IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

IN THE FEDERAL TERRITORY OF KUALA LUMPUR, MALAYSIA

CIVIL SUIT NO: WA-22IP-40-08/2016

BETWEEN

DR H K FONG BRAINBUILDER PTE LTD
(Registration No.: 201018514C) … **PLAINTIFF**

AND

1. **SG-MATHS SDN BHD**
   (Co. No.: 701063-K)

2. **LUM SAU LEONG**
   (NRIC No.: 490818-10-5445)

3. **LEONG CHUN PIEW**
   (NRIC No.: 471115-10-5699)

4. **LUM CHEE GHEET**
   (Trading in the name and style of
   PUSAT LATIHAN PERKEMBANGAN KAJI KREATIF)
   (Business Registration No.: 001891577-D)

5. **SMO ONLINE PLT**
   (Registration No.: LLP0002001-LGN)

6. **SMO TESTING PLT**
   (Registration No.: LLP0002980-LGN) … **DEFENDANTS**

JUDGMENT

(after trial)

A. Introduction

1. This case concerns "*Dr. Fong's Method*" of teaching mathematics to students in primary and secondary schools (**Dr. Fong's Method**) which

has been developed by Dr. Fong Ho Kheong (**Dr. Fong**), a Singaporean citizen.

2. Dr. Fong incorporated the plaintiff company (**Plaintiff**) in Singapore. The Plaintiff has entered into a Master License Agreement dated 18.12.2013 [**MLA (2013)**] with the first defendant company (**1st Defendant**). The MLA (2013) allows the 1st Defendant to, among others, operate and manage the "*BrainBuilder*" business (a business to teach mathematics to students) (**BrainBuilder Business**) in Malaysia.

3. The following issues arise in this case:

   (1) in view of clause 37 MLA (2013) (**Clause 37**) -

      (a) does Malaysian court have jurisdiction to hear this case? In this regard, have the Plaintiff and all the defendants (**Defendants**) in this matter submitted to the jurisdiction of Malaysian court?; and

      (b) if this court has jurisdiction to hear this case, whether the law of Malaysia or Singapore applies to MLA (2013);

   (2) if Malaysian law applies to MLA (2013) -

      (a) whether the Franchise Act 1998 (**FA**) applies to MLA (2013);

      (b) if FA applies to MLA (2013), have ss 6(1) and/or 6A(1) FA been breached in this case?; and

(c) if there is a breach of ss 6(1) and/or 6A(1) FA, whether the following documents are void under s 24(a) and/or (b) of the Contracts Act 1950 (**CA**) -

(i) is MLA (2013) void in its entirety or can the court sever the illegal part of MLA (2013) and enforce its remaining part?,

(ii) a guarantee dated 18.12.2013 executed by the second defendant (**2nd Defendant**) and third defendant (**3rd Defendant**) in favour of the Plaintiff (**Guarantee**) and

(iii) a power of attorney dated 18.12.2013 given by the 1st Defendant to the Plaintiff (**PA**);

(3) if MLA (2013), Guarantee and PA (**3 Documents**) are void, whether the court may grant remedy to any party under -

(a) s 66 CA;

(b) s 71 CA; or

(c) the doctrine of unjust enrichment;

(4) if the 3 Documents are valid -

(a) whether the 1st to 3rd Defendants have breached MLA (2013); and

(b) are the 2nd and 3rd Defendants liable to the Plaintiff under the Guarantee?;

(5) whether the 2nd to 6th Defendants have committed the following torts -

(a) the tort of conspiracy to defraud the Plaintiff; and

(b) the tort of breach of confidence;

(6) whether Dr. Fong had misrepresented to the 1st to 3rd Defendants in respect of the 3 Documents; and

(7) whether the Plaintiff's suit in this case (**Plaintiff's Suit**) constitutes an abuse of court process.

B. Plaintiff's case

4. Dr. Fong has a doctorate in Mathematics Education, a subject which focuses on mathematical theories, practice and development of curriculum materials. Dr. Fong was a former Associate Professor in the National Institute of Education, Nanyang Technological University, Singapore. Dr. Fong has given lectures to teachers of primary and secondary schools in Singapore, Malaysia, South Korea, Bahrain and United Arab Emirates.

5. Dr. Fong claims to have developed Dr. Fong's Method to help students to learn Mathematics. Dr. Fong then developed the BrainBuilder Business which uses Dr. Fong's Method to teach Mathematics to students.

6. The 2nd and 3rd Defendants have been Dr. Fong's "*best friends*" for approximately 55 years. The 2nd and 3rd Defendants were interested to

start the BrainBuilder Business in Malaysia. Consequently, the 1st Defendant was incorporated in Malaysia on 27.6.2005 with -

(1) the 2nd and 3rd Defendants owning a total of 85% of the paid up shares in the 1st Defendant;

(2) Dr. Fong holds 15% of the paid up shares in the 1st Defendant; and

(3) the 2nd and 3rd Defendants are the only directors of the 1st Defendant.

7. Dr. Fong Brainbuilder Pte. Ltd. (**DFB**) is a company incorporated in Singapore by Dr. Fong. DFB entered into a Master License Agreement with the 1st Defendant on 26.2.2008 [**MLA (2008)**]. By reason of MLA (2008) -

(1) Dr. Fong provided Dr. Fong's Method and confidential information to the 1st Defendant; and

(2) the 1st Defendant operated the BrainBuilder Business in Malaysia by opening centres to teach Mathematics to students by using Dr. Fong's Method (**BB Centres**).

8. The MLA (2008) expired on 30.6.2012. On 18.12.2013, the 3 Documents were executed.

9. Dr. Fong first discovered that the 1st Defendant had breached MLA (2013) when the latter awarded a sub-license to Encik Suhaimi bin Ramly (**Encik Suhaimi**) to operate a BB Centre at Setapak (**Setapak Centre**).

10. After Dr. Fong's discovery of Setapak Centre, he appointed Mr. Andrew Tham Chee Hoong (**SP1**) and Mr. Michael Tham Chek Mun (**SP2**) to assist the Plaintiff. The Plaintiff alleged that the 1st Defendant had committed various breaches of MLA (2013).

11. The fourth defendant (**4th Defendant**) is the 2nd Defendant's daughter and a former employee of the 1st Defendant. The Plaintiff alleged that the 4th Defendant took over a registered business, "*Pusat Latihan Perkembangan Kaji Kreatif*" (**PLPKK**), from the 2nd and 3rd Defendants. According to the Plaintiff, PLPKK runs "*TeamMathics*" business which unlawfully -

    (1) competes with BrainBuilder Business; and

    (2) uses the Plaintiff's confidential information (**Plaintiff's Confidential Information**).

12. The Plaintiff claims, among others, as follows:

    (1) the 2nd and 3rd Defendants are liable to the Plaintiff under the Guarantee for the 1st Defendant's breaches of MLA (2013);

    (2) the 2nd and 3rd Defendants have set up the fifth defendant (**5th Defendant**) and sixth defendant (**6th Defendant**) as limited liability partnerships to conduct business which unlawfully competes with BrainBuilder Business; and

    (3) the 5th and 6th Defendants have wrongfully utilized the Plaintiff's Confidential Information.

13. Due to the 1st Defendant's various breaches of the MLA (2013), the Plaintiff terminated the MLA (2013) (**Termination**) by way of a letter dated 8.10.2015 from the Plaintiff to the 2nd and 3rd Defendants (**Termination Notice**). The 1st Defendant did not comply with post-termination provisions in MLA (2013) so as to enable the Plaintiff to take over the 1st Defendant's BB Centres.

C. Defendants' case

14. The 2nd and 3rd Defendants testified, among others, as follows:

(1) Dr. Fong's Method is based on Singapore's Mathematics syllabus (**Singapore Maths**) which is created by Dr. Kho Tek Hong, the Principal Curriculum Specialist in the Curriculum Planning and Development Division of Singapore's Ministry of Education. Singapore Maths is owned by the Singapore Government and not by Dr. Fong or the Plaintiff;

(2) Singapore Maths is taught in Malaysia by many tuition and learning centres;

(3) the 2nd and 3rd Defendants had been misled by Dr. Fong as follows -

(a) the 2nd and 3rd Defendants signed MLA (2008) and MLA (2013) based on Dr. Fong's misrepresentation that both agreements were franchise agreements and MLA (2013) was an extension of MLA (2008);

(b) the 2nd and 3rd Defendants were misled to believe that DFB was the same company as the Plaintiff. If the 2nd and 3rd Defendants had known that DFB was not the same company as the Plaintiff, the 1st Defendant would not have executed MLA (2013); and

(c) the 2nd and 3rd Defendants were misled to believe that the Plaintiff has rights to the registered trade marks or patent regarding Singapore Maths (taught by the 1st Defendant); and

(4) the 2nd and 3rd Defendants proposed to sell the 1st Defendant's BrainBuilder Business to the Plaintiff for RM2.5 million. Dr. Fong initially agreed to this proposal but later Dr. Fong reneged on his word. SP2 is SP1's father. The 1st to 3rd Defendants claimed that the Termination Notice was sent to enable SP1 and SP2 to take over the 1st Defendant's BrainBuilder Business (**Alleged Acquisition**) without having to pay RM2.5 million for the Alleged Acquisition.

15. The 1st to 3rd Defendants counterclaimed against the Plaintiff [**Counterclaim (1st to 3rd Defendants)**] for, among others, the following relief:

(1) a declaration that the MLA (2013) and Guarantee are invalid;

(2) the Plaintiff shall refund all money paid by the 1st Defendant to the Plaintiff and Dr. Fong; and

(3) the Plaintiff shall pay compensatory damages (to be assessed by the court), exemplary damages and aggravated damages to the 1st to 3rd Defendants.

16. The 4th Defendant is the sole proprietor of PLPKK and is a partner of the 5th and 6th Defendants. According to the 4th Defendant -

(1) the 4th Defendant was an employee of the 1st Defendant who resigned after the Termination;

(2) PLPKK has no business and bank account. PLPKK's name was used to apply for a tuition centre license from the Ministry of Education and a business license from Subang Jaya's Municipal Council. The 4th Defendant allowed PLPKK's name to be used for a TeamMathics "*motivation centre*" (**TeamMathics Centre**);

(3) the 5th and 6th Defendants do not operate Mathematics tuition centres. The 5th and 6th Defendants are only involved in organizing Mathematics competitions for school students;

(4) there is no contract between the Plaintiff on the one part and the 4th to 6th Defendants on the other part. There is also no dealing between the Plaintiff on the one hand and the 4th to 6th Defendants on the other hand. Prior to the filing of the Plaintiff's Suit, the 4th to 6th Defendants did not receive any demand from the Plaintiff or its solicitors; and

(5) the Plaintiff's Suit was filed against the 4th to 6th Defendants to put pressure on the 2nd Defendant to give in to the Plaintiff's Suit.

D. Preliminary matters

D(1). Does Malaysian court have jurisdiction to try this case?

17. Clause 37 provides as follows:

> "*The construction, interpretation and enforcement of [MLA (2013)] is governed by the laws in force in Singapore and the parties unconditionally and irrevocably submit to the non-exclusive jurisdiction of the Courts in Singapore.*"

18. In the Court of Appeal case of **YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd** [1997] 2 MLJ 621, at 666, Mahadev Shankar JCA has held that there is a distinction between the question of whether the court has jurisdiction to hear a case and and the issue of which law should apply in the case. Based on **YK Fung Securities**, I shall first decide whether Malaysian court has jurisdiction to hear this case in light of Clause 37.

19. Firstly, I am of the view that Malaysian High Court has jurisdiction to hear this case under s 23(1)(a), (b) and/or (c) of the Courts of Judicature Act 1964 (**CJA**) as follows:

    (1) the Plaintiff's Suit is based on, among others, the alleged breaches of MLA (2013) and Guarantee in Malaysia. The causes of action for breaches of MLA (2013) and Guarantee arise in Malaysia (not in Singapore) and hence, the Malaysian High Court has jurisdiction to try this case pursuant to s 23(1)(a) CJA;

(2) s 23(1)(b) CJA cloaks this court with jurisdiction to try this matter because -

(a) the 2nd to 4th Defendants reside in Malaysia; **and/or**

(b) the 1st Defendant has its place of business in Malaysia; **and/or**

(3) as provided in s 23(1)(c) CJA, the facts on which the Plaintiff's Suit and the Counterclaim (1st to 3rd Defendants) are based, exist or are alleged to have occurred solely in Malaysia (not Singapore).

20. Secondly, Malaysian court (not a court in Singapore) is the "*forum conveniens*" (appropriate forum) to decide this case for the following reasons:

(1) the 3 Documents had been prepared in Malaysia by the Plaintiff's solicitors, Messrs Anne Hooi & Associates (who practised law in Malaysia);

(2) the 3 Documents had been executed in Malaysia;

(3) the MLA (2013) was performed in Malaysia, in particular, payments pursuant to the MLA (2013) were made by the 1st Defendant to the Plaintiff and Dr. Fong in Malaysia;

(4) the alleged breaches of MLA (2013) and Guarantee took place solely in Malaysia; and

(5) all the witnesses, except for Dr. Fong, reside in Malaysia.

21. Clause 37 has only provided for Singapore courts to have non-exclusive jurisdiction to decide regarding MLA (2013). In other words, Clause 37 does not bar a Malaysian court from hearing this case. Even if there is a clause in MLA (2013) which confers exclusive jurisdiction on a Singapore court to try this case, such a contractual clause cannot be enforced in view of the breach of ss 6(1) and 6A(1) FA which render the MLA (2013) void under s 24(a) and/or (b) CA [please see Part F(3) below].

22. In any event, the Plaintiff and Defendants have irrevocably submitted to the jurisdiction of Malaysian court and are estopped from disputing this court's jurisdiction to try this case. This decision is based on the following reasons:

(1) the Plaintiff's Suit is filed in Malaysia and none of the Defendants have applied under O 12 r 10(1)(g) of the Rules of Court 2012 (**RC**) for a declaration that Malaysian court has no jurisdiction to try the Plaintiff's Suit;

(2) the Counterclaim (1st to 3rd Defendants) had been filed but the Plaintiff did not apply under O 12 r 10(1)(g) RC for a declaration that this court had no jurisdiction to decide the Counterclaim (1st to 3rd Defendants);

(3) the Defendants applied to court and obtained an order for the Plaintiff to provide security for costs of the Plaintiff's Suit (**SFC Order**). The Plaintiff had complied with the SFC Order; and

(4) all the parties in this case had participated in the trial which had been completed.

D(2). <u>Is Malaysian law applicable to MLA (2013)?</u>

23. Clause 56 MLA (2013) (**Clause 56**) states that MLA (2013) "*shall be governed and construed according to the laws of Malaysia*". There is a conflict between Clause 37 [Singaporean law is applicable to MLA (2013)] and Clause 56.

24. Despite Clause 37, I have no hesitation to apply Malaysian law to MLA (2013). For reasons explained in Parts F(2) and F(3) below -

(1) the Plaintiff and the 1st to 3rd Defendants cannot circumvent the mandatory application of ss 6(1) and 6A(1) FA; and

(2) the MLA (2013) has contravened ss 6(1) and 6A(1) FA. Accordingly, MLA (2013), including Clause 37, is void and unenforceable.

D(3). <u>Who is *alter ego* of DFB, Plaintiff and 1st Defendant?</u>

25. The Federal Court cases of **Solid Investment Ltd v Alcatel Lucent (M) Sdn Bhd** [2014] 3 CLJ 73, at 92, **Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors** [2015] 1 MLJ 773, at paragraphs 96-99 and **Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor** [2015] 9 CLJ 537, at paragraphs 39, 44 and 45, have laid down the following two conditions to be fulfilled (**2**

Conditions) for the court to pierce or lift a corporate veil to reveal an individual as the company's *alter ego*, controller or "*directing mind and will*":

(1) there exists special circumstances to pierce or lift the corporate veil (**1st Condition**), such as the existence of an illegal contract; **and**

(2) the piercing or lifting of a corporate veil is in the interest of justice (**2nd Condition**).

26. There is a difference between the piercing of a corporate veil and its lifting. A company's corporate veil is pierced by a party when the party seeks to impose personal liability on an individual. The Court lifts (not pierces) the corporate veil of a company to ascertain the true factual position without imposing any personal liability on a particular individual - please see Staughton LJ's judgment in the English Court of Appeal case of **Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose) (No. 1)** [1991] 4 All ER 769, at 779.

27. I am satisfied that the 2 Conditions have been fulfilled for the court to lift the corporate veil of DFB and the Plaintiff to reveal Dr. Fong as the *alter ego* of these two companies. This decision is premised on the following evidence and reasons:

(1) the 1st Condition has been satisfied because the 1st to 3rd Defendants have claimed that MLA (2013) is illegal for breaching s 6A(1) FA - please refer to the Supreme Court's judgment delivered by Peh Swee Chin SCJ in **Lim Kar Bee v Duofortis Properties (M) Sdn Bhd** [1992] 2 MLJ 281, at 291; and

(2) the 2nd Condition is met because the following evidence and reasons show that it is in the interest of justice to lift the corporate veil of DFB and the Plaintiff -

(a) in Dr. Fong's first witness statement (WSSP4A, answer to question no. 14), he admitted that DFB is his company;

(b) paragraph 9 of the Statement of Claim (**SOC**) pleaded that Dr. Fong is the founder of the Plaintiff;

(c) the Brainbuilder Business of DFB and the Plaintiff is based on Dr. Fong's Method;

(d) the 1st Defendant made payments due under MLA (2013) to Dr. Fong personally (instead of the Plaintiff); and

(e) SP1 testified during cross-examination that Dr. Fong instructed the Plaintiff to file the Plaintiff's Suit.

28. This court pierces the 1st Defendant's corporate veil to show that the 2nd and 3rd Defendants are its *alter ego* because -

(1) the 2nd and 3rd Defendants have alleged illegality in this case. Hence, the fulfilment of the 1st Condition in this case; and

(2) the 2nd Condition is satisfied because the following evidence and reasons show that it is in the interest of justice to pierce the 1st Defendant's corporate veil -

(a) if the 2nd and 3rd Defendants are not the 1st Defendant's *alter ego*, they would not have executed the Guarantee to indemnify the Plaintiff and its "*officers, directors, shareholders and employees against any and all losses, damages, liabilities, costs and expenses … resulting from … any failure*" by the 1st Defendant to perform the MLA (2013) - please see clause 2 of the Guarantee;

(b) the 2nd and 3rd Defendants own 85% of the total shares in the 1st Defendant;

(c) the 2nd and 3rd Defendants are the only directors of the 1st Defendant;

(d) emails, letters and minutes of meetings have been sent by Dr. Fong, SP1, SP2 and the Plaintiff to the 2nd and 3rd Defendants (not to the 1st Defendant) regarding the 1st Defendant's BB Centres; and

(e) despite the fact that the Termination Notice was sent to the 2nd and 3rd Defendants (not to the 1st Defendant), the 2nd and 3rd Defendants did not insist for the Plaintiff to send the Termination Notice to the 1st Defendant.

E. <u>Credibility of witnesses</u>

29. I find as a fact that Dr. Fong, SP1 and SP2 are credible witnesses. This is because firstly, their testimonies are supported by contemporaneous

emails, letters and minutes of meetings. Secondly, the lengthy cross-examination of Dr. Fong, SP1 and SP2 by the Defendants' learned counsel, did not show any reason to doubt their veracity.

30. It is this court's finding of fact that the 2nd Defendant is an unreliable witness. This decision is premised on the following evidence and reasons:

(1) the 2nd Defendant's testimony that Dr. Fong's Method was not developed by Dr. Fong is materially contradicted by the 2nd Defendant's ownemail dated 20.3.2008 to the 3rd Defendant which stated that "*BrainBuilder Maths employs well-established strategies which were developed for over 25 years by [Dr. Fong]*". When there is a conflict between contemporaneous documentary evidence and self-serving oral testimony, I will readily accept the former - please see Siti Norma Yaakob JCA's (as she 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;

(2) during cross-examination, the 2nd Defendant stated that he was "*a bit confused*" about Dr. Fong's Singapore Maths because he was used to BrainBuilder method. The court then cautioned the 2nd Defendant that he had taken an oath to tell the truth in court. After I have administered such a caution, the 2nd Defendant did a *volte face* and admitted that he understood "*Dr. Fong's brand of mathematics*";

(3) the 2nd Defendant gave evidence during cross-examination that he did not know whether the 1st Defendant's staff had taught at TeamMathics

Centres because he was not involved with TeamMathics Centres. Such evidence is not true because photographs in exhibits P14 to P93 (**Photographs**) showed the 2nd Defendant's active involvement in TeamMathics Centre at Subang Jaya. The Photographs are admissible as evidence as an exception to the documentary hearsay rule - **Tenaga Nasional Bhd v Api-api Aquaculture Sdn Bhd** [2015] 3 AMR 811, at paragraph 31. The decision in **Api-api Aquaculture** has been affirmed by the Court of Appeal;

(4) during cross-examination, the 2nd Defendant disagreed with the Plaintiff's learned counsel that the 1st Defendant did not reply to the Termination Notice and letters dated 6.11.2015 and 25.11.2015 by the Plaintiff's solicitors. However, the 2nd Defendant admitted subsequently that the 1st Defendant's purported replies had not been adduced in this case. These answers by the 2nd Defendant undermine his own credibility; and

(5) the 2nd Defendant incredulously testified during cross-examination that he could not remember whether he had received an email dated 23.11.2014. An honest witness may not have remembered the contents of an email but would be candid to admit the witness's receipt of the email.

31. I am not able to accept the 3rd Defendant as a truthful witness due to the following evidence and reasons:

(1) during cross-examination, the 3rd Defendant claimed that he had retired from business after the Termination. The Photographs however showed the 3rd Defendant's active participation in Subang Jaya's TeamMathics Centre;

(2) when questioned by the Plaintiff's learned counsel on what had happened to the 1st Defendant's students after the Termination, the 3rd Defendant was less than honest by answering that he did not know what had happened to the 1st Defendant's students. I will explain later in this judgment regarding what has happened to the 1st Defendant's students after the Termination;

(3) during cross-examination, the 3rd Defendant had the temerity to claim that "*My Maths Olympiad PLT*" (**MMO**), a limited liability partnership, is a subsidiary of the 1st Defendant. Such evidence clearly proves the 3rd Defendant's lack of credibility because a partnership cannot be a subsidiary of a company;

(4) Setia Pals Sdn. Bhd. (**SPSB**) is incorporated on 13.12.2012 with the 2nd and 3rd Defendants as its only directors. The 1st Defendant holds 61% of the shares in SPSB. During cross-examination, the 3rd Defendant was economical with the truth by claiming that SPSB was one of the 1st Defendant's branches. This is because there is no documentary evidence to prove that SPSB is one of the 1st Defendant's branches. The 3rd Defendant admitted during cross-examination that no evidence had been adduced in court regarding

any payment by the 1st Defendant to the Plaintiff on the ground that SPSB was one of the 1st Defendant's branches; and

(5) throughout the 3rd Defendant's cross-examination, he had been evasive until the court had to warn him that he had taken an oath to answer truthfully all questions posed by the Plaintiff's learned counsel.

32. I do not find the 4th Defendant to be a credible witness due to the following evidence and reasons:

(1) despite the fact that the 4th Defendant was a former employee of the 1st Defendant, she testified during cross-examination that she was not aware of MLA (2013). Such a testimony is materially contradicted by the her own witness statement which stated that she had resigned as the 1st Defendant's employee after the Termination;

(2) the 4th Defendant stated during cross-examination that she was unaware of the fact that the 1st Defendant had used the Plaintiff's materials and logo. Such evidence could not be accepted because the 4th Defendant attended a meeting on 26.6.2015 [**Meeting (26.6.2015)**] and a copy of the minutes of Meeting (26.6.2015) had been given to her. According to the minutes of Meeting (26.6.2015), Dr. Fong, SP1 and SP2 had discussed with, among others, the 4th Defendant, regarding the implementation of "*PowerMaths*" workbooks;

(3) the 4th Defendant gave evidence during cross-examination that she did not have access to the information regarding the 1st Defendant's number of students and income. Such evidence could not be true in

light of an attachment to the 3rd Defendant's email dated 8.7.2015 to SP1 (copied to, among others, the 4th Defendant) which contained information regarding the 1st Defendant's number of students, revenue and administration fees;

(4) during cross-examination, the 4th Defendant initially testified that she did not know when TeamMathics Centres started. However, the 4th Defendant readily agreed to the very next question by learned counsel for the Plaintiff that TeamMathics Centres opened sometime towards the end of 2015; and

(5) the 4th Defendant is a partner of the 5th and 6th Defendants. Yet, the 4th Defendant testified during cross-examination that she did not know whether the 5th and 6th Defendants competed with BrainBuilder Business. An honest partner of a business would know the nature of the partnership's business.

F. Validity of 3 Documents

F(1). Court's approach

33. When a party alleges a contract or transaction is unlawful, I will adopt the approach as stated in **Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur bin Hussain & Ors** [2017] 2 MLRH 177, at paragraph 39, as follows:

"*39. This court will adopt the following approach in deciding whether [two agreements] were a cloak for a transaction which is illegal and unenforceable under [MoneyLenders Act 1951]:*

(1) illegality need not be pleaded - please see the Supreme Court's judgment delivered by Peh Swee Chin SCJ in ***Lim Kar Bee v Duofortis Properties (M) Sdn Bhd*** *[1992] 2 MLJ 281, at 288. …;*

(2) a party may raise an issue on illegality at any stage of the proceedings, even at the appellate level. In ***Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd*** *[1989] 1 MLJ 457, at 460-462, the breach of s 5(1) [Housing Development (Control & Licensing) Act 1966] was only raised for the first time during the hearing of the appeal before the Privy Council. Despite the fact that the illegality issue had not been pleaded and raised in the High Court and the then Federal Court, the Privy Council in a judgment delivered by Lord Oliver, allowed such a question to be raised. …;*

(3) proviso (a) to s 92 EA allows oral and documentary evidence to be admitted to contradict a contract on the ground of illegality - please refer to the Supreme Court's judgment delivered by Peh Swee Chin SCJ in ***Lim Kar Bee****, at p. 289;*

(4) there is no privilege attached to a communication between a client and his or her practising [Advocate & Solicitor (A&S)] (Legal Communication) in the following circumstances -

(a) when the Legal Communication was made in furtherance of any illegal purpose - please see proviso (a) to s 126(1) EA; and/or

(b) *when the A&S observed any fact in the course of the A&S's employment which showed any crime or fraud had been committed since the commencement of the A&S's employment - please see proviso (b) to s 126(1) EA;*

(5) *in deciding whether there is an illegality in a case, the court has the discretion to lift and/or pierce a corporate veil - please refer to* ***Lim Kar Bee****, at 291;*

(6) *the court is not bound by the label or description of the agreement in question - please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case* ***Sia Siew Hong & Anor v Lim Gim Chian & Ors*** *[1996] 3 CLJ 26, at 32;*

(7) *the court can and should go should behind the agreement or transaction to ascertain -*

(a) *the true nature of the agreement or transaction - Gopal Sri Ram JCA's judgment in the Court of Appeal case of* ***Sri Kelangkota–Rakan Engineering JV Sdn. Bhd. v Arab–Malaysian Prima Realty Sdn. Bhd.*** *[2001] 1 MLJ 324, at 333-334. The Court of Appeal's judgment in* ***Sri Kelangkota*** *has been affirmed by the Federal Court in a judgment given by Abdul Malek Ahmad FCJ (as he then was) - please refer to [2003] 3 MLJ 257; and*

(b) *the true nature of the relationship between the parties - please see the judgment of Gopal Sri Ram JCA in the Court of Appeal in* ***Pan Global Equities Sdn Bhd & Anor v Taisho Co Sdn Bhd*** *[2006] 1 MLJ 158, at 161; and*

(8) *in **Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd** [1999] 2 CLJ 997, at 1010 and 1015-1016, the Federal Court recognised the trend in other Common Law countries that courts should be slow to strike down commercial transactions on illegality. The Federal Court has incorporated such a trend as part of Malaysian Common Law in **Lori Malaysia Bhd**.*"

The Court of Appeal has affirmed the decision in **Barisan Tenaga Perancang**.

34. If there is an illegal contract or transaction, the court is duty bound to take cognizance of the illegality and cannot enforce the illegal contract or transaction (even if the illegality is not pleaded or raised by any party) - please see **Tan Kang Hai v Slimming Sanctuary** [2016] 5 MRLH 651, at paragraphs 11, 49 and 50.

35. Learned counsel for the Plaintiff and Defendants have cited an impressive array of cases on illegal contracts. I am of the view that whether a contract or transaction has breached a provision of law, depends on the construction of that provision. As such, cases on illegality depend on the interpretation of the particular law which has been contravened.

F(2). <u>Does FA apply to MLA (2013)?</u>

36. As decided in the above Part D(2), Malaysian law applies to MLA (2013). The MLA (2013) is not entitled a "*franchise*" contract. Nor does the MLA (2013) use the word "*franchise*". However, as explained in **Barisan Tenaga Perancang**, the court is not bound by the label or description given by the

parties to MLA (2013). I am of the view that FA applies to MLA (2013) for the following reasons:

(1) according to s 3(1) FA, FA applies to the operation of a "*franchise*" in Malaysia. Section 4 FA defines a "*franchise*" as follows -

> " ***"franchise" means a contract or an agreement****, either expressed or implied, whether oral or written,* ***between two or more persons by which*** *-*
>
> *(a)* ***the franchisor grants to the franchisee the right to operate a business according to the franchise system as determined by the franchisor during a term to be determined by the franchisor****;*
>
> *(b)* ***the franchisor grants to the franchisee the right to use a mark, or a trade secret, or any confidential information or intellectual property, owned by the franchisor or relating to the franchisor, and includes a situation where the franchisor, who is the registered user of, or is licensed by another person to use, any intellectual property, grants such right that he possesses to permit the franchisee to use the intellectual property****;*
>
> *(c)* ***the franchisor possesses the right to administer continuous control during the franchise term over the franchisee's business operations in accordance with the franchise system****; and*
>
> *(d) [Deleted by Franchise (Amendment) Act 2012 (****Act A1442****)]*

(e) ***in return for the grant of rights, the franchisee may be required to pay a fee or other form of consideration***.

(f) *[Deleted by Act A1442]*"

(emphasis added).

A perusal of MLA (2013) clearly shows that MLA (2013) fulfills all the four cumulative conditions of a "*franchise*" in s 4(a), (b), (c) and (e) FA (**4 Prerequisites**);

(2) the oral evidence of the 2nd and 3rd Defendants regarding the operation of the 1st Defendant's BrainBuilder Business proves that such a business fulfills all the 4 Prerequisites. Such evidence has not been rebutted by any of the Plaintiff's witnesses;

(3) clauses 11.2, 11.9, 23.1 and 23.2 MLA (2013) state that the 1st Defendant shall comply with "*manuals*" [defined widely in clause 1 MLA (2013)]. The Plaintiff has provided the 1st Defendant with a "*Franchise Operations Manual*" (**FOM**) to operate the BrainBuilder Business. A perusal of the FOM clearly shows that the BrainBuilder Business has satisfied the 4 Prerequisites; and

(4) the Plaintiff cannot deny that MLA (2013) is a franchise agreement because the following evidence shows that Dr. Fong and the Plaintiff (Dr. Fong is its *alter ego*) have actual knowledge of such a fact -

(a) Dr. Fong's email dated 11.4.2013 to the 2nd Defendant referred to the 1st Defendant as a Master Franchisee;

(b) Ms. Anne Hooi Yoke Ling (**Ms. Hooi**) was the Plaintiff's solicitor who drafted the 3 Documents, including MLA (2008). During cross-examination, Dr. Fong admitted that he had been advised by Ms. Hooi by way of an email dated 24.12.2013 to register the BrainBuilder Business as a franchise (**Ms. Hooi's Email dated 24.12.2013**) but he did not act on that advice. Ms. Hooi's Email dated 24.12.2013 stated as follows:

> "… ***The Government here is getting strict and if a business is run like a franchise long enough, they can treat it as a franchise and consider it an offence not to register.***
>
> ***We will look into registration as the franchise and see how we go from here. The ultimate decision will be yours.*** …"
>
> (emphasis added).

I attach great weight to Ms. Hooi's Email dated 24.12.2013 which was sent to Dr. Fong only six days after the execution of the 3 Documents on 18.12.2013;

(c) Dr. Fong explained during re-examination that the 1st Defendant had been given the "*task*" to register BrainBuilder Business as a franchise; and

(d) the Plaintiff's learned counsel questioned the 3rd Defendant on 8.6.2017 (**3rd Defendant's Cross-Examination**) as follows:

> "*Q:* ***Now Mr. Leong, on the issue of franchise, do you agree that Dr Fong had requested that you look into that matter way back in December 2013?***
>
> …
>
> *A: I can't remember, My Lord.*
>
> …
>
> *Q:* ***You were concerned that they will implement Bumiputera quota in the company****.*
>
> …
>
> *A: I disagree, My Lord.*"
>
> (emphasis added).

F(3). Have ss 6(1) and/or 6A(1) FA been breached?

37. The relevant parts of ss 6, 6A and 6B FA are reproduced below:

> "***Registration of franchisor***
>
> *s 6(1)* ***A franchisor shall register his franchise with the Registrar before he can operate a franchise business*** *or make an offer to sell the franchise to any person.*
>
> *(2)* ***Any franchisor who fails to comply with this section, unless exempted by the Minister under section 58, commits an offence and shall, on conviction, be liable -***
>
> *(a)* ***if such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or***

subsequent offence, to a fine not exceeding five hundred thousand ringgit*;*

…

Registration of franchisee of foreign franchisor

s 6A(1) ***Before commencing the franchise business, a franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Registrar by using the prescribed application form and such application shall be subject to the Registrar's approval****.*

…

Registration of franchisee

s 6B. ***A franchisee who has been granted a franchise from a local franchisor or local master franchisee shall register the franchise with the Registrar*** *by using the prescribed registration form within fourteen days from the date of signing of the agreement between the franchisor and franchisee.*"

(emphasis added).

38. Dr. Fong admitted during cross-examination that the 1st Defendant's BrainBuilder Business franchise was not registered with the Registrar of Franchise (**Registrar**). The Registrar is appointed under s 5(1) FA and performs the duties imposed and exercise the powers conferred on the Registrar under FA [please see s 5(2) FA].

39. Regarding the validity of MLA (2013) under FA, I understand the submission of the Plaintiff's learned counsel as follows:

(1) the court should be slow to strike down commercial contracts such as MLA (2013);

(2) ss 6(1) and 6B(1) FA apply to a "*local*" franchise while s 6A(1) FA concerns a "*foreign*" franchise. Accordingly, ss 6(1) and 6B FA are not relevant to MLA (2013) regarding a foreign franchise;

(3) s 6(2) FA provides for penal consequences if there is a breach of s 6(1) FA by a local franchisor. There is however no criminal sanction for a contravention of s 6A(1) FA by the franchisee of a foreign franchise. Accordingly, Parliament does not intend to invalidate MLA (2013) for the 1st Defendant's failure to register the BrainBuilder Business franchise with the Registrar under s 6A(1) FA (**1st Defendant's Failure**); and

(4) if the court invalidates MLA (2013) based on a breach of s 6A(1) FA, this will cause an injustice to the Plaintiff because -

(a) the Plaintiff will be unable to enforce MLA (2013) and Guarantee against the 1st to 3rd Defendants and claim for losses suffered by the Plaintiff as a result of various breaches of MLA (2013) by the 1st to 3rd Defendants; and

(b) it is solely the 1st Defendant's Failure which has contravened s 6A(1) FA.

40. I am of the following view:

(1) ss 6, 6A and 6B FA have been introduced by Act A1442 with effect from 1.1.2013. Part I of the Interpretation Acts 1948 and 1967 (**IA**)

applies to interpret FA - please see s 2(1)(a) IA. Section 17A IA (in Part 1 IA) provides as follows:

> "***Regard to be had to the purpose of Act***
>
> *17A.* ***In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object***."
>
> (emphasis added).

In **Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd** [2004] 2 CLJ 265, the Federal Court applied s 17A IA to give a purposive construction of a tax statute.

In accordance with s 17A IA, this court gives a purposive interpretation of ss 6, 6A and 7 FA. The purpose of ss 6, 6A and 7 FA, as intended by Parliament through Act A1442, is for all franchises, local and foreign, to be registered with the Registrar (**Purposive Construction**). The Purposive Construction is supported by the following -

(a) the title to FA states that FA is "*to provide for the registration of … franchises*". In the Federal Court case of **Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd** [2004] 1 CLJ 701, at 736, Augustine Paul JCA (as he then was) referred to the preamble to the

Pengurusan Danaharta Nasional Berhad Act 1998 to ascertain the object of that statute; and

(b) the speech by the then Deputy Minister for Domestic Trade, Cooperatives and Consumerism, Datuk Hajah Rohani binti Abdul Karim, in Dewan Negara on 17.7.2012 (at the second and third reading of the bill which was subsequently passed as Act A1442) (**Parliamentary Debates**) states the objects of Act A1442 as follows -

> "*… **Akta Francais 1998** …. **merupakan satu undang-undang bagi pendaftaran** dan pengawalseliaan **sistem perniagaan secara francais di Malaysia yang merangkumi perkara-perkara berikut:***
>
> *…*
>
> *(ii)* ***mengadakan satu sistem pendaftaran yang sistematik bagi membantu dan memantau perkembangan industri francais tanah air****;*
>
> *…*
>
> ***Sebelum ini …, kita hanya mendaftar francaisor dan tidak francaisi. Jadi didapati bahawa ini memang … berat sebelah****.*
>
> ***Oleh yang demikian, … kita mesti cepat-cepat membuatkan pindaan ini supaya kita mendapati satu perlindungan yang begitu baik kepada francaisi yang … sudah sampai kepada angka 5,000 lebih francaisi*** *…*
>
> *…* ***itulah yang dimasukkan di dalam pindaan ini supaya ia memantapkan lagi, mengukuhkan lagi Akta Francais ini supaya kita dapat memberi satu keyakinan kepada usahawan-usahawan yang hendak menceburi dalam perniagaan francais***

didapati bahawa mereka akan menceburi dengan bidang ini dengan lebih yakin kerana ada undang-undang.

… ***kalau kita ada undang-undang sedemikian, bukan sahaja untuk dalam negara tetapi sebenarnya untuk yang datang daripada luar negara pun mempunyai satu keyakinan yang begitu tinggi untuk masuk ke negara kita*** *…*

… ***daripada tahun 1998 iaitu semasa akta pertama digubal sehingga sekarang mendapati banyak … loopholes yang mungkin akan melambatkan perkembangan industri francais****.*

Oleh yang demikian, sebab itulah kita memang memperketat dan memang didapati … ada yang telah mengiklankan untuk menceburi dalam bidang francais. Sebenarnya mereka tidak ada berdaftar dengan kementerian kita iaitu bahagian francais tetapi telah mengiklankan supaya mengajak usahawan-usahawan menjadi francaisi. Jadi ini yang kita masukkan dalam seksyen-sekysen dan kita perkenalkan lagi penalti yang lebih tinggi supaya ini menjadi satu deterrent. Oleh yang demikian kita juga berharap dengan adanya pindaan ini kita telah dapat memperketat lagi jangan adanya penipuan-penipuan dan keadaan yang berat sebab itulah yang kita harapkan dengan pindaan kepada akta ini supaya mereka ini dapat kita beri perlindungan."

(emphasis added).

The court may refer to Parliamentary Debates regarding a statute in the interpretation of that statute - **Danaharta Urus**, at p. 737-741. According to the Parliamentary Debates, the requirement to

register franchises on the part of franchisors and franchisees has the following objectives -

(i) to enable the Registrar to supervise the development of the franchise industry in this country;

(ii) to protect franchisees from fraud;

(iii) to encourage entrepreneurs to participate in the franchise industry; and

(iv) to attract foreign investors to invest in our Malaysian franchise industry;

(2) as explained in the above Part F(2), the BrainBuilder Business is a "*franchise*" under s 4(a), (b), (c) and (e) FA. Based on the Purposive Construction, s 6(1) FA applies to all "*franchisors*", local and foreign. The Purposive Construction is supported by the wide definition of "*franchisor*" in s 4 FA to mean "*a person who grants a franchise to a franchisee and includes a master franchisee with regard to his relationship with a subfranchisee, unless stated otherwise in [FA]*". Accordingly, I cannot accept the submission by the Plaintiff's learned counsel that s 6(1) FA applies only to local franchisors. Such a submission is contrary to the Purposive Construction. Furthermore, if I have acceded to such a submission -

(a) this will create an absurdity wherein local franchisors have to register their franchises with the Registrar under s 6(1) FA but

foreign franchisors are exempted from such a requirement. Under s 58 FA, only the "*Minister*" (defined in s 4 FA as the Minister for the time being charged with the responsibility for matters relating to franchises) may exempt a franchisor, local and foreign, from the requirement of registration under s 6(1) FA; and

(b) this will cause an injustice to franchisees of foreign franchises [as compared to franchisees of local franchises who are required to be registered under s 6(1) FA]. This is because if a foreign franchisor is not required to register the foreign franchise with the Registrar under s 6(1) FA, the foreign franchisor may wriggle out from compliance with mandatory provisions legislated by Parliament in FA for the protection of franchisees of foreign franchises;

(3) additionally or alternatively, a literal interpretation of s 6(1) FA together with the wide definition of "*franchisor*" in s 4 FA, requires a foreign franchisor to register the franchise with the Registrar (**Literal Interpretation**);

(4) based on the Purposive Construction and Literal Interpretation, the Plaintiff is required to register the BrainBuilder Business franchise with the Registrar under s 6(1) FA. The Plaintiff's failure to do so amounts to a contravention of s 6(1) FA (**Plaintiff's Breach**);

(5) it is not disputed by the 1st to 3rd Defendants that the 1st Defendant's Failure has breached s 6A(1) FA (**1st Defendant's Breach**);

(6) the effect of the Plaintiff's Breach and the 1st Defendant's Breach (**2 Breaches**) on the validity of MLA (2013) depends on whether ss 6(1) and 6A(1) FA are intended by Parliament to be mandatory or directory provisions. I have no hesitation to decide that our legislature has intended for ss 6(1) and 6A(1) FA to be imperative provisions. Such a decision is supported by the following reasons -

(a) the following four High Court decisions have held that the franchise agreements in those cases are void and unenforceable due to the failure to register the franchises in question -

(i) Zabariah Mohd. Yusof J's (as she then was) judgment in **SP Multitech Intelligent Homes Sdn Bhd v I Home Sdn Bhd** [2010] 16 MLRH 537, at 539;

(ii) Tengku Maimun Tuan Mat J's (as she then was) decision in **Munafsya Sdn Bhd v Proquaz Sdn Bhd** [2012] MLRHU 1, at paragraph 72; and

(iii) the judgments of Abu Bakar Jais JC (as he then was) in **Lim Seng Kiat & Anor v Jee Hing Lim & Anor** [2015] MLRHU 1, at paragraphs 16, and **Tea Delights (M) Sdn Bhd & Anor v Yeap Win Nee & Anor** [2015] MLRHU 1, at paragraphs 9-16;

(b) the use of the mandatory term "*shall*" in ss 6(1) and 6A(1) FA clearly shows Parliament's intention for these provisions to have mandatory effect - please see Mohd. Dzaiddin FCJ's (as he then

was) judgment in the Federal Court case of **Public Prosecutor v Yap Min Woie** [1996] 1 MLJ 169, at 172-173; and

(c) the Parliamentary Debates are clear regarding our legislature's intention for ss 6(1) and 6A(1) FA to be mandatory provisions;

(7) clause 48.1 MLA (2013) (**Clause 48.1**) provides that where any provision of MLA (2013) is judged by the court to be invalid, such a provision may be severed from the MLA (2013) without invalidating the other provisions of MLA (2013).

The court has a discretion to invoke the doctrine of severance to "*save*" the lawful part of a contract by severing its illegal provisions. In this case, I cannot apply the doctrine of severance or Clause 48.1 to save any provision in MLA (2013) because -

(a) as explained in the above sub-paragraph (6), ss 6(1) and 6A(1) FA are intended by Parliament to be mandatory provisions. If I have applied the doctrine of severance or Clause 48.1, this will unlawfully circumvent the imperative provisions of ss 6(1) and 6A(1) FA; and

(b) the 2 Breaches do not concern a particular term of MLA (2013) which is illegal and may be severed from all other lawful provisions of MLA (2013). The 2 Breaches concern the lack of registration of the 1st Defendant's BrainBuilder Business and taints the entire MLA (2013);

(8) in view of the 2 Breaches, I find MLA (2013) to be void in its entirety under either one or both of the following grounds -

(a) the MLA (2013) is forbidden by ss 6(1) and 6A(1) FA within the meaning of s 24(a) CA; and/or

(b) the MLA (2013) is of such a nature that, if permitted, would defeat ss 6(1) and 6A(1) FA [please see s 24(b) CA].

In the Federal Court case of **Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay Abdullah** [2015] 5 MLRA 377, at paragraphs 70 and 71, Jeffrey Tan FCJ has held that when a party has alleged that a contract is illegal, the court has a duty to consider the validity of the contract based on s 24 CA; and

(9) the above decision to invalidate the entire MLA (2013) based on s 24(a) and/or (b) CA is not unjust because the Dr. Fong and the Plaintiff (Dr. Fong is its *alter ego*) have been legally advised by the Plaintiff's solicitor, Ms. Hooi, to register the 1st Defendant's BrainBuilder Business franchise under FA (by way of Ms. Hooi's Email dated 24.12.2014). Dr. Fong and the Plaintiff however chose to ignore this legal advice on the misconceived idea that shares in the 1st Defendant might have to be given to Bumiputeras (please see the 3rd Defendant's Cross-Examination). Furthermore, even if there was the 1st Defendant's Failure [not to register the BrainBuilder Business franchise under s 6A(1) FA], the Plaintiff could have exercised the power granted by the 1st Defendant to the Plaintiff under the PA and

apply to the Registrar (as the 1st Defendant's lawful attorney) to register the same under s 6A(1) FA.

F(4). <u>Whether Guarantee and PA are invalid due to illegal MLA (2013)</u>

41. In **Malayan Banking Bhd v Neway Development Sdn Bhd & Ors** [2017] 5 MLJ 180, at paragraph 22, Richard Malanjum CJ (Sabah & Sarawak) decided in the Federal Court as follows:

> "*[22] At the outset we would think that the leave question is academic and misconceived in relation to this appeal. Our reason is this. It simply ignored the first stage of the transaction, namely,* ***the purchase of the native land itself through the native nominee. It was obviously done in order to circumvent a clear statutory prohibition. As such the purchase was clearly illegal as correctly found by the courts below. It was not disputed that it was the fourth respondent who was the actual purchaser of the native land through the native nominee. Such fact was confirmed by the execution of successive power of attorney, an instrument prohibited by s 64(2) of the SLO. In the power of attorney dated 8 July 2002, the native nominee purportedly gave absolute powers to the fourth respondent to deal with the native land. Obviously the fourth respondent must have been very well aware of the statutory prohibition. As such the purchase the native land itself was illegal ab initio. Section 24(a) and (b) [CA] is clear. In our view no amount of gymnastic argument could remedy the default. Thus, any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with such illegality. Hence, even the third party first legal charge security for the term loan given by the appellant was also tainted with illegality.***"

(emphasis added).

Based on **Malayan Banking**, if a contract is void under any paragraph in s 24 CA, any other contract, instrument or document which is related to the void contract may be tainted with illegality and may also be rendered void.

42. I am of the view that the 3 Documents form a single composite transaction. This decision is premised on the following evidence and reasons:

(1) the 3 Documents concern the same BrainBuilder Business;

(2) the 3 Documents are prepared by the same solicitor, Ms. Hooi;

(3) clause 15.3 MLA (2013) provides that "*all persons with ownership interest*" in MLA (2013) "*must*" execute the Guarantee in the form provided in Appendix 3 to MLA (2013) (**Appendix 3**). The Guarantee is exactly in the form of Appendix 3;

(4) clauses 1 to 4 of the Guarantee concern only the obligations of the 1st Defendant under MLA (2013);

(5) clause 34 MLA (2013) states that to "*secure the performance*" of the 1st Defendant of the obligations under MLA (2013), the 1st Defendant irrevocably appoints, among others, the Plaintiff as the 1st Defendant's attorney. Hence, the execution of the PA. Clause 1 PA provides that the 1st Defendant has irrevocably appointed, among others, the Plaintiff as the 1st Defendant's attorney; and

(6) the 3 Documents were executed on the same day (18.12.2013) and their execution was witnessed by Ms. Hooi.

As the 3 Documents constitute a single composite transaction, the illegality of MLA (2013) will consequently taint the Guarantee and PA. Accordingly, the Guarantee and PA will be similarly void in their entirety under s 24(a) and/or (b) CA - please see **Malayan Banking**.

F(5). Whether court may grant remedy when 3 Documents are void

43. Sections 66 and 71 CA provide as follows:

> "***Obligation of person who has received advantage under void agreement****, or contract that becomes void*
>
> *s 66.* ***When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it****.*
>
> ***Obligation of person enjoying benefit of non-gratuitous act***
>
> *s 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).

44. I will first consider s 71 CA. This court relies on the opinion of the Privy Council delivered by Lord Upjohn in an appeal from Malaysia, **Siow Wong Fatt v Susur Rotan Mining Ltd & Anor** [1967] 2 MLJ 118. It was decided in **Siow Wong Fatt**, at p. 120 as follows:

> ***"It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under section 71.***
>
> ***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).

45. Based on **Siow Wong Fatt**, s 71 CA does not apply for the court to grant relief to any party in this case because the 1st Defendant's performance of MLA (2013) is not lawful (due to the 2 Breaches). Furthermore, the Plaintiff's Breach under s 6(1) FA has penal consequences under s 6(2)(a) FA.

46. Regarding s 66 CA, Ramly Ali FCJ decided as follows in the Federal Court in **Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd** [2014] 4 MLRA 11, at paragraphs 37-39:

> "*37.* ***The effect of a void contract or agreement is provided for under s 66 [CA]*** *…*
>
> *38.* *…* ***The Privy Council in Harnath Kaur v Inder Singh*** *[1922] LR 50 IA 69* ***in considering a claim based on s 65 of the Indian Contracts Act 1872 [CA (India)] (which is identical to our s 66 [CA]) ruled****:*
>
> > ***"an agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void****."*
>
> *…*
>
> *39.* ***A right to restitution may arise out of a failure of a contract though the right itself be not a matter of contractual obligation. It appears to be based on the principle exemplified in the Roman Law 'condicto causa data causa non secuta'*** *(contract becomes impossible to perform owing to outbreak of war in 1914).* ***The Privy Council in Menaka v Lum Kum Chum*** *[1976] 1 MLRA 592,* ***in dealing with s 65 [CA (India)] … ruled****:*
>
> > ***"In that way effect will be given to s 65 under which each party is bound to restore any advantage which he has received to the person from whom he received it - see Govindram Seksaria v Radbone where Lord Morton of Henryton said:***

> ***"The result of s 65 [CA (India)] was that, as from [the date on which the contract became void] each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale"*** **"**
>
> (emphasis added).

47. According to **Tan Chee Hoe & Sons**, for s 66 CA to apply -

    (1) there must be evidence that a contracting party has received an "*advantage*" in an agreement "*discovered to be void*" or when the agreement "*becomes void*"; and

    (2) any contracting party who received an advantage can be ordered by the court to restore the advantage or pay compensation to the other contracting party.

48. I am unable to invoke s 66 CA in this case because the 1st Defendant has made payments under the MLA (2013) to Dr. Fong and the Plaintiff regarding the 1st Defendant's right to operate BrainBuilder Business. As such, the 1st Defendant has not received any advantage under the MLA (2013) to be restored to the Plaintiff under s 66 CA. Moreover, the Plaintiff has taken the position in this case that MLA (2013) is valid and has not breached FA. Hence, the Plaintiff did not plead in the SOC and adduce any evidence regarding any advantage received by the 1st Defendant under a void MLA (2013).

49. The material facts in **Tan Chee Hoe & Sons** can be easily distinguished from this case because the purchaser in a sale of shares contract in **Tan Chee Hoe & Sons** has received a deposit of 10% of the sale price from the vendor (an advantage under the contract) and this deposit is rightfully ordered by the Court of Appeal (affirmed by the Federal Court) to be restored to the vendor under s 66 CA. In this case, no deposit has been paid by any party under the MLA (2013).

50. It is to be noted that s 7(1) of New Zealand's Illegal Contracts Act 1970 [**ICA (NZ)**] confers power on the court to grant "*such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just*". It is hoped that our legislature may confer power along the lines of s 7(1) ICA (NZ) on Malaysian courts to grant any just and appropriate remedy in cases regarding illegal contracts.

51. I have not overlooked the development of case law in the following countries regarding the court's power to grant relief in respect of illegal agreements:

    (1) the judgment of United Kingdom's Supreme Court in **Patel v Mirza** [2017] 1 All ER 191. It is to be noted that Mary Lim Thiam Suan JCA in the Court of Appeal case of **Norihan Talib & Ors v Mohd Nasir Hassan & Ors** [2017] MLRAU 1, at paragraphs 34-37, has referred to the judgments of Lord Mance and Lord Sumption in **Patel**;

(2) the High Court of Australia's decisions in **Nelson & Anor v Nelson & Ors** (1995) 132 ALR 133 and **Fitzgerald v FJ Leonhardt Pty Ltd** (1997) 143 ALR 569; and

(3) the majority judgment of the Supreme Court of Canada in **Hall v Herbert** [1993] 2 SCR 159.

52. I am not able to apply the cases stated in the above paragraph 51 because we have our own s 66 CA. Furthermore, as a matter of *stare decisis*, I am bound by the Federal Court's judgment in **Tan Chee Hoe & Sons**.

53. I will now decide whether the Plaintiff may rely on the doctrine of unjust enrichment as propounded by Azahar Mohamed FCJ in the Federal Court case of **Dream Property Sdn Bhd v Atlas Housing Sdn Bhd** [2015] 2 MLJ 441. According to **Dream Property**, at paragraphs 110, 117 and 118, the court may grant restitution to a plaintiff when the following four cumulative conditions of a cause of action in unjust enrichment have been proven by the plaintiff:

(1) the defendant had been enriched;

(2) the defendant's enrichment has been gained at the plaintiff's expense;

(3) the defendant's retention of the benefit is unjust; and

(4) the defendant has no defence to extinguish or reduce the defendant's liability to make restitution.

54. Based on **Dream Property**, I find as a fact that the Plaintiff has failed to prove a cause of action in unjust enrichment against the 1st to 3rd Defendants. This finding is based on the following evidence and reasons:

(1) the SOC did not plead that the 1st to 3rd Defendants have been unjustly enriched at the Plaintiff's expense;

(2) the Plaintiff's list of issues to be tried in this case did not state for the court's determination the question of whether the court should order the 1st to 3rd Defendants to make restitution to the Plaintiff based on a cause of action in unjust enrichment;

(3) there is no evidence to prove that -

(a) the 1st to 3rd Defendants have been enriched in this case;

(b) the enrichment of the 1st to 3rd Defendants has been gained at the expense of Plaintiff or Dr. Fong; and

(c) the retention of benefit by the 1st to 3rd Defendants is unjust; and

(4) evidence has been adduced in this case that the 1st Defendant has paid Dr. Fong and the Plaintiff under the MLA (2013).

G. <u>Assumption that 3 Documents are valid</u>

55. In the event that the Court of Appeal reverses the above decision that the 3 Documents are void, I will now decide whether the 1st to 3rd Defendants have breached MLA (2013) and Guarantee.

G(1). Have 1st to 3rd Defendants breached MLA (2013)?

56. As explained in the above Part D(3), the 2nd and 3rd Defendants are the 1st Defendant's *alter ego*. Accordingly, the 2nd and 3rd Defendants are personally liable for any breach of MLA (2013) by the 1st Defendant.

57. Firstly, I am satisfied that the 1st to 3rd Defendants have breached clause 17.1 MLA (2013) (**Clause 17.1**) as follows:

    (1) according to Clause 17.1, a monthly report must be furnished to the Plaintiff which include all the details stated in paragraphs (a) to (f) of Clause 17.1;

    (2) the 1st Defendant only gave to the Plaintiff either a one page or two page document entitled "*Revenue Summary*" (**Revenue Summary**). The Revenue Summaries had no details and supporting documents; and

    (3) the 3rd Defendant admitted during cross-examination that the Revenue Summaries did not have a breakdown of the number of students. The 3rd Defendant further admitted in cross-examination that despite the Plaintiff's requests, the 1st Defendant did not supply to the Plaintiff details and breakdown of information in the Revenue Summaries.

58. The 2nd and 3rd Defendants alleged that the Plaintiff could verify the contents of the Revenue Summaries with the 1st Defendant's sub-licensees (**Sub-Licensees**). I am not able to accept this contention because the 1st

Defendant (not the Sub-Licensees) owes a contractual duty under Clause 17.1 to the Plaintiff. Furthermore, there is no contract between the Plaintiff and Sub-Licensees.

59. I should refer to the 1st Defendant's letter dated 6.5.2015 to Dr. Fong which stated, among others, as follows:

> "*… you have agreed and accepted in total, the format and timing of the reporting (extraneous of [MLA (2013)]") by way of quarterly, as well as half yearly reporting …*
>
> *There is thus no reason to believe that we are in breach of [MLA (2013)], as you have agreed by your conduct to alter Clause 17.1 and 17.2 [MLA (2013)] on the Monthly Reports and General Reports to be submitted to you.*"

I am not able to accept the contents of the 1st Defendant's letter dated 6.5.2015 because clause 45 MLA (2013) provides that MLA (2013), including Clause 17.1, may only be varied by a written agreement between the Plaintiff and 1st Defendant. There has not been any written agreement between the Plaintiff and 1st Defendant to vary MLA (2013), let alone Clause 17.1.

60. Clause 17.2 MLA (2013) (**Clause 17.2**) states that the 1st Defendant must furnish to the Plaintiff "*any other … calculations or information*" as required by the Plaintiff. I find as a fact that the 1st to 3rd Defendants have contravened Clause 17.2.

61. The Plaintiff has proven the following breaches of MLA (2013) by the 1st to 3rd Defendants:

(1) the 3rd Defendant agreed during cross-examination that the 1st Defendant did not pay the increase in administration fees to the Plaintiff upon the renewal of sub-licenses for BB Centres in Subang Jaya and Cheras Alam Damai - please see clause 6.2(a)(i) and paragraph 8(iii) of Appendix 1 (**Appendix 1**) to MLA (2013);

(2) clause 29.2 MLA (2013) (**Clause 29.2**) provides that the 1st Defendant will not without the Plaintiff's prior written consent "*conduct, carry on, be involved with or acquire any interest (financial or beneficial) in any other business … which is similar to or competes with*" the BrainBuilder Business. Clause 29.2 has been breached by the 1st to 3rd Defendants as follows -

(a) SP2 sent an email dated 26.8.2015 to the 2nd and 3rd Defendants which requested the 2nd and 3rd Defendants to explain regarding MMO. Subsequently, there was an email dated 14.9.2015 (from SP2) and a letter dated 14.9.2015 (from the Plaintiff) to the 2nd and 3rd Defendants regarding MMO. The 3rd Defendant admitted during cross-examination that he did not reply to the emails and letter concerning MMO. The registration of MMO as a business which is similar to and/or which may compete with the BrainBuilder Business, constitutes a breach of Clause 29.2; and

(b) SPSB was incorporated on 13.12.2012 with the 2nd and 3rd Defendants as its only directors. The 1st Defendant holds 61% of the shares in SPSB. There is a contravention of Clause 29.2 with

the incorporation of SPSB which has a similar business and/or which may compete with the BrainBuilder Business;

(3) the 1st Defendant had operated more than five BB Centres but did not pay to the Plaintiff sub-license fees for each of the centres in excess of five [as provided in clause 6.1 MLA (2013) read with paragraph 5 of Appendix 1]; and

(4) after the Termination, the 2nd and 3rd Defendants breached clause 29.3 MLA (2013) by carrying on TeamMathics business (which competes with the BrainBuilder Business). This is clear from the following evidence -

(a) the Photographs;

(b) publication dated 11.8.2016 in "*Sin Chew Daily*" (a national newspaper in Chinese), exhibit P12 (**Newspaper Publication**). The Newspaper Publication stated the same telephone number as 1st Defendant's BB Centre in Subang Jaya;

(c) during cross-examination, the 4th Defendant admitted that -

(i) all TeamMathics Centres used the same premises and same telephone numbers as the 1st Defendant's BB Centres; and

(ii) except for three TeamMathics Centres, the other TeamMathics Centres are managed by the same personnel

who previously managed the 1st Defendant's BB Centres; and

(d) the 1st Defendant did not give any notice or inform its students of the Termination. It is clear that TeamMathics Centres have taken over the students who have initially enrolled in BB Centres.

62. Regarding Setapak Centre, I find that Dr. Fong and the Plaintiff are estopped from claiming that the 1st to 3rd Defendants have breached MLA (2013) because Dr. Fong has admitted during cross-examination that he had received payments from the 1st Defendant regarding Setapak Centre - please see the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in **Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd** [1995] 4 CLJ 283, at 294-295.

G(2). Whether 2nd and 3rd Defendants are liable under Guarantee

63. Regarding the breaches of MLA (2013) by the 1st to 3rd Defendants [please see the above Part G(1)], the 2nd and 3rd Defendants are clearly liable to the Plaintiff under the Guarantee.

H. Have 2nd to 6th Defendants committed tort of conspiracy to defraud Plaintiff?

64. In **Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors** [2016] 11 MLJ 38, I have followed, among others, the Court of Appeal decisions in **Renault SA v Inokom Corp Sdn Bhd & other appeals** [2010] 5 MLJ 394, at paragraphs 30-34, and **SCK Group Bhd & Anor v Sunny**

Liew Siew Pang & Anor [2011] 4 MLJ 393, at paragraphs 13 and 14, regarding the elements of the tort of conspiracy by unlawful means (which includes the tort of conspiracy to defraud). It was held in **Muniandy**, at paragraph 21, as follows:

> "*21. Based on my understanding of the above cases -*
>
> *(1) the 3 elements of the tort of conspiracy to injure by unlawful means (3 Elements), are as follows:*
>
> *(a) there must be proof of -*
>
> *(i) an agreement; and/or*
>
> *(ii) a combination of efforts*
>
> *of the conspirators to injure the plaintiff. Such an agreement or combination may be -*
>
> *(ai) formal or informal; or*
>
> *(aii) in writing or by word of mouth;*
>
> *(b) there are acts committed to execute the agreement or combination to injure the plaintiff; and*
>
> *(c) the plaintiff has suffered damage due to acts done in execution of the agreement or combination to injure the plaintiff.*"

65. I am satisfied that the Plaintiff has failed to discharge the legal and evidential burden to prove on a balance of probabilities that the 2nd to 6th Defendants have conspired to defraud the Plaintiff. This decision is based on the following evidence and reasons:

(1) there is no evidence of any agreement or combination of efforts on the part of the 2nd to 6th Defendants to commit fraud on the Plaintiff (**Agreement/Combination**);

(2) no act has been committed to execute any Agreement/Combination. During cross-examination of SP1, he admitted that he had no evidence that 2nd and 3rd Defendants had conducted classes for 5th and 6th Defendants by using Dr. Fong's Method; and

(3) the Plaintiff has not adduced any evidence regarding any loss or damage which the Plaintiff has suffered due to any act done in execution of any Agreement/Combination.

I. <u>Whether 2nd to 6th Defendants have committed tort of breach of confidence</u>

66. According to the Federal Court's judgment delivered by Richard Malanjum CJ (Sabah & Sarawak) in **Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor** [2016] 6 CLJ 176, at paragraph 31, the tort of breach of confidence has the following 3 ingredients:

(1) the information in question must have the necessary quality of confidence;

(2) the information must have been imparted in circumstances importing an obligation of confidence; and

(3) there must be an unauthorised use of that information to the detriment of the party communicating it.

67. I find as a fact that the Plaintiff has failed to prove that the 2nd to 6th Defendants have committed tort of breach of confidence. This is because there is no evidence that there has been an unauthorized use of the Plaintiff's Confidential Information by the 2nd to 6th Defendants to the Plaintiff's detriment. During cross-examination, Dr. Fong admitted that the Plaintiff did not have evidence that the Defendants had used the students' database of BrainBuilders Business.

J. Whether Dr. Fong had misrepresented to 1st to 3rd Defendants

68. I am of the view that Dr. Fong has not committed any fraudulent or negligent misrepresentation to the 1st to 3rd Defendants regarding the 3 Documents. Nor did Dr. Fong misrepresent anything to the 1st to 3rd Defendants which falls within any of the paragraphs (a) to (c) of s 18 CA. Section 18 CA reads as follows:

> " *"Misrepresentation" includes -*
>
> *(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;*
>
> *(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and*

(c) *causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.*"

69. The above decision is supported by the fact that the 1st to 3rd Defendants did not raise any concern or complaint regarding any misrepresentation by Dr. Fong (**Alleged Misrepresentation**) until after the filing of the Plaintiff's Suit. The Alleged Misrepresentation is clearly an afterthought by the 1st to 3rd Defendants to stifle unlawfully the Plaintiff's Suit.

70. Even if is assumed that the Alleged Misrepresentation has been proven, I cannot allow the Counterclaim (1st to 3rd Defendants) in view of the illegality of the 3 Documents [please see the above Parts F(3) and F(4)] and the court's inability to grant any remedy in this case [please refer to the above Part F(5)].

K. <u>Whether Plaintiff's Suit is an abuse of court process</u>

71. The tort of abuse of court process has been explained by Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of **Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Ungku Mohamed** [1998] 2 CLJ 340, at 352-356. The Plaintiff's Suit cannot constitute an abuse of court process because -

(1) the 1st to 3rd Defendants have breached the MLA (2013) [please refer to the above Part G(1)]; and

(2) save for the illegality of the Guarantee [as explained in the above Part F(4)], the 2nd and 3rd Defendants would have been liable to the Plaintiff under the Guarantee [please see the above Part G(2)].

L. Costs

72. In view of the illegality and unenforceability of the 3 Documents, there will be no order as to costs regarding the Plaintiff's Suit and Counterclaim (1st to 3rd Defendants) - please see **Tan Kang Hai**, at paragraph 54.

M. Court's decision

73. Premised on the above evidence and reasons -

(1) the Plaintiff's Suit is dismissed;

(2) the Counterclaim (1st to 3rd Defendants) is dismissed;

(3) no order as to costs is made in this case; and

(4) the SFC Order is discharged and the sum of RM50,000.00 (furnished as security for costs by the Plaintiff to the Defendants) shall be refunded to the Plaintiff.

74. In summary -

(1) despite Clause 37 -

(a) this court has jurisdiction to try this case pursuant to s 23(1)(a), (b) and/or (c) CJA. The Malaysian court is the appropriate forum,

as compared to a court in Singapore, to hear this matter. In any event, all the parties in this case have irrevocably submitted to the jurisdiction of this court; and

(b) Malaysian law applies to MLA (2013);

(2) the 2 Conditions have been fulfilled for the court to lift the corporate veil to reveal that -

(a) Dr. Fong is the *alter ego* of DFB and the Plaintiff; and

(b) the 2nd and 3rd Defendants are the 1st Defendant's directing mind and will;

(3) the MLA (2013) constitutes a "*franchise*" agreement because all the 4 Prerequisites in s 4(a), (b), (c) and (e) FA have been fulfilled. Hence, the FA applies to MLA (2013);

(4) in view of the 2 Breaches under ss 6(1) and 6A(1) FA, the entire MLA (2013) is void under s 24(a) and/or (b) CA. The Guarantee and PA are also void under s 24(a) and/or (b) CA because all the 3 Documents form a single composite transaction;

(5) as the 3 Documents are void, on the facts of this case the court cannot grant redress to any party under -

(a) ss 66 or 71 CA; or

(b) the doctrine of unjust enrichment;

(6) if the 3 Documents are valid -

(a) the 1st to 3rd Defendants are liable to the Plaintiff for breaches of MLA (2013); and

(b) the 2nd and 3rd Defendants are liable to the Plaintiff under the Guarantee;

(7) the 2nd to 6th Defendants have not committed -

(a) the tort of conspiracy to defraud the Plaintiff; and

(b) the tort of breach of confidence;

(8) Dr. Fong has not misrepresented anything to the 1st to 3rd Defendants regarding the 3 Documents; and

(9) the Plaintiff's Suit does not constitute an abuse of court process.

75. This judgment serves as a reminder that **all** franchisors and franchisees (local and foreign) are mandatorily required under ss 6(1), 6A(1) and 6B FA to register their franchises with the Registrar.

WONG KIAN KHEONG
Judge
High Court (Commercial Division)
Kuala Lumpur

DATE: 11 JUNE 2018

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