the corporate labyrinth" before the court. We also agree with the Court of Appeal that there must be evidence either of actual fraud or some conduct amounting to fraud in equity to justify the lifting of corporate veil. The position of the law on this subject had been clearly stated by Gopal Sri Ram JCA (as he then was) in Law Kam Loy v. Boltex Sdn Bhd** [2005] 3 CLJ 355 at p. 362 as follows:*

In my judgment, in the light of the more recent authorities such as Adams v. Cape Industries Plc, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity."

(emphasis added); and

(b) Richard Malanjum CJ (Sabah & Sarawak) decided in **Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors** [2015] 1 MLJ 773, at , as follows -

"*96. …, we are of the view* ***that it is now a settled law in Malaysia that the Court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality*** *(See:* ***Prest v Prest & Ors*** *[2013] UKSC 34).*

97. ***As to what constitutes fraudulent purposes it has been described as to include actual fraud or fraud in equity*** *(See:* ***Law Kam Loy & Anor v Boltex Sdn Bhd & Ors****, supra).* ***And fraud in equity occurred in '…cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies…****' (See:* ***Sunrise Sdn Bhd v First Profile (M) Sdn Bhd*** *[1996] 3 MLJ 533)*"

(emphasis added).

77. Based on **Solid Investment Ltd**, the court may pierce a company's corporate veil if there is proof that –

(a) the company's individual *alter ego* or controller has committed actual or Common Law fraud by using the company in question. It is clear that there should be proof beyond all reasonable doubt of actual or Common Law fraud – please see, eg. the Federal Court's judgment in **Yong Tim v Hoo Kok Chong & Anor** [2005] 3 CLJ 229, at 235; or

(b) there is equitable fraud, constructive fraud or unconscionable conduct on the part of the company's individual *alter ego* or controller in respect of the company in question. In **KTL Sdn Bhd**, at paragraph 94, I have expressed the view that equitable fraud, constructive fraud or unconscionable conduct on the part of the company's individual *alter ego* or controller need only be proved on a balance of probabilities.

78. **Gurbachan Singh** empowers the court to pierce a company's corporate veil to ensure that the company's individual *alter ego* or controller does not evade his or her legal or contractual duty and/or liability by exploiting the company's legal personality.

79. This court is of the considered view that the 1st Defendant's corporate veil should be pierced so as to render the 2nd and 3rd Defendants personally liable to the Plaintiff for the 1st Defendant's liability for the 3 Causes of Action.

80. Firstly, there is proof on a balance of probabilities that at the material period of time (**Material Time**) when –

(a) the Oral Contract was made between the Plaintiff and the 1st to 3rd Defendants;

(b) the Plaintiff agreed to the Plaintiff's Temporary Loan to 1st Defendant based on the Assurance by 2nd and 3rd Defendants;

(c) the Plaintiff's Total Payment was made;

(d) the 1st Defendant commenced and operated the SOVO Business at the Premises; and

(e) the Loan Agreement was executed;

- the 2nd and 3rd Defendants were the *alter ego* and controllers of the 1st Defendant. The reasons to support such a finding are as follows:

(i) the 2nd and 3rd Defendants are the subscribers of the shares in the 1st Defendant;

(ii) the 2nd and 3rd Defendants were the only directors of the 1st Defendant at the Material Time;

(iii) the emails sent by the 3rd Defendant in this case at the Material Time, eg the 3rd Defendant's Email dated 26.3.2013, stated that he was the 1st Defendant's CEO; and

(iv) the 2nd Defendant had given evidence that the 3rd Defendant "*had a role in every aspect of the business*" of the 1st Defendant. Such evidence has not been challenged during the 2nd Defendant's cross-examination by learned counsel for the 1st and 3rd Defendants and is deemed to have been accepted by both the 1st and 3rd Defendants. In **Kedah Cement Sdn Bhd v Masjaya Trading Sdn Bhd** [2007] 3 MLJ 597, at 605 and 606, PS Gill FCJ gave the following judgment in the Federal Court –

> "*[30] To digress a little,* ***it is an elementary rule of evidence that a party eliciting from a witness under cross-examination evidence unfavourable to his case, may seek to adduce evidence in rebuttal. It has also been emphasized repeatedly, through case laws of the need to cross-examine a witness on matters disputed that form the bedrock of the defence or plaintiff's case, respectively. Flowing from this proposition, a witness should be challenged in the witness box, or at any rate it should be made plain while the witness is in the box that his evidence is not accepted on material assertions. This we believe***

is not merely a technical rule of evidence but is a rule of essential justice*.*

…

[36] ***Pausing for a moment, we wish to state for the record that the doctrine requiring a testing of testimonial statement by cross-examination has always been understood as requiring not necessarily an actual cross-examination, but merely an opportunity to exercise the right to cross-examination if desired. The reason is that whenever an opponent has declined to avail himself of the offered opportunity to cross-examine, it must have supposed to have been because he believed that the testimony could not or need not be disputed at all or be shaken by cross-examination. This doctrine is perfectly settled. By the present doctrine, testimony never actually tested at all, in consequence of the carelessness, fraud, or incompetence of counsel, or of privity in interest is admitted, if merely the opportunity so to test it had existed*** *(see Sarkar of Evidence (13th Ed) at p 1333).*"

(emphasis added).

81. The first reason for piercing the 1st Defendant's corporate veil (so as to impose personal liability on the 2nd and 3rd Defendants for the 1st Defendant's liability for the 3 Causes of Action to the Plaintiff), is because there is proof on a balance of probabilities that the 2nd and 3rd Defendants have committed equitable fraud, constructive fraud and/or unconscionable acts against the Plaintiff. This finding is premised on the following evidence and reasons:

(a) at the Meeting on 22.3.2013, the 2nd and 3rd Defendants initially proposed to the Plaintiff to invest in the SOVO Business at the Premises. The 2nd and 3rd Defendants then convinced the Plaintiff to enter into the Oral Contract with the 1st to 3rd Defendants;

(b) contrary to the Oral Contract, the 2nd and 3rd Defendants subsequently changed their "*pitch*" and unconscionably induced the Plaintiff to provide the Plaintiff's Temporary Loan to 1st Defendant by giving the Assurance by 2nd and 3rd Defendants;

(c) as explained later in this judgment, the 2nd and 3rd Defendants have breached both the Oral Contract and the Assurance by 2nd and 3rd Defendants;

(d) the 2nd and 3rd Defendants signed the Loan Agreement on behalf of the 1st Defendant. As stated above, Clauses 1.1, 1.2, 1.5 and 1.6 have expressly provided that upon the occurrence of the 2 Events, the 1st Defendant shall hand over the SOVO Business at the Premises to GSSB. Despite the occurrence of the 2 Events, the 2nd and 3rd Defendants did not allow the 1st Defendant to hand over the SOVO Business at the Premises to GSSB;

(e) the Plaintiff's Total Payment had been made and 2 shares in GSSB had been allotted without any payment to the 1st Defendant. In such circumstances, it is not just, equitable or conscionable for the 2nd and 3rd Defendants to refuse to allow the

1st Defendant to sign the SHA and to hand over the SOVO Business at the Premises to GSSB;

(f) the 3rd Defendant's Emails Requesting For Plaintiff's Payments clearly showed that the 3rd Defendant was the main "*mover*" who requested for the Plaintiff's Total Payment;

(g) the 3rd Defendant had unconscionably delayed and prevaricated in refusing to allow the 1st Defendant to sign the SHA (**3rd Defendant's Prevarication**). Clear examples of the 3rd Defendant's Prevarication are as follows -

(i) Ms. Sa's Email dated 8.7.2013 had already confirmed that all parties had agreed to the terms and conditions of the SHA but yet, the 3rd Defendant dishonestly refused to allow the 1st Defendant to execute the SHA;

(ii) the 3rd Defendant did not reply to various emails from the Plaintiff, SP2 and Ms. Sa requesting the 1st Defendant to execute the SHA;

(iii) despite the 3rd Defendant's Email dated 19.3.2014 requesting for the Meeting on 26.3.2014, the 3rd Defendant did not turn up at the Meeting on 26.3.2014;

(iv) at the Meeting on 21.4.2014, the 3rd Defendant himself requested for more time for the 1st Defendant to hand over the SOVO Business at the Premises to GSSB; and

(v) the 3rd Defendant agreed at the Meeting dated 6.5.2014 for the 1st Defendant to hand over the SOVO Business at the Premises to GSSB; and

(h) the 3rd Defendant's Email dated 19.3.2014 threatened to stop the SOVO Business at the Premises with immediate effect. Such a conduct by the 3rd Defendant is not only unconscionable but is also extortionate in nature.

82. The evidence and reasons elaborated in the above paragraph 81, also support the piercing of the 1st Defendant's corporate veil so as to ensure that the 2nd and 3rd Defendants do not evade their legal liability to the Plaintiff by misusing the 1st Defendant's corporate personality (as explained in **Gurbachan Singh**).

V. 3rd Defendant is not credible

83. It is clear that the 3rd Defendant has a vested interest in This Suit. According to **Karthiyayani**, this court should examine carefully the self-serving evidence of the 3rd Defendant.

84. After scrutinizing the 3rd Defendant's evidence and comparing it with the Loan Agreement, contemporaneous emails and "*WhatsApp*" messages as well as considering all the surrounding circumstances of this case and the inherent probabilities and improbabilities of the subject matter of this case, I find that the 3rd Defendant is not a credible witness. This finding of fact is premised on the following evidence and reasons:

(a) as explained above, the 3rd Defendant's Prevarication in respect of the 1st Defendant's refusal to sign the SHA, proves the 3rd Defendant's lack of probity. The 3rd Defendant's testimony cannot rebut the 3rd Defendant's Prevarication which is relevant as the 3rd Defendant's own conduct under s 8(2) EA;

(b) the 3rd Defendant was adamant that he had no intention to give up the SOVO Business at the Premises to any party, including GSSB. Such a defence is not supported by any email, letter or document exchanged between the 1st and 3rd Defendants on the one part and the Plaintiff, SP2 and Ms. Sa on the other part. More importantly, such evidence from the 3rd Defendant is rebutted by the undisputed and contemporaneous emails and "*WhatsApp*" messages;

(c) the 3rd Defendant admitted during cross-examination that the following matters in his WS (**3rd Defendant's WS**) were not correct –

(i) only the 3rd Defendant introduced the SOVO business concept to the Plaintiff;

(ii) all the payments by the Plaintiff were made directly to the 1st Defendant's Creditors; and

(iii) the 3rd Defendant held only 1 share in the 1st Defendant.

The importance of the 3rd Defendant's WS cannot be under-estimated because –

(1) the 3rd Defendant's WS was prepared when the 3rd Defendant was legally represented and had access to legal advice; and

(2) the 3rd Defendant's WS was prepared pursuant to one of the pre-trial case management directions of this court under Order 34 rule 2(2)(m) RC. In other words, both the 3rd Defendant and his solicitors have sufficient time to prepare the 3rd Defendant's WS.

For the 3rd Defendant to admit during cross-examination that there was not one but three errors in the 3rd Defendant's WS, speaks volume of the 3rd Defendant's lack of credibility;

(d) the 3rd Defendant had the impudence to disagree with the suggestion put to him during cross-examination that the 1st

Defendant had benefitted from the Plaintiff's Total Payment. Such evidence clearly showed that the 3rd Defendant was economic with the truth;

(e) when the 3rd Defendant was cross-examined regarding the contemporaneous emails sent or copied to him, the 3rd Defendant "*conveniently*" could not remember;

(f) the 3rd Defendant alleged in the 3rd Defendant's WS that he did not know about the 1st Defendant's ownership of 2 shares in GSSB (**1st Defendant's 2 Shares in GSSB**). The 3rd Defendant's WS further averred that the 3rd Defendant did not sign any resolution of the 1st Defendant's board of directors to authorize the ownership of the 1st Defendant's 2 Shares in GSSB. Such evidence is clearly not true in the light of the following –

(i) attached to Ms. Sa's Email dated 2.4.2013 to the 3rd Defendant, were 2 sets of application forms for GSSB's shares to be signed by the 3rd Defendant himself. The 3rd Defendant did not deny receipt of Ms. Sa's Email dated 2.4.2013. Nor did the 3rd Defendant allege that the contents and attachments to Ms. Sa's Email dated 2.4.2013 were not true;

(ii) there was no email, letter or correspondence from the 1st and 3rd Defendant to deny the 1st Defendant's 2 Shares in GSSB;

(iii) neither the 1st Defendant nor the 3rd Defendant complain to SSM that the 1st Defendant's 2 Shares in GSSB were not correct and GSSB's record with SSM should be rectified; and

(iv) the 1st Defendant did not apply to the High Court under s 162(1)(a) of the 1965 Act to rectify GSSB's "*register of members*" (please see s 158(1) of the 1965 Act which require certain details of a company's shareholders to be kept by the company) so as to delete the 1st Defendant's 2 Shares in GSSB from GSSB's register of members;

(g) the 3rd Defendant's WS stated that the 3rd Defendant had only 1 share in the 1st Defendant but the 3rd Defendant admitted during cross-examination that presently, the 3rd Defendant owns 160,000 shares in the 1st Defendant! Such a big discrepancy in the 3rd Defendant's own testimony regarding the number of shares owned by the 3rd Defendant in the 1st Defendant, clearly shows that the 3rd Defendant attempted to conceal his true shareholding in the 1st Defendant;

(h) there were material contradictions between the 3rd Defendant's evidence and SD3's testimony as follows –

(i) the 3rd Defendant disagreed with Mr. Sarjeet Singh's suggestion that the 1st Defendant had benefitted from the Plaintiff's Total Payment but SD3 frankly admitted that the 1st Defendant had enjoyed benefits from the Plaintiff's Total Payment; and

(ii) the 3rd Defendant gave evidence that he was not involved in the negotiations regarding the terms and conditions of the SHA (**Negotiations**) as he was busy setting up the SOVO Business at the Premises. According to the 3rd Defendant's sworn testimony, it was the 2nd Defendant and SD3 who were involved in the Negotiations. Such evidence was materially contradicted by SD3 who stated during re-examination that there was a lot of "*verbal communication*" and "*numerous meetings*" between the 2nd and 3rd Defendants "*for and on behalf*" of the 1st Defendant with the Plaintiff regarding the Negotiations;

(i) the 3rd Defendant's WS alleged that the 2nd Defendant had resigned as the 1st Defendant's director due to health problems. Such evidence is untrue for these reasons -

(1) the 2nd Defendant has testified that he left the 1st Defendant because -

(1A) the 1st Defendant owed money to him and his company, WICSB, for work done for the 1st Defendant; and

(1B) the 2nd Defendant has transferred his shares in the 1st Defendant but has yet to be paid; and

(2) learned counsel for the 1st and 3rd Defendants did not put to the 2nd Defendant during the 2nd Defendant's cross-

examination that the 2nd Defendant had resigned as the 1st Defendant's director because of health problems; and

(j) the 3rd Defendant admitted during cross-examination that sub-paragraph 21(f) of the Defence wrongly stated that GSSB operated "*SOVO Express*". Such an averment in the Defence was drafted when the 3rd Defendant was legally represented and had the benefit of legal advice.

85. In **Dr. Shanmuganathan**, at p. 83, Anuar CJ (Malaya) held as follows in the Federal Court –

> "*With respect, we wish to recall the words of Spenser-Wilkinson J in* ***Goh Ah Yew v PP*** *[1949] MLJ 150 at 153 wherein he held:*
>
> > ***A witness cannot be regarded as a split personality who is worthy of credit at one moment and unworthy of credit at the next****.*
>
> *This observation was cited with approval by Edgar Joseph Jr J (as he then was) in* ***Khoo Cheng Huat v PP*** *[1991] 1 MLJ 42 at p. 45.*"

(emphasis added).

86. Based on **Dr. Shanmuganathan**, in view of the improbable and untrue testimony of the 3rd Defendant, I cannot but conclude that the 3rd Defendant has given self-serving evidence to stifle unlawfully This Suit.

W. SD3's credibility is doubtful

87. Firstly, I find that SD3 is not an independent witness in this case. This is because SD3 admitted that there was a lot of "*verbal communication*" and "*numerous meetings*" regarding the Negotiations. SD3's active involvement regarding the Negotiations was not disputed by SD3. Indeed, I find on a balance of probabilities that SD3 was part of the 3rd Defendant's Prevarication. The 3rd Defendant's Prevarication could not have been executed without SD3's complicity. This is clear from Ms. Sa's Email dated 21.5.2014 to SD3 to request the 1st Defendant to hand over the Main Tenancy of the Premises and the Tenancies. SD3 should have the honesty to inform the Plaintiff, SP2 and/or Ms. Sa that the 3rd Defendant would not allow the 1st Defendant to sign the SHA and to hand over the SOVO Business at the Premises to GSSB.

88. SD3 described himself as the CSO (*Chief Strategic Officer*) of the 1st Defendant in the contemporaneous emails sent by SD3 (eg. SD3's Email dated 29.3.2013). However, SD3's witness statement merely stated that SD3 is an "*advisor*" to the 1st Defendant. It is clear that SD3 is now attempting to cloak, if not down play, his active involvement in this case.

89. SD3 gave evidence that he did not know whether the Loan Agreement had been executed by the 1st Defendant or not. Such evidence is materially contradicted by SD3's Email dated 10.4.2013 which

requested from the Plaintiff and SP2 a copy of the signed Loan Agreement for the records of the 1st Defendant!

90. In addition to the above reasons, I find that SD3 is not a credible witness because he admitted that his own WS which stated that he had only met the Plaintiff once, was not correct because he had indeed met the Plaintiff "*several times*".

X. Was there breach of Oral Contract and/or Assurance by 2nd and 3rd Defendants?

91. Irrespective of the 3rd Defendant's personal liability for the 1st Defendant's debt due to the Plaintiff as a result of the piercing of the 1st Defendant's corporate veil (please see the above Part U), I now consider whether the 2nd and 3rd Defendants have breached the Oral Contract and/or Assurance by 2nd and 3rd Defendants.

92. On a balance of probabilities, I am satisfied that the 2nd and 3rd Defendants have breached the Oral Contract and/or Assurance by 2nd and 3rd Defendants when –

(a) the 1st Defendant did not sign the SHA; and

(b) the 1st Defendant did not hand over the SOVO Business at the Premises to GSSB

93. As submitted by Mr. Sarjeet Singh, the Plaintiff was not cross-examined at all in respect of the breaches of the Oral Contract and the Assurance by 2nd and 3rd Defendants. Accordingly, the Plaintiff's evidence on the breaches of the Oral Contract and the Assurance by 2nd and 3rd Defendants, is deemed to have been accepted by the 3rd Defendant - **Kedah Cement Sdn Bhd**.

94. Even if I have erred in piercing the 1st Defendant's corporate veil to impose liability on the 3rd Defendant (please see the above Part U), the 3rd Defendant is still personally liable to the Plaintiff for breach of the Oral Contract and the Assurance by 2nd and 3rd Defendants.

Y. Court's decision

95. Based on the above reasons, I have no hesitation to allow This Suit against the 1st and 3rd Defendants with costs.

WONG KIAN KHEONG
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

DATE: 22 APRIL 2015

Counsel for Plaintiff:	*Mr. Sarjeet Singh Sidhu & Mr. Kam Chin Khoon (Messrs Sidhu & Associates)*
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