

- (a) copyright infringement under s 36(1) of the Copyright Act 1987
(CA);
- (b) tort of breach of confidence;
- (c) tort of unlawful interference with Plaintiff's business; and
- (d) tort of conspiracy by unlawful means

(Plaintiff's Suit); and

- (2) the first defendant (**1st Defendant**) had counterclaimed against the Plaintiff for copyright infringement, tort of breach of confidence and tort of unlawful interference with 1st Defendant's business (**1st Defendant's Counterclaim**).

2. The only novel issues which arise in this case are –

- (1) what is the effect of “*ACPO (Association of Chief Police Officers) Good Practice Guide for Digital Evidence*” (**ACPO's Guide**) in respect of expert evidence by computer forensic analysts?;
- (2) can Defendants rely on opinion evidence based on the experience of an Inland Revenue Board's (**IRB**) investigating officer regarding stamp duty forgeries committed by “*runners*”?;
- (3) what is the scope of copyright infringement under the 2 limbs of s 36(1) CA; and
- (4) if the court allows Plaintiff's Suit or 1st Defendant's Counterclaim, how should the court decide in respect of –

- (a) exemplary damages;
- (b) aggravated damages;
- (c) compensatory damages under s 37(1)(b) CA;
- (d) an account of profits under s 37(1)(c) and (3) CA;
- (e) statutory damages under s 37(1)(d) and (8) CA (**Statutory Damages**); and
- (f) additional damages under s 37(7) CA (**Additional Damages**)?

B. Plaintiff's case

3. The following witnesses testified for the Plaintiff in this case:

- (1) Encik Asrul Sani bin Shamsuddin (**Encik Asrul**);
- (2) Puan Suryawati bt. Yusoff (**Puan Suryawati**);
- (3) Encik Harris bin Ismail (**Encik Harris**);
- (4) Mr. Lim Fang Chen (**Mr. Lim**);
- (5) Puan Rozana bt. Ramly (**Puan Rozana**); and
- (6) Mr. Sanjay Sidhu (**Mr. Sanjay**).

4. Encik Harris testified as follows, among others:

- (1) Encik Harris is –
 - (a) an Executive Director of the Plaintiff; and
 - (b) the Group Chief Executive Officer (**CEO**) and President of “*HeiTech Group of Companies*” (**HeiTech Group**);
- (2) Plaintiff is -

- (a) a subsidiary of HeiTech Padu Bhd. (**HeiTech**), a public listed company; and
 - (b) a member of HeiTech Group;
- (3) HeiTech Group has over 20 years of experience specializing in developing Information and Communications Technology (**ICT**) systems and infrastructure for various government agencies, government linked companies, financial institutions and commercial sector;
- (4) Encik Harris is not involved in the day-to-day running of the Plaintiff but he is involved in the oversight of the business of the Plaintiff because he would be given reports and emails regarding the Plaintiff;
- (5) the second defendant (**2nd Defendant**) was initially the Company Secretary of HeiTech Group. Subsequently, 2nd Defendant became the Plaintiff's CEO (on 5.5.2006) and Managing Director (**MD**) (on 16.9.2010). The 2nd Defendant reported to Encik Harris and had discussions with him during "*business planning meetings*";
- (6) Bank Negara Malaysia proposed to "*Persatuan Insurans Am Malaysia*" (**PIAM**) an idea (**Proposal**) to develop and manage a centralized database for all insurance companies to refer in the processing of motor insurance claims (**Insurance Claims Processing**);

- (7) PIAM approached Plaintiff regarding the Proposal. The Plaintiff decided to invest a lot of money, time and effort to develop “*Electronic Vehicle Authentication System*” (**eVAS System**) because eVAS System would be able to generate high revenue for the Plaintiff. The advantages of eVAS System are -
- (a) eVAS System can authenticate “*Approved Permits*” (**AP**), chassis and engine profiles of all vehicles imported into Malaysia. Users of eVAS System, such as financial institutions, will be able to authenticate vehicle data on real time and can then decide to provide hire purchase financing for imported cars (**HP Financing**);
 - (b) eVAS System can prevent fraud regarding AP and HP Financing;
 - (c) eVAS System will directly connect its users to relevant government agencies and can therefore save its users a lot of money as they need not pay runners; and
 - (d) eVAS System will reduce subjectivity and improve Insurance Claims Processing;
- (8) on behalf of Plaintiff, 2nd Defendant proposed to HeiTech to support Plaintiff to develop eVAS System (**Project**). HeiTech agreed to the Project by getting necessary approvals and funds for the Project. Plaintiff had expended a lot of money, time and effort for the Project as follows –

- (a) in 2010, Plaintiff commissioned its sister company, MSCL Holdings Sdn. Bhd. (**MSCL**), to develop eVAS System;
- (b) from 1.7.2009 to 31.7.2014, Plaintiff had employed 1st Defendant to –
 - (i) take charge of development of the Project;
 - (ii) be the contact person with MSCL regarding the Project;
 - (iii) represent Plaintiff in meetings with clients and/or potential clients;
- (c) both 1st and 2nd Defendants -
 - (i) had access to all information and documents related to eVAS System (**eVAS Information**);
 - (ii) briefed Plaintiff's Board of Directors (**BOD**) regarding development of Project; and
 - (iii) represented Plaintiff in discussions with various clients and/or potential clients, including Ministry of International Trade and Industry (**MITI**), Ministry of Finance (**MOF**), Malaysia Automotive Institute (**MAI**) and Financial Information Services Sdn. Bhd. (**FIS**);
- (d) Plaintiff, MAI and FIS were negotiating on a Memorandum of Understanding regarding eVAS System (**Draft Tripartite MOU**); and

- (e) Plaintiff and MAI were discussing a draft “*Joint Co-operation Agreement For the Provision of Electronic Vehicle Authentication System*” (**Draft JCA**);
- (9) eVAS Information constitutes confidential information and a trade secret which is owned exclusively by Plaintiff;
- (10) by reason of employment contracts with Plaintiff, 1st and 2nd Defendants are restrained from using or disclosing eVAS Information to a third party without Plaintiff’s prior consent;
- (11) by way of a letter dated 23.1.2015, MAI informed Plaintiff that MAI would not proceed with purchase of eVAS System from the Plaintiff because intellectual property rights (**IP**) in eVAS Information belonged to 1st Defendant due to a license agreement dated 10.4.2007 between 1st Defendant and Plaintiff (**Alleged License Agreement**). The Plaintiff claimed that the Alleged License Agreement had been fabricated as, among others, the Plaintiff had not authorized 2nd Defendant to sign the Alleged License Agreement on behalf of Plaintiff;
- (12) Plaintiff conducted investigation which revealed, among others –
- (a) according to a webpage, “*MOTORME.MY*”, FIS would collaborate with MAI and third defendant company (**3rd Defendant**) regarding eVAS System and all 3 parties would sign a tripartite agreement;

- (b) a compact disc (**CD**) was adduced as evidence to show the signing of an “*EVAS Tripartite Agreement*” on 3.7.2015 at MAI’s premises in Cyberjaya. The CD showed the 1st Defendant, 2nd Defendant and Encik Shaharudin acting on behalf of 3rd Defendant in dealings with MAI and FIS; and
- (c) Plaintiff has promoted a new business called “*CARFACTS*”. The 1st Defendant is the CEO of a company which has changed its name on 27.3.2014 from “*Fourbros Sdn. Bhd.*” to “*Carfax Sdn. Bhd.*” (**Carfax**). Encik Shaharudin is a director of Carfax. The Plaintiff had expended money on CARFACTS by, among others, sending 1st Defendant to the United States of America to do research regarding CARFACTS; and
- (13) Encik Harris affirmed a Statutory Declaration (**SD**) under s 42 CA which stated that copyright subsisted in work regarding eVAS System (**eVAS Work**) at the latest in March 2014 and such a copyright is owned by the Plaintiff.
5. Mr. Lim gave the following evidence, among others:
- (1) Mr. Lim was the Head of “*Product and Design*” Department in MSCL. Mr. Lim was subsequently transferred from MSCL to Plaintiff;
- (2) Mr. Lim was MSCL’s Project Manager for eVAS System who led a team consisting of a web designer, 2 developers and a system architecture designer (**Mr. Lim’s Team**) to -

- (a) develop eVAS System; and
 - (b) provide consultancy services for the Project;
- (3) regarding the Project -
- (a) over a period of 5 years, after a lot of time, research, effort and skill, Mr. Lim's Team created eVAS Work by, among others, producing -
 - (i) a first prototype in 2010 and a second prototype in 2014 (**Prototypes**);
 - (ii) "*VIN Decoding Engine*";
 - (iii) a detailed process work flow (which lays down the logical steps to be taken one by one in eVAS System) (**MSCL's Workflow**);
 - (b) the essential features of MSCL's Workflow are -
 - (i) there is a two-tier verification process by way of a single login to "*Financial Information System*" and eVAS System by username and password. Such a single login is not common; and
 - (ii) "*eVAS Credit Deduction Flow*" informs a user of eVAS System on whether the user has sufficient credit in eVAS System to use eVAS System. When eVAS System is used,

eVAS System will automatically deduct a fee from the user's credit in the eVAS System;

(c) the Project is about 80% complete in the sense that eVAS System can be connected to a database;

(d) Mr. Lim stated that it was his "*standard way of preparing documents*" by putting "*Copyright @ [MSCL]*" on MSCL's Workflow;

(e) as regards 1st Defendant -

(i) 1st Defendant was Plaintiff's contact person for the Project;

(ii) Mr. Lim liaised and discussed with 1st Defendant regarding the Project. Mr. Lim stated that he took into account 1st Defendant's comments on the Project and tweaked the process work flow but disagreed that -

(iia) 1st Defendant had shown eVAS Work documents to Mr. Lim sometime in 2008 or 2009. In fact, Mr. Lim asserted that the first time he met 1st Defendant was in 2010;

(iib) for the entire Project until 1st Defendant left Plaintiff, 1st Defendant informed Mr. Lim regarding the process work flow; and

(iic) 1st Defendant played an important role in the Project; and

- (iii) Mr. Lim asked 1st Defendant to arrange a meeting with the potential users of 1st Defendant but 1st Defendant did not do so;
 - (f) Mr. Lim gave a report dated 12.1.2014 on the work done in the Project (**Mr. Lim's Report**); and
 - (g) MSCL issued an invoice dated 30.9.2014 to Plaintiff (for a sum of RM250,000.00) in respect of the Project. During cross-examination, Mr. Lim admitted that there were “serious” discrepancies between the sums stated for work done by MSCL in its invoice and its costing proposal to Plaintiff. Mr. Lim however explained that MSCL's costing proposal was only an estimate and there was additional work by MSCL during the development of the Project; and
- (4) 1st Defendant's “*MySDI*” System (**1st Defendant's System**) has the same essential features, process flow and logical sequence of MSCL's Workflow.
- 6. Encik Asrul, Puan Suryawati and Puan Rozana have been subpoenaed by Plaintiff to give evidence in this case.
 - 7. Encik Asrul is an Assessment Executive Officer in IRB. Encik Asrul's evidence is as follows, among others:

- (1) on 13.10.2016, Encik Asrul was referred to the original copy of the Alleged License Agreement (**Exhibit P2**). The first page of Exhibit P2 had a digital stamp franking mark which stated, among others, “02-108” and the date of “23.4.07”. Encik Asrul testified that based on the records of Collector of Stamp Duties (**Collector**), the Collector did not use a digital stamp franking machine with the number 02-108 on 23.4.2007;
- (2) Exhibit P2 had a digital franking stamp mark at page 1 **and** a “*Setem Hasil*” of RM10.00 (**Revenue Stamp**) glued on its page 12 with a date “20.4.2007” (**Double Stamping**). During cross-examination, Encik Asrul testified that the Collector will not allow Double Stamping; and
- (3) according to -
 - (i) a Power Point presentation by IRB on history and manner of stamping under Stamp Act 1949 (**SA**) from 1957 to present times (**Exhibit P3**); and
 - (ii) IRB’s Media Statement (**Exhibit P4**),
 - the Revenue Stamp was only introduced on 1.2.2009.

8. Puan Suryawati is an Assessment Executive Officer with IRB. On 7.11.2016, Puan Suryawati testified as follows, among others:

- (1) on 13.10.2016, the 1st Defendant went to Puan Suryawati's office and showed her Exhibit P2. Puan Suryawati visually inspected the Revenue Stamp on Exhibit P2 and found it to be valid;
 - (2) when Puan Suryawati was shown Exhibits P3 and P4, she admitted that she was not sure that the Revenue Stamp on Exhibit P2 was only used from 1.2.2009 because she only started to work in the Stamp Duty Unit in January 2015;
 - (3) Double Stamping is not the practice of the Collector; and
 - (4) ordinarily, the Revenue Stamp should be placed on the first page of the document in question.
9. The Plaintiff recalled Puan Suryawati to the witness stand on 6.12.2016 and she was shown a copy (not the original) of the Alleged License Agreement (**Exhibit P14**). Puan Suryawati testified that she could not remember whether she had examined Exhibit P2 or Exhibit P14 on 13.10.2016 (when she met 1st Defendant). During re-examination –
- (1) Puan Suryawati stated that there were differences between Exhibit P2 (original) and Exhibit P14 (copy) as follows -
 - (a) there were scratch marks on page 1 of Exhibit P14 (not found in Exhibit P2); and
 - (b) the digital franking stamp mark on Exhibit P2 was brighter than the same mark on Exhibit P14;

(2) the Plaintiff's learned counsel, Ms. Cindy Goh Joo Seong (**Ms. Goh**) applied for leave of court to cross-examine Puan Suryawati under s 154 of the Evidence Act 1950 (**EA**). Mr. Suaran Singh (**Mr. Suaran**), the Defendants' learned counsel, objected to this application. I exercised my discretion under s 154 EA and granted leave for Ms. Goh to cross-examine her own witness because Puan Suryawati initially testified on 7.11.2016 that she had seen Exhibit P2 (original) on 13.10.2016. During Puan Suryawati's recall on 6.12.2016, she gave evidence that she could not remember whether she had examined Exhibit P2 or Exhibit P14 on 13.10.2016. There is therefore a material contradiction in Puan Suryawati's evidence in respect of which document (Exhibit P2 or Exhibit P14) had been examined by her on 13.10.2016. I rely on the following judgment of Siti Norma Yaakob J (as she then was) in the High Court case of **S. Lourdenadin v M. Ratnavale Nee Annalakshmi Vattivelu & Anor** [1986] CLJ (Rep) 481, at 490 –

“Our s. 154 is in pari materia with s. 154 of the Indian Evidence Act 1872 and the case of Amathayaramal v. The Official Assignee, High Court Madras [1933] IC 629 provides the following guidelines how this discretion can be exercised.

(1) Before the procedure can be adopted, the party wishing to cross-examine its own witness, must formally ask and obtain the Court's permission.

- (2) *It is not necessary that the witness should first of all be determined to be hostile as in the law and practice in England.*
- (3) *Although s. 154 gives the Court unfettered discretion, it ought not to exercise its discretion unless during the examination-in-chief of the witness something happens which make it necessary for facts to be got from the witness by means of cross-examination.”*

(emphasis added).

I am of the view that the court may exercise its discretion under s 154 EA to grant leave for a party to cross-examine his or her own witness if it is necessary for that party to elicit the truth from the witness by way of cross-examination regarding a “*fact in issue*” (as defined in s 3 EA) and/or a “*relevant fact*” (construed in s 3 EA to be a relevant fact as provided in EA); and

- (3) when Ms. Goh suggested to Puan Suryawati that it was impossible for her to be unsure whether she had inspected Exhibit P2 or Exhibit P14, she replied that she did not know. Puan Suryawati added that she was not sure whether the Revenue Stamp was genuine or not. She even admitted that she did not properly examine the document on 13.10.2016.

10. Puan Rozana is an Assistant Legal Officer with Malaysia Department of Insolvency (**MDI**). It is not disputed that 1st Defendant is an undischarged

bankrupt since December 2015. Puan Rozana gave the following evidence during examination-in-chief:

- (1) 1st Defendant handed over the original copy of the Alleged License Agreement to MDI in his application for sanction of the Director General of Insolvency (**DGI**) for the 1st Defendant's Counterclaim [s 38(1)(a) of the Bankruptcy Act 1967 requires DGI's sanction for 1st Defendant's Counterclaim];
 - (2) 1st Defendant sent 2 emails dated 12.10.2016 and 17.10.2016 (**Exhibits P7** and **P8** respectively) to MDI which requested MDI to return the original copy of the Alleged License Agreement to 1st Defendant so as to enable 1st Defendant to use that document in this case; and
 - (3) Puan Rozana returned the original copy of the Alleged License Agreement to 1st Defendant on 18.10.2016 and such a fact was evidenced in MDI's letter dated 18.10.2016 signed by Puan Rozana and acknowledged by 1st Defendant (**Exhibit P9**)
11. In this case, 1st Defendant relied on a screen shot from his notebook "*MacBook Air*" (**1st Defendant's Notebook**) to prove that he had created 1st Defendant's System on certain dates (**Timestamps**) and Plaintiff had therefore infringed his copyright in his work regarding 1st Defendant's System. The Defendants had adduced expert evidence from Encik Shukri bin Othman (**Encik Shukri**) to prove the reliability of the Timestamps. The

Plaintiff had however called Mr. Sanjay, a computer forensics expert, to rebut Encik Shukri's expert opinion.

C. Defendants' case

12. The following persons gave evidence for the Defendants in this case:

- (1) 1st Defendant;
- (2) 2nd Defendant;
- (3) Encik Shaharudin bin Ismail (**Encik Shaharudin**);
- (4) Encik Shukri; and
- (5) Encik Khairul Anwar bin Jamil (**Encik Khairul**).

13. 1st Defendant gave the following evidence, among others:

- (1) 1st Defendant was the author and owner of all IP rights in respect of eVAS System and eVAS Information (which is called MySDI System by 1st Defendant). The 1st Defendant prepared 1st Defendant's System as an independent contractor of Insolvency Data Corporation Bhd. (**IDCB**);
- (2) 1st Defendant knew 2nd Defendant since 1997. In 2006, 1st Defendant shared 1st Defendant's System with 2nd Defendant (who was then working for Plaintiff). The 2nd Defendant suggested that 1st Defendant should collaborate with the Plaintiff to carry out 1st Defendant's System;

- (3) to protect 1st Defendant's IP rights in 1st Defendant's System, 1st Defendant drafted Alleged License Agreement by obtaining a sample from the Internet and "reengineered" it to fit his "business model";
- (4) to prove the 1st Defendant's Counterclaim, the 1st Defendant relied on the following evidence -
 - (a) Alleged License Agreement;
 - (b) workflow documents regarding 1st Defendant's System (**1st Defendant's Workflow Documents**);
 - (c) a document in 1st Defendant's handwriting regarding the framework of 1st Defendant's System (**1st Defendant's Framework**);
 - (d) a document entitled "*Proposing New Recurring Revenue, Vehicle Authentication System - eVAS*" which was allegedly prepared by 1st Defendant (**1st Defendant's eVAS Proposal**); and
 - (e) Timestamps regarding the dates of preparation of -
 - (i) 1st Defendant's Workflow Documents on 5.9.2008 and 11.11.2008; and
 - (ii) 1st Defendant's eVAS Proposal on 29.3.2008;
- (5) regarding the Alleged License Agreement -

- (a) 1st Defendant handed a copy (not the original) of Alleged License Agreement to Puan Suryawati; and
 - (b) in respect of Double Stamping, 1st Defendant alleged that he paid RM40.00 (RM30.00 for the service and RM10.00 as cost of the stamp) to a runner (a Malay gentleman named “*Din*”), to have the Alleged License Agreement stamped. The 1st Defendant then realized that the Alleged License Agreement was stamped on its signing page. As such, he instructed the same runner to have the first page of the Alleged License Agreement stamped;
- (6) after 1st Defendant left Plaintiff, he incorporated 3rd Defendant and requested 2nd Defendant and fourth defendant (**4th Defendant**) as well as Encik Shaharudin to be directors of 3rd Defendant. The 1st Defendant could not be 3rd Defendant’s director due to his bankrupt status; and
- (7) 1st Defendant claimed to be a consultant for Plaintiff and was not its employee because -
- (a) 1st Defendant was not given a room, work station, email account or access card by Plaintiff. The 1st Defendant had to use his personal email to transact business on behalf of Plaintiff;
 - (b) 1st Defendant could not print documents himself in Plaintiff’s office and had to get Plaintiff’s staff to help him to print documents; and

(c) Plaintiff did not make any Employees Provident Fund contribution as an employer for 1st Defendant except for November and December 2013 and the period from February to August 2014.

14. 2nd Defendant testified, among others, as follows:

- (1) 2nd Defendant was the Plaintiff's Chief Operating Officer (**COO**) in 2000. On 1.5.2005, 2nd Defendant was appointed the MD and CEO of the Plaintiff. In 2013, 2nd Defendant was made Plaintiff's "Advisor". The 2nd Defendant was also the Group Company Secretary of HeiTech Group and the Company Secretary for Plaintiff;
- (2) on 13.1.2014, 2nd Defendant gave notice to Plaintiff that he resigned with immediate effect as a member of Plaintiff's BOD and as Plaintiff's Advisor;
- (3) 2nd Defendant first met 1st Defendant in 1997. About 2006 or 2007, 1st Defendant informed 2nd Defendant that 1st Defendant was developing eVAS System and asked for 2nd Defendant's views on eVAS System. The 2nd Defendant then proposed to 1st Defendant that 1st Defendant should collaborate with Plaintiff to develop eVAS System; and
- (4) before collaborating with Plaintiff, 1st Defendant insisted on protecting his IP rights in eVAS System. Hence, the Alleged License Agreement was signed between Plaintiff and 1st Defendant. The 2nd Defendant signed the Alleged License Agreement on behalf of the Plaintiff because he was authorized to do so as Plaintiff's CEO and MD.

15. Encik Shaharudin gave the following evidence, among others:

- (1) Encik Shaharudin is a director of 3rd Defendant and the “*Director of Business Development*” for AmGeneral Insurance Bhd.;
- (2) Encik Shaharudin had almost 30 years’ experience in automotive industry. He was previously the General Manager (**GM**) at AmBank Bhd. as its head of Auto Finance Division;
- (3) Encik Shaharudin first met 1st Defendant sometime in 1998. Encik Shaharudin explained to 1st Defendant regarding various problems faced by banks in auto finance industry, especially regarding runners who “*tend to take short cuts and cut corners*” concerning verification of AP for purpose of HP Financing. Encik Shaharudin then suggested to 1st Defendant that there should a system to eliminate runners as a “*middle man*” and to allow banks to verify AP for purpose of HP Financing; and
- (4) after discussing with Encik Shaharudin, 1st Defendant proposed eVAS System and drafted 1st Defendant’s Workflow Documents. 1st Defendant’s Workflow Documents were shown to Encik Shaharudin around 2007 or 2008.

16. Encik Khairul is an IRB’s Assessment Executive Officer who had been subpoenaed by Defendants to give evidence in this case. Encik Khairul testified, among others, as follows:

- (1) Encik Khairul is attached to Tax Operations Department in IRB. His duties include, among others, investigation into forgeries of revenue stamps;
- (2) Encik Khairul stated that it was possible that the contents of Exhibit P4 (IRB's Media Statement that, among others, the use of revenue stamps with the denomination of 10 sen and 15 sen had been stopped by Collector) was not true. This was because according to Encik Khairul, revenue stamps with the denominations of 10 sen and 15 sen are still issued and sold by the Post Office. Encik Khairul added that, contrary to Exhibit P3 (IRB's Power Point presentation), revenue stamps with the denominations of RM1, RM2 and RM5 were still used from 2005 to 2009;
- (3) when shown the digital stamp franking mark on the first page of Exhibit P2 (original copy of Alleged License Agreement), Encik Khairul testified that based on his experience as an IRB investigation officer, this digital stamp franking mark was not genuine because there was no serial number. Encik Khairul added that as an IRB investigation officer, he had encountered forged digital stamp franking marks which involved runners (**Stamp Duty Forgeries**). According to Encik Khairul, parties who are liable to pay stamp duty under SA, do not know about Stamp Duty Forgeries committed by their runners and are deceived by their runners to believe that the relevant stamp duty has been paid. Encik Khairul stated that Stamp Duty Forgeries usually involved revenue stamps with the denomination of RM10;

- (4) based on Encik Khairul's experience, he opined that the Revenue Stamp at page 12 of Exhibit P2 was genuine. He subsequently testified that he did not know when the Revenue Stamp was first issued; and
- (5) Encik Khairul had come across 2 cases of Double Stamping. Encik Khairul then gave a lengthy explanation of some scenarios regarding Double Stamping.

D. Whether 1st Defendant could rely on Timestamps

17. During pre-trial case management, pursuant to O 40A r 5 of the Rules of Court 2012 (**RC**), I have directed Mr. Sanjay and Encik Shukri to discuss before trial in the presence of all parties and their solicitors for the following 2 purposes:
 - (1) whether Mr. Sanjay and Encik Shukri can agree on matters regarding the Timestamps (**Experts' Agreement**). All parties had agreed in writing under O 40A r 5(5) RC that the Experts' Agreement shall be binding on them; and
 - (2) Mr. Sanjay and Encik Shukri would summarise the differences in their expert opinions and the reasons for such differences (**Experts' Disagreement**). Parties had agreed in writing that the cross-examination of Mr. Sanjay and Encik Shukri shall be confined to the Experts' Disagreement.
18. According to the Experts Agreement, among others –

- (1) parties do not dispute the expertise of Mr. Sanjay and Encik Shukri in the field of computer forensic analysis;
 - (2) contents of a “*bash history file*” (**BHF**) in a computer can be modified or deleted;
 - (3) Encik Shukri did not conduct a “*Meta Data*” [information embedded in files by a computer’s operating system (**OS**) which is hidden from ordinary view] analysis of BHF in 1st Defendant’s Notebook; and
 - (4) if a file is created in a different computer, modified in that computer and then copied to a Macbook, there will be no evidence in that Macbook to indicate the modification.
19. The Experts’ Disagreement concerned, among others, the following issues:
- (1) whether Encik Shukri’s analysis of 1st Defendant’s Notebook was in accordance with the best practice of digital forensic analysis;
 - (2) whether it was reasonable for BHF in 1st Defendant’s Notebook to have no contents;
 - (3) whether the Timestamps had been changed;
 - (4) whether it was unusual that there was no created timestamp on file “*MRC_evas.pptx*” in 1st Defendant’s Notebook; and
 - (5) whether the signature mismatch of file “*MRC_evas.ppsx*” was unusual.

20. Encik Shukri is the Chief Forensic Analyst and COO of Siaga Informatics Sdn. Bhd. Encik Shukri testified as follows, among others:

- (1) when Encik Shukri was given 1st Defendant's Notebook, the "*FireVault*" encryption system had been enabled. Encik Shukri disabled FireVault before he commenced a "*Dump Disk*" imaging process (**Imaging Process**) to get an unencrypted (readable) image (**Disk Image**) of all data in the hard disk (**HD**) in 1st Defendant's Notebook, including matters which had been deleted from the HD. According to Encik Shukri, if he did not disable FireVault, he would not be able to obtain the Disk Image in an unencrypted form and there was a possibility that he might not have obtained all the data in the HD;
- (2) before Imaging Process, Encik Shukri checked BHF in 1st Defendant's Notebook and found nothing suspicious. Encik Shukri disagreed with Mr. Sanjay's opinion that it is not reasonable for BHF in 1st Defendant's Notebook to have no contents. According to Encik Shukri, whether a BHF has contents or not, depends on the user of a notebook. Encik Shukri stated that in everyday use of a notebook, there is no need to run a "*Touch*" command in the Terminal of a MacBook notebook;
- (3) after Encik Shukri had obtained the Disk Image, he used "*EnCase Forensic 8.01.01*" software to retrieve information contained in the Disk Image (**Retrieved Information**);
- (4) Encik Shukri ascertained whether there was any change to the Timestamps in the Retrieved Information by -

- (a) checking the internal setting and time zone; and
 - (b) determining whether Timestamps had been modified by using the Touch command. Encik Shukri viewed BHF to determine whether the Touch command had been used to modify Timestamps; and
- (5) by using the above 2 methods, Encik Shukri could not find any evidence of modification of Timestamps.

21. Mr. Sanjay is an Executive Director (Advisory) in BDO Governance Advisory Sdn. Bhd. According to Mr. Sanjay, among others –

- (1) there was no need for Encik Shukri to disable the FileVault prior to the Imaging Process because the data was unencrypted (readable). The “*proper*” practice of digital forensic analysis would require FileVault to be enabled during the Imaging Process;
- (2) the disabling of FileVault would begin to decrypt the entire user partition (which contains all data created by the user). The decryption process should be completed before the commencement of Imaging Process. Mr. Sanjay opined that there would not be enough time for the completion of decryption process and consequently, the decryption process was active during the Imaging Process. Hence, the decryption process would affect the Disk Image (obtained by way of Imaging Process);

- (3) the hash information of the “*Source Hard Drive*” (**SHD**) of 1st Defendant’s Notebook must be ascertained for the following 2 reasons -
- (a) to ensure that the Disk Image was a correct copy of HD; and
 - (b) to verify that the Disk Image had not been altered by Imaging Process.

Encik Shukri did not hash the SHD;

- (4) when a file is created, copied or transferred to a computer running “*MAC OS*”, the OS will always assign a “*created*” timestamp to reflect the time of creation, copy or transfer. Mr. Sanjay is of the view that it is unusual for file “*MRC_evas.pptx*” not to have a created timestamp;
- (5) the signature analysis of file “*MRC_evas.ppsx*” showed the value of “*Alias*”. This means the file extension (*ppsx*) did not match its file header (data contained in the first few bytes of a file which can be used to identify the file type). Such a signature mismatch of file “*MRC_evas.ppsx*” was unusual and suggested that file “*MRC_evas.ppsx*” might have been manually edited. Furthermore, EnCase software had identified file “*MRC_evas.ppsx*” as an Android Application Package and not a “*PowerPoint (.pps)*” file. This further suggested that file “*MRC_evas.ppsx*” had been manually altered;
- (6) Encik Shukri only checked BHF attributed to the user account “*syahri*”. It is possible for a user to run a Touch command using the prefix “*sudo*” which will elevate the user to “*root*” (administrator) level.

In such an instance, BHF will not be located in the user's account but will be linked to the root user's account. Encik Shukri did not examine BHF of root user and users other than the user account "*syahri*";

- (7) the contents of a BHF can be easily removed with a command such as "*history-c*" or "*history-cw*";
- (8) Encik Shukri did not check the applications installed in 1st Defendant's Notebook to determine whether any such application could allow the manipulation of timestamps;
- (9) Encik Shukri did not ascertain on which computer the files were originally created. Files could be first created on a different computer and its timestamp could be subsequently modified and then copied to 1st Defendant's Notebook. In such an event, there is no evidence in 1st Defendant's Notebook to indicate the time of modification of timestamp;
- (10) when a file is first created in a computer, there are 2 timestamps, namely –
 - (a) "*File System*" timestamp created by the OS and draws from the local clock in the computer; and
 - (b) Meta Data timestamp.

Both File System and Meta Data timestamps are independently maintained in the sense that if a user manually alters a File System timestamp by using a third party software, there is no guarantee that

the Meta Data timestamp will also be similarly altered. Hence, the need to check the entire Meta Data to ascertain the Meta Data timestamp; and

(11) it was not reasonable for BHF in 1st Defendant's Notebook to be empty because an administrator would be likely to have run a Terminal command at some point in time. Encik Shukri did not check the bash session file (which shows a list of Terminal sessions) (**BSF**) to ascertain why BHF was empty.

22. During cross-examination, Mr. Sanjay stated that he had not personally used EnCase software. I attach no weight to such a fact due to the following reasons:

- (1) the Defendants are estopped by Experts' Agreement from challenging Mr. Sanjay's expertise in this case;
- (2) Mr. Sanjay's impressive *Curriculum Vitae* leaves no room to doubt his expertise regarding Timestamps;
- (3) during cross-examination, Mr. Sanjay was able to answer Mr. Suaran's questions with cogent reasons; and
- (4) Mr. Sanjay explained during re-examination that at his work place, he has no personal experience in using EnCase software because his subordinates will carry out forensic examination by using EnCase software. Mr. Sanjay is however familiar with the use of EnCase

software because he has been trained in respect of its use and he regularly supervises its use by his subordinates.

23. I find as a fact that Mr. Sanjay is a reliable expert witness and I reject the expert opinion of Encik Shukri. This decision is premised on the following evidence and reasons:

- (1) there were 6 files in 1st Defendant's Notebook which were purportedly created before 2014 (**6 Files**). Encik Shukri admitted in cross-examination that as 1st Defendant's Notebook was a 2014 model and could not have been used by 1st Defendant prior to 2014, the 6 Files must have been created in a different computer. As stated in the Experts' Agreement, if a file is created in a different computer, modified in that computer and then copied to a Macbook, there will not be any evidence in the Macbook to indicate that modification. Accordingly, Encik Shukri agreed in cross-examination that he could not conclusively prove that there was no modification of the timestamps of the 6 Files. This is a ground in itself to find that the Timestamps are not reliable and cannot be used to support the 1st Defendant's case;
- (2) during cross-examination, Encik Shukri agreed that decryption process should be completed before he commenced Imaging Process. Encik Shukri further admitted that the reason why Imaging Process should only start after the completion of decryption process, is to prevent further encryption of data during the Imaging Process. As the Disk Image had been obtained by Encik Shukri by running together both the

decryption process and Imaging Process (**2 Processes**), there might be further encryption of data in the HD. Accordingly, the Disk Image acquired by Encik Shukri was incomplete and could not be relied on by Encik Shukri or any competent computer forensic analyst. Consequently, the Retrieved Information is also incomplete. On this ground alone, Encik Shukri's expert view on Timestamps cannot be accepted;

- (3) in answers to questions no. 8 and 9 of Encik Shukri's witness statement (**WSSD2**), he testified that –
- (a) he took approximately 28 minutes (**28 Minutes Period**) to run the 2 Processes;
 - (b) it is "*quite common*" for the 2 Processes to be completed within the 28 Minutes Period; and
 - (c) the time period to complete the 2 Processes depends on "*several factors*", such as the size of contents of files in 1st Defendant's Notebook.

Encik Shukri agreed during cross-examination that the 28 Minutes Period was not sufficient for the 2 Processes to be completed. Such an answer materially contradicted his answer to question no. 8 WSSD2 (it is "*quite common*" for the 2 Processes to be completed within 28 Minutes Period). As explained by Mr. Sanjay, Imaging Process takes some time because it copies the entire space of HD (irrespective of whether HD is populated with data or not).

If the 2 Processes could not be completed within 28 Minutes Period, there is a severe doubt that the Disk Image obtained by Encik Shukri was complete. Similarly, the Retrieved Information could not be complete. This is another ground to reject Encik Shukri's expert opinion which was based on an incomplete Disk Image and incomplete Retrieved Information.

I have not overlooked Encik Shukri's evidence during re-examination where he testified that 28 Minutes Period was only for the Imaging Process (not for 2 Processes). Such evidence clearly contradicted his own answer to question no. 8 in WSSD2 (28 Minutes Period was for the completion of the 2 Processes);

- (4) during cross-examination, Encik Shukri admitted that part of his answers to questions no. 8 and 9 WSSD2 was not true because the **size** of contents of files in 1st Defendant's Notebook does **not** affect the speed of Imaging Process. During re-examination, Encik Shukri testified that the **type** (not the size) of contents of files in 1st Defendant's Notebook, would affect the speed of Imaging Process. Answer to question no. 9 in WSSD2 however clearly stated that the size (not the type) of contents of files in 1st Defendant's Notebook, would determine the speed of the 2 Processes. Such conflicting evidence in Encik Shukri's WSSD2, cross-examination and re-examination, undermined his credibility;

- (5) as *per* the Experts Agreement, contents of BHF can be modified. This fact is confirmed by Encik Shukri during cross-examination. Hence, the fact that BHF is empty, does not necessarily mean that no Touch command has been given to modify Timestamps. This is because even if there was a Touch command to alter Timestamps, such a command could have been deleted in BHF. In other words, the fact that BHF is empty or has contents, is immaterial because the contents of BHF can be modified. Furthermore, Encik Shukri did not examine BSF (which shows a list of Terminal sessions) to confirm that 1st Defendant did not use the Terminal at all;
- (6) when Mr. Suaran orally asked Encik Shukri during examination-in-chief, Encik Shukri affirmatively answered that he had done a Meta Data analysis of BHF to the best of his ability. Such oral evidence was contrary to the Experts' Agreement. Furthermore, during cross-examination, Encik Shukri admitted that his expert report did not mention about his purported Meta Data analysis of BHF. I find that Encik Shukri's evidence regarding Meta Data analysis was an afterthought after he had perused Mr. Sanjay's expert report regarding the importance of a Meta Data analysis of BHF;
- (7) Encik Shukri agreed in cross-examination that besides the user account "*syahri*", there were 2 other accounts in 1st Defendant's Notebook, namely "*Guest*" and "*Shared*" (**2 Other User Accounts**). According to Mr. Sanjay, it is possible for a user to run a Touch command using the prefix "*sudo*" which will elevate the user to root (administrator) level. Encik Shukri agreed that if the user of 2 Other

User Accounts runs a Touch command to amend Timestamps, the history of that Touch command will be reflected in BHF of the 2 Other User Accounts (not in BHF of the user account “*syahri*”). Significantly, Encik Shukri did not examine BHF of 2 Other User Accounts. Such an omission means that Encik Shukri’s analysis is inadequate as there may be a history of Touch command to amend Timestamps in BHF of 2 Other User Accounts. This is another ground to reject Encik Shukri’s expert view in this case; and

- (8) during Encik Shukri’s re-examination, he testified that there was no created timestamp for the file “*MRC_evas.pptx*” because there was a possibility that the few bytes in respect of its file creation were corrupted. I am not able to accept this evidence because firstly, according to Mr. Sanjay, EnCase software had identified file “*MRC_evas.pptx*” as an existing file in HD (not a file which is deleted from 1st Defendant’s Notebook and subsequently recovered by EnCase software). Accordingly, file “*MRC_evas.pptx*” should have a created timestamp. According to Mr. Sanjay, unlike “*Windows*” machine, the Mac OS (1st Defendant’s Notebook runs Mac OS) is very good in retaining the original creation of timestamp, regardless of the number of copying. In Mr. Sanjay’s expert view, the only way file “*MRC_evas.pptx*” did not have a created timestamp was when a third party software had been used to delete that created timestamp. Encik Shukri did not check 1st Defendant’s Notebook to ascertain whether a third party software had been used to delete or modify Timestamps.

Secondly, if file “*MRC_evas.pptx*” was corrupted, I accept Mr. Sanjay’s expert opinion that such a file could not be copied at all and it would be likely that the timestamp would be altered (not lost). Lastly, Encik Shukri’s expert report did not allude to the possibility that file “*MRC_evas.pptx*” could be corrupted. Hence, such a possibility is an afterthought on Encik Shukri’s part.

24. During re-examination, Mr. Sanjay referred to ACPO’s Guide which is applicable in United Kingdom (**UK**). Mr. Sanjay did not refer to any specific provision in ACPO’s Guide which had not been complied with by Encik Shukri in this case. As such, I will not decide whether Encik Shukri’s expert evidence has fallen short of ACPO’s Guide. Having said that, I am of the following view:

(1) ACPO’s Guide (Version 5, 5.10.2011) has been prepared to provide guidance for UK’s law enforcement agencies which deal with “*digital evidence*” (information stored or transmitted in digital form); and

(2) ACPO’s Guide has no binding effect in Malaysia but may be referred to by Malaysian courts in ascertaining the weight, if any, to be attached to the expert opinion of a digital forensic expert. If a digital forensic expert’s evidence does not comply with ACPO’s Guide, such a non-compliance should be considered by the court in deciding the weight (if any) to be given to that expert opinion.

25. 1st Defendant has a self-serving motive under s 8(1) EA to alter Timestamps so as to defeat unlawfully Plaintiff’s Suit as well as to bolster

illegitimately 1st Defendant's Counterclaim. Such a reason supports Mr. Sanjay's expert view that no reliance can be placed on the Timestamps.

26. Additionally or alternatively, 1st Defendant had alleged a particular fact (Timestamps were alleged to be true). Hence, the 1st Defendant (not the Plaintiff) has the evidential (not legal) burden under s 103 EA to prove the truth of a particular fact (Timestamps were reliable) - please see Mokhtar Sidin JCA's judgment in the Court of Appeal case of **Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor** [1996] 3 MLJ 627, at 638 and 639. For reasons expressed in the above paragraphs 23 and 25, I am of the view that 1st Defendant has failed to discharge the evidential onus under s 103 EA to prove the truth of Timestamps.

27. Mr. Suaran has submitted that Mr. Sanjay's expert testimony cannot be relied upon because Mr. Sanjay did not examine 1st Defendant's Notebook and did not request for it. I am not able to accede to this contention for the following reasons:

(1) during re-examination, Mr. Sanjay had explained that his team of computer forensic experts had examined "*Apple Macbook*" (the same model as 1st Defendant's Notebook) and Mr. Sanjay's expert view is also based on this examination;

(2) as stated in the above paragraph 26, by reason of s 103 EA, the evidential burden to prove the reliability of Timestamps lies on 1st Defendant and not the Plaintiff. In other words, the Plaintiff has no

evidential onus to examine 1st Defendant's Notebook or request for it;
and

- (3) the fact that Encik Shukri had examined 1st Defendant's Notebook, does not *ipso facto* mean that the court has to accept his expert opinion. The above paragraph 23 has explained in detail why this court cannot accept Encik Shukri's expert testimony.

E. Piercing 3rd Defendant's corporate veil

28. To pierce or lift a corporate veil, 3 Federal Court judgments require 2 conditions to be fulfilled cumulatively (**2 Conditions**), namely –

- (1) the piercing or lifting of a corporate veil is in the interest of justice (**1st Condition**); **and**
(2) there exists special circumstances to pierce or lift the corporate veil (**2nd Condition**).

I rely on the following 3 Federal Court judgments which have laid down the 2 Conditions –

- (a) Hasan Lah FCJ's judgment in **Solid Investment Ltd v Alcatel Lucent (M) Sdn Bhd** [2014] 3 CLJ 73, at 92;
(b) the decision of Richard Malanjum CJ (Sabah & Sarawak) in **Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors** [2015] 1 MLJ 773, at paragraphs 96-99; and

(c) the judgment of Richard Malanjum CJ (Sabah & Sarawak) in **Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor** [2015] 9 CLJ 537, at paragraphs 39, 44 and 45

29. I have no hesitation to pierce 3rd Defendant's corporate veil to reveal 1st, 2nd and 4th Defendants as the *alter ego*, controllers and/or directing mind and will of 3rd Defendant at the material time. Such a decision is based on the following evidence and reasons:

(1) the 1st Condition is fulfilled based on the following facts -

(a) 1st Defendant admitted that he incorporated 3rd Defendant and requested 2nd and 4th Defendants to be directors of 3rd Defendant. The 2nd and 4th Defendants agreed to 1st Defendant's request and were appointed as 3rd Defendant's directors;

(b) 3rd Defendant has only 2 shareholders (2nd and 4th Defendants) holding 1 share with a nominal value of RM1 each; and

(c) 1st Defendant is 3rd Defendant's CEO while 2nd Defendant is its Company Secretary; **and**

(2) there exists the following special circumstances which fulfil the 2nd Condition -

(a) 1st, 2nd and 4th Defendants had fraudulently fabricated the Alleged License Agreement – please see Part G below;

- (b) 3rd Defendant's corporate veil is pierced to prevent 1st, 2nd and 4th Defendants from evading their liability to Plaintiff for the 4 Causes of Action; **and/or**
- (c) to prevent 1st, 2nd and 4th Defendants from abusing 3rd Defendant's corporate personality.

F. Assessment of evidence

30. I will start with Encik Khairul's evidence because his testimony (based on his experience as an IRB investigation officer) has far-reaching effect. I am of the following view regarding Encik Khairul's testimony:

- (1) Encik Khairul had no personal knowledge regarding the Double Stamping of Exhibit P2 because -
 - (a) Exhibit P2 was not stamped before Encik Khairul. In fact, Encik Khairul agreed during cross-examination that he commenced work in respect of stamp duty from 15.2.2011 (after the Double Stamping of Exhibit P2);
 - (b) Encik Khairul admitted in cross-examination that he did not investigate Exhibit P2. In fact, no police report has been lodged in respect of Double Stamping of Exhibit P2. Nor was there any complaint made to the Collector in respect of the Double Stamping of Exhibit P2. It is therefore clear that the Collector had not investigated into the Double Stamping of Exhibit P2; and

- (c) Encik Khairul agreed with Ms. Goh that he personally did not know whether the runner in question had committed Stamp Duty Forgeries regarding the Double Stamping of Exhibit P2.

In view of the above reasons, Encik Khairul's evidence regarding Stamp Duty Forgeries (based on his experience as IRB's investigating officer) was merely his own personal opinion. Such opinion evidence is **not** –

- (i) a “*fact in issue*” (defined in s 3 EA 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*”);
or
- (ii) a fact which 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*”.

As Encik Khairul's opinion evidence is neither a “*fact in issue*” nor a “*relevant fact*” as understood in EA, such evidence cannot be given under s 5 EA which provides as follows -

“Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.”

(emphasis added).

In **Tenaga Nasional Bhd v Api-api Aquaculture Sdn Bhd** [2015] 3 AMR 811, at sub-paragraph 24(c), I have decided that s 5 EA is exhaustive and provides that only evidence regarding facts in issue and relevant facts may be given in a trial. This decision in **Api-api Aquaculture Sdn Bhd** has been affirmed on appeal to the Court of Appeal;

(2) the following Court of Appeal cases in UK and Singapore have refused to admit opinion evidence when the court is in a position to decide on the issue at hand -

(a) in **R v Turner** [1975] 1 All ER 70, at 74, Lawton LJ held as follows

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“Our law excludes evidence of many matters which in life outside the courts sensible people take into consideration when making decisions. Two broad heads of exclusion are hearsay and opinion. ...

... If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary.”

(emphasis added); and

- (b) Yong Pung How CJ decided as follows in **Chou Kooi Pang & Anor v Public Prosecutor** [1998] 3 SLR 593, at paragraphs 16 and 17 -

“16. ... it is well established that expert opinion is only admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge. If, on the proven facts, a judge can form his own conclusions without help, the opinion of an expert is unnecessary: R v Turner [1975] QB 834.

*17. In the present case, the question was whether the first appellant knew or at least suspected that he was carrying drugs. This could only be inferred from the surrounding circumstances by the trier of fact, and was a matter entirely within the trial judge's purview. **A chief and justified concern of the courts is that the fact-finding process should not be surrendered to professionals such as psychiatrists, but should remain the province of the courts.** As such, we were of the view that the trial judge was entitled to reject the evidence of DW1 and to come to his own conclusions from the surrounding circumstances.”*

(emphasis added); and

- (3) in any event, I find as a fact that Encik Khairul is not credible for the following reasons -

- (a) Encik Khairul's bare testimony regarding the use of revenue stamps with the denominations of 10 sen, 15 sen, RM1, RM2 and

RM5, is contrary to Exhibits P3 and P4. When there is a conflict between oral and documentary evidence, I prefer the latter – please see the Federal Court case of **Tindok Besar Estate Sdn Bhd v Tinjar Co** [1979] 2 MLJ 229, at 234. More importantly, Exhibits P3 and P4 are issued by IRB, a body incorporated under Inland Revenue Board of Malaysia Act 1995. According to s 114(e) EA, there is a rebuttable presumption that the “*official acts*” of IRB in issuing Exhibits P3 and P4 “*have been regularly performed*” – please see the Supreme Court’s judgment delivered by Azmi SCJ in **Ramli bin Kechik v Public Prosecutor** [1986] CLJ Rep 243, at 248; and

- (b) during examination-in-chief, Encik Khairul confidently testified that the Revenue Stamp at page 12 of Exhibit P2 was genuine. When shown the relevant page in Exhibit P3 regarding the Revenue Stamp during cross-examination, Encik Khairul quickly changed his evidence and agreed with Ms. Goh’s suggestion that based on Exhibit P3, the Revenue Stamp could not have been glued on Exhibit P2 on 20.4.2007.

31. I find as a fact that Encik Asrul is a credible witness for the following reasons:

- (1) Encik Asrul’s evidence is supported by documentary evidence issued by IRB, namely Exhibits P3 and P4 [presumed under s 114(e) EA to be regularly issued by IRB]; and

(2) Encik Asrul is an impartial witness in this case.

32. This court cannot accept Puan Suryawati as a witness of truth because -

- (1) on 7.11.2016, Puan Suryawati testified that she had examined Exhibit P2 on 13.10.2016. On 6.12.2016, she gave evidence that she could not remember whether she had examined Exhibit P2 or Exhibit P14 (copy of original Exhibit P2) on 13.10.2016. When leave was granted to Ms. Goh to cross-examine Puan Suryawati, she stated that she did not know whether she had inspected Exhibit P2 or Exhibit P14 on 13.10.2016! Puan Suryawati had therefore given 3 different versions on the very same document she had purportedly examined on 13.10.2016;
- (2) Puan Suryawati's opinion that the Revenue Stamp was valid, was clearly inconsistent with IRB's own documents in Exhibits P3 and P4;
- (3) on 7.11.2016, Puan Suryawati gave evidence that the Revenue Stamp was valid. However, on 6.12.2016, she changed her sworn testimony and stated that she was unsure whether the Revenue Stamp was genuine or not;
- (4) Puan Suryawati testified that she did not properly examine the document on 13.10.2016. In other words, she admitted that she had not competently performed her duties as an officer of the Collector on 13.10.2016; and

- (5) Puan Suryawati only started to work in the Stamp Duty Unit in January 2015. As such, she had no personal knowledge regarding the Revenue Stamp before she joined the Stamp Duty Unit.
33. I have no hesitation to find as a fact that Puan Rozana is a truthful witness. This finding is due to the following reasons:
- (1) Puan Rozana's evidence is supported by contemporaneous documentary evidence (Exhibits P7, P8 and P9);
 - (2) Puan Rozana is an independent witness; and
 - (3) Mr. Suaran did not cross-examine Puan Rozana.
34. Regarding the credibility of Encik Harris –
- (1) Encik Harris had been cross-examined regarding a case wherein he had been charged with "*Criminal Breach of Trust*" in the Sessions Court sometime in 1998 (**CBT Charge**). I place no weight on the CBT Charge because -
 - (a) the CBT Charge is not relevant under s 52 EA ("*In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except so far as his character appears from facts otherwise relevant*"). According to the Explanation in s 55 EA, the word "*character*" in s 52 EA includes "*both reputation and disposition*" – please see Abdul Aziz Abdul Rahim JCA's

judgment in the Court of Appeal case of **Datuk S. Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim & other appeals** [2015] 4 MLJ 34, at paragraphs 28 and 30; and

(b) Encik Harris was acquitted of the CBT Charge in the Sessions Court without his defence being called and this acquittal had been upheld by the High Court. In other words, the presumption of Encik Harris' innocence in the CBT Charge had been proven after trial in the Sessions Court and this had been affirmed by the High Court; and

(2) Encik Harris gave evidence based on documents. The Defendants had not shown any document which had materially contradicted Encik Harris' testimony. Hence, there is no reason to doubt Encik Harris' credibility.

35. This court finds Mr. Lim to be a credible witness because his testimony is supported by the following documentary evidence:

- (1) documents regarding the Prototypes and MSCL's Workflow;
- (2) MSCL's invoice to Plaintiff; and
- (3) Mr. Lim's Report.

36. I find as a fact that 1st Defendant is not a credible witness. This finding is premised on the following evidence and reasons:

- (1) as explained in Part G below, the Alleged License Agreement is not genuine and -

- (a) there is sufficient evidence to investigate whether 1st Defendant had fabricated the Alleged License Agreement within the meaning of s 192 of the Penal Code (**PC**). I reproduce the relevant part of s 192 PC as follows -

“Whoever ... makes any document containing a false statement, intending that such ... false statement may appear in evidence in a judicial proceeding, ..., and that such ... false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said “to fabricate false evidence”.”

(emphasis added).

Section 193 PC provides that if any person intentionally fabricates false evidence for the purpose of being used in a judicial proceeding, he or she shall be punished with imprisonment up to 7 years and/or a fine; and

- (b) there are grounds to investigate whether 1st Defendant had given false evidence regarding the Alleged License Agreement under s 191 PC. Section 191 PC provides as follows -

“Whoever, being legally bound by an oath, ..., makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.”

(emphasis added).

Section 193 PC provides that if any person intentionally gives false evidence in a judicial proceeding, he or she shall be punished with imprisonment up to 7 years and/or a fine;

- (2) as explained in Part D above, the Timestamps are not reliable. Hence, there is sufficient evidence to investigate whether 1st Defendant had fabricated the Timestamps, an offence under s 192 PC. There are also grounds to investigate whether 1st Defendant had given false evidence regarding the Timestamps under s 191 PC;
- (3) during cross-examination, 1st Defendant testified that the first version of 1st Defendant's Workflow Documents was created by him from the middle to late 2006. This materially contradicted paragraph 7.1 of 1st Defendant's affidavit affirmed on 12.5.2016 (**Enc. No. 47**) (which averred that 1st Defendant's Workflow Documents were prepared by him sometime in 2008). Enc. No. 47 had been filed in support of, among others, 1st Defendant's application to set aside *ex parte* Anton Piller Order (**APO**). Paragraph 7.1 of Court Enc. No. 47 had not been withdrawn or corrected by 1st Defendant. The affirmation of a false affidavit constitutes an offence under s 193 PC.

During re-examination, 1st Defendant stated that he adduced in court the "*latest version*" in his notebook and his earlier versions had been overwritten. If this evidence is true, how could 1st Defendant produce the purported first version of 1st Defendant's Workflow Documents!;

(4) 1st Defendant's credibility has been severely undermined by his own documents as follows -

(a) 1st Defendant entered into a "*Confidentiality Agreement*" dated 24.6.2011 with Plaintiff (**Confidentiality Agreement**). The Confidentiality Agreement provided, among others -

(i) "*trade secret*" is defined widely in clause 3(a) as any "*information which is for use, or is used in the operation of*" Plaintiff's business;

(ii) according to clause 3(b), "*confidential information*" means any "*proprietary property*" of Plaintiff;

(iii) 1st Defendant agreed, among others, not to reveal, give away, disclose, divulge or make known in any manner "*confidential information*" to any person [clause 2(i)];

(iv) 1st Defendant agreed to take all action necessary to ensure that "*confidential information*" is maintained as secret and confidential [clause 2(ii)];

(v) 1st Defendant's obligations under Confidentiality Agreement shall apply after 1st Defendant ceased to be in Plaintiff's employment (clause 6); and

(vi) the Confidentiality Agreement "*contains the sole and entire agreement between the parties as to the matters contained*

herein and integrates and supersedes any and all other agreements between them” (Clause 8 Confidentiality Agreement).

If 1st Defendant was the creator of eVAS System, 1st Defendant would not have entered into Confidentiality Agreement and would have instead insisted that Plaintiff agree not to disclose 1st Defendant’s System by way of a non-disclosure agreement;

- (b) 1st Defendant sent an email dated 8.5.2012 to Encik Ahmad Nor, Legal Counsel of HeiTech Group (**Encik Ahmad**). In this email, 1st Defendant proposed amendments to Draft JCA. If 1st Defendant had created eVAS System, 1st Defendant would not have agreed to Draft JCA, let alone send an email to HeiTech Group’s Legal Counsel to propose amendments to Draft JCA. Furthermore Encik Ahmad replied to 1st Defendant by way of an email dated 26.1.2014 (which attached 4 draft agreements regarding eVAS System). The 1st Defendant did not reply to Encik Ahmad’s email and inform Encik Ahmad that 1st Defendant was the creator of eVAS System;
- (c) 1st Defendant’s allegation that he had created eVAS System is inconsistent with his own update dated 5.3.2013 to Plaintiff’s BOD regarding eVAS System and the Project (**1st Defendant’s Update to Plaintiff’s BOD**). The 1st Defendant’s Update to Plaintiff’s BOD stated, among others, as follows -

“... Currently, we are awaiting approval from MITI for MAI to sign eVAS project agreement on behalf of MITI/Government with [Plaintiff]. ...

**...
In the meantime, our eVAS team in [Plaintiff] is constantly updating, revising, evaluating and evolving the eVAS system which is progressing well.**

Conclusion

[Plaintiff’s BOD] is hereby informed on latest progress of the eVAS project.”

(emphasis added).

Any reasonable person who had created eVAS System and had entered into a genuine license agreement with Plaintiff, would not have written 1st Defendant’s Update to Plaintiff’s BOD in the manner as stated above. The 1st Defendant’s Update to Plaintiff’s BOD also contradicted 1st Defendant’s testimony during re-examination that he did not work at all on any file regarding eVAS System when he was with Plaintiff;

- (d) 1st Defendant sent an email dated 15.11.2013 to 2nd Defendant (copied to, among others, Encik Harris, Mr. Lim and Encik Ahmad) which stated, among others -

“First and foremost, I would like to say that the eVAS Project currently stands at 80% completion. Actually, by stating that

percentage, I am being very humble as I believe that the percentage is much higher.

Nevertheless, once again I would like to reiterate with my humbleness that the project delivery stands at 80% completion. This is a fact that cannot be denied by any parties as there are documentary evidence available on the work done. ...

At this juncture, the eVAS Project was stepping into the next level where funds were required for the development of this project. So, a board paper was prepared for the requisition of these funds from the board of [Plaintiff]. Based on the board paper presented, a sum of RM250k was approved for development of this project. ...

Prior to this latest development, I would also like to recollect a mid-year review meeting that was held in Janda Baik about 2 years ago where it was agreed upon in principle that the development of this project would be led by MSCL. ...

*...
Apart from all the above, we should also not forget the fact that the original party we were dealing with on behalf of the government of Malaysia was [MITI]. But subsequently, the scenarios changed as MITI delegated the project to MAI, the newly formed agency under MITI. It was also resolved that MAI would be signatory to the agreement of this project on behalf of the government, which was originally between [Plaintiff] and MITI. So, the legal documentation prepared also needed fresh perspective and review. ...*

... So, after much deliberations, it was agreed that the formula be maintained with ratio 25:75 between MAI and [Plaintiff]. This was a major achievement as we still maintained the profit margin for [Plaintiff] despite the significant change of scenario. ...

...

Having said that, despite all that I have done so far for the success of the project and brought the project to the 80% mark of completion, all of the sudden feels that I am incompetent to handle this project and/or any person feels that they can do better than me, are most welcome to replace me at the tail end of this project ... and to take all the glory and limelight for this project. Frankly, I have no objection if anybody wants to stoop that low. ...”

(emphasis added).

The 1st Defendant's email dated 15.11.2013 amounts to an admission by 1st Defendant of the following matters -

- (i) 1st Defendant did not create eVAS System because 1st Defendant admitted that at the time of 1st Defendant's email dated 15.11.2013, eVAS System was developed by MSCL for Plaintiff and was about 80% complete. The 1st Defendant did not refer at all to the Alleged License Agreement. In fact, 1st Defendant was willing to be replaced in respect of the development of the Project!;
- (ii) Plaintiff had incurred expenditure in developing eVAS System;

- (iii) legal documentation was necessary for the agreement between MAI and Plaintiff regarding eVAS System; and
- (iv) 1st Defendant knew about the proposed profit-sharing ratio 25:75 between MAI and Plaintiff; and
- (e) 1st Defendant entered into a “*Settlement Agreement for the Mutual Separation of Service*” dated 4.7.2014 with Plaintiff (**Settlement Agreement**). The Settlement Agreement did not mention anything about the fact that 1st Defendant created and owned copyright in eVAS System. On the contrary, the Settlement Agreement provided, among others -
 - (i) 1st Defendant shall have no “*further claims whatsoever*” against Plaintiff “*for whatever reasons and howsoever caused*” (**Clause 3 Settlement Agreement**);
 - (ii) in consideration of 1st Defendant accepting “*Separation Benefit*” of RM42,000.00, 1st Defendant “*releases and discharges*” Plaintiff “*from all actions, proceedings, causes of action, claims, demands, choses in action*” which 1st Defendant “*now has or anytime hereafter has had against*” Plaintiff [**Clause 4(b) Settlement Agreement**];
 - (iii) 1st Defendant would still be bound by Confidentiality Agreement [**Clause 4(c) Settlement Agreement**]; and

(iv) the Settlement Agreement “*supersedes all ... agreements whether made in writing or orally*” (**Clause 5 Settlement Agreement**).

Clauses 3, 4(b), 4(c) and 5 Settlement Agreement would not only undermine 1st Defendant’s credibility but would also bar 1st Defendant’s Counterclaim based on the 1st Defendant’s alleged copyright ownership of eVAS System;

- (5) during cross-examination, 1st Defendant stated that when he left Plaintiff, he could not remember asking Plaintiff to return all materials on eVAS Information. If 1st Defendant was the creator and owner of eVAS System and Information, 1st Defendant would have asked, if not demanded, that Plaintiff return all materials regarding eVAS System and Information when 1st Defendant left Plaintiff;
- (6) answer to question 30 of 1st Defendant’s witness statement referred to a document which stated that the then Deputy Minister in the Prime Minister’s Department, Tan Sri Dr. M. Kayveas (**Tan Sri Kayveas**), launched IDCB’s website on 28.7.2007. Such a reference was untrue as IDCB was only incorporated on 20.9.2007 and Tan Sri Kayveas could not therefore have launched IDCB’s website on 28.7.2007!

The 1st Defendant maintained during re-examination that IDCB’s website had been launched before IDCB’s incorporation at the behest of Tan Sri Kayveas. I cannot give any credence to such evidence because the Defendants did not call Tan Sri Kayveas to testify in this

case. In fact, Tan Sri Kayveas was not even listed as one of the Defendants' List of Witnesses filed in court pursuant to O 34 r 2(2)(I) RC;

- (7) 1st Defendant admitted during cross-examination that 3rd Defendant had signed MOU with MAI and FIS (**3rd Defendant's Tripartite MOU**) which was different from Draft Tripartite MOU (supposed to be entered by Plaintiff, MAI and FIS). The 1st Defendant further alleged that 3rd Defendant's Tripartite MOU had been classified as an "*official secret*" under the Official Secrets Act 1972 (**OSA**). This answer shows 1st Defendant's lack of credibility because no evidence had been adduced by Defendants to prove that 3rd Defendant's Tripartite MOU constitutes an "*official secret*" under s 2(1) OSA. The definition of an "*official secret*" under s 2(1) OSA is as follows -

" "official secret" means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as "Top Secret", "Secret", "Confidential" or "Restricted", as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B;"

(emphasis added).

The Schedule to OSA provides that Cabinet documents, documents of State "*Executive Council*" and documents concerning national security, defence and international relations, constitute "*official secrets*" (which

do not include 3rd Defendant's Tripartite MOU). If 3rd Defendant's Tripartite MOU had indeed been classified as an "*official secret*" under s 2(1) OSA (**Alleged OSA Classification**), 1st Defendant would have produced the Alleged OSA Classification as evidence in this case so as to avoid an adverse inference under s 114(g) EA being drawn against him for not adducing 3rd Defendant's Tripartite MOU [please see sub-paragraph 43(2) below]; and

- (8) 1st Defendant has only a Diploma in Tourism Management from Reliance School of Tourism. The 1st Defendant has no education, training, qualification, experience and expertise in ICT to enable him to create and develop eVAS System. Furthermore, the 1st Defendant had no assistance from any person who was trained, qualified, experienced or skilled in ICT. Nor had 1st Defendant any track record or notable achievement in ICT. It is therefore improbable for 1st Defendant with his educational and work background to have created and developed eVAS System on his own.

37. 2nd Defendant is not a reliable witness. This finding of fact is premised on the following evidence and reasons:

- (1) for reasons elaborated in Part G below, the Alleged License Agreement is not genuine, there are grounds to investigate whether 2nd Defendant had committed the following offences -
 - (a) whether 2nd Defendant had abetted 1st Defendant's fabrication of Alleged License Agreement, an offence under s 109 PC. Section

109 PC provides that if PC does not provide for the punishment of an offence of abetment, an abettor of an offence shall be punished with the same punishment as the offence abetted; and

(b) whether 2nd Defendant had given false evidence under s 191 PC regarding the Alleged License Agreement;

(2) 2nd Defendant sent an email dated 5.11.2012 to, among others, Encik Harris, and stated as follows -

“I am pleased to update, that MoF has, at a meeting with MITI and [Plaintiff] last Tuesday 8 May 2012 at Putrajaya, approved the eVAS project. ...”

(emphasis added).

2nd Defendant's own email dated 5.11.2012 undermines his testimony that 1st Defendant had created eVAS System;

(3) 2nd Defendant testified that he had been Plaintiff's MD from 1.5.2005. The 2nd Defendant however admitted in cross-examination that he could not adduce any document to prove his appointment as the Plaintiff's MD with effect from 1.5.2005. More importantly, 2nd Defendant's allegation that he was Plaintiff's MD with effect from 1.5.2005, is effectively rebutted by the following documents -

(a) Plaintiff's letter dated 29.7.2010 only offered to 2nd Defendant the post as Plaintiff's MD from 16.9.2010 to 15.9.2010. This offer was accepted by 2nd Defendant on 11.8.2010 (**2nd Defendant's**

Employment Contract). The 2nd Defendant is barred by ss 91 and 92 EA from adducing any evidence to contradict, vary or add to the 2nd Defendant's Employment Contract – please see the Federal Court case of **Tindok Besar Estate**, at p. 233;

- (b) 2nd Defendant signed the following contracts on Plaintiff's behalf as its CEO and not as its MD;
 - (i) agreement dated 6.4.2007 with AmAssurance Bhd. (**AmAssurance Agreement**); and
 - (ii) agreement dated 9.5.2007 with Kurnia Insurans (M) Bhd. (**Kurnia Insurans Agreement**); and
- (c) the earliest document which stated that 2nd Defendant was Plaintiff's MD, was the Plaintiff's letter dated 20.6.2012 to 1st Defendant (which was signed by 2nd Defendant himself). If 2nd Defendant had been Plaintiff's MD from 1.5.2005, there was no reason why 2nd Defendant could not adduce any agreement, letter, email or document showing that he was Plaintiff's MD from 1.5.2005 to 15.9.2010 (2nd Defendant's Employment Contract took effect on 16.9.2010);
- (4) 2nd Defendant first informed the court that he had not given evidence prior to this case. However, when cross-examined about a previous case, namely **Yuny-Li Home Care Sdn Bhd v Mohan Raj Ratnam & Ors** [2009] 9 MLJ 141, 2nd Defendant admitted that he had testified in

that case. It is clear that 2nd Defendant had not been truthful when he initially testified that he had not given evidence prior to this case;

- (5) 2nd Defendant testified in cross-examination that contracts signed by him on Plaintiff's behalf, did not have to be vetted by HeiTech Group's in-house legal department. Such evidence cannot be true because there was an email dated 26.1.2014 from Encik Ahmad (HeiTech Group's Legal Counsel) to 1st Defendant which was copied to 2nd Defendant and to which 4 draft agreements regarding eVAS System were attached. In other words, contrary to 2nd Defendant's sworn evidence, HeiTech Group's in-house legal department did vet draft contracts regarding eVAS System. Furthermore, 1st Defendant's email dated 15.11.2013 to 2nd Defendant expressly referred to the need for legal documentation regarding eVAS System and 2nd Defendant did not reply to this email and allege that he could sign any agreement concerning eVAS System without being vetted by HeiTech Group's internal legal department.

This court cannot accept 2nd Defendant's evidence that he could sign contracts on Plaintiff's behalf –

- (a) without the need for these contracts to be vetted by HeiTech Group's in-house counsel; and
 - (b) without the knowledge and approval of Plaintiff's BOD
- because the court cannot allow a CEO and/or MD of a company to by-pass fraudulently the company's internal legal department

and BOD to the detriment of that company, its shareholders and creditors;

- (6) Plaintiff only offered employment to 1st Defendant by way of letters dated 25.6.2013 and 30.10.2013. Yet, 2nd Defendant falsely issued a letter dated 10.8.2012 which stated that 1st Defendant was a “*permanent staff*” with Plaintiff since 1.7.2009! Such a misrepresentation was never corrected or retracted by 2nd Defendant. The 2nd Defendant tried to explain that this letter was only an internal document. Such evidence is not credible because the letter dated 10.8.2012 issued by 2nd Defendant was addressed “*To Whom It May Concern*”; and
- (7) 2nd Defendant stated in cross-examination that 4th Defendant was not his close acquaintance. Such testimony contradicted paragraph 19 of 2nd Defendant’s affidavit affirmed on 4.3.2016 (filed in support of application to set aside *ex parte* APO) which averred that 4th Defendant was a close friend of 2nd Defendant.

38. I am of the view that Encik Shaharudin is not a credible witness because –

- (1) in answers to questions no. 12 and 13 of Encik Shaharudin’s witness statement, he stated that the earliest 1st Defendant showed 1st Defendant’s Framework to him was “*around 2007 or 2008*”. However, during cross-examination, Encik Shaharudin admitted that this answer “*cannot be true*” as 1st Defendant’s Framework was not shown to him around 2007 or 2008;

- (2) the bare oral testimony of Encik Shaharudin that 1st Defendant had shown him 1st Defendant's Workflow Documents "*somewhere around 2005*", is not supported by any document. In fact, during cross-examination, Encik Shaharudin could not recall which particular 1st Defendant's Workflow Document was shown by 1st Defendant to him; and
- (3) Encik Shaharudin is not an independent witness as he is a director of 3rd Defendant and works together with 1st Defendant in Carfax. Furthermore, Encik Shaharudin admitted during cross-examination that he signed 3rd Defendant's Tripartite MOU on behalf of 3rd Defendant.

G. Whether Alleged License Agreement was genuine

39. Proviso (a) to s 92 EA admits extrinsic evidence to invalidate Alleged License Agreement on the ground of fraud – please see Suffian J's (as he then was) judgment in the Federal Court case of **Siah v Tengku Nong** [1964] 1 MLJ 43, at 44. In the Federal Court case of **Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd** [2015] 7 CLJ 584, at paragraphs 48-52, Richard Malanjum CJ (Sabah & Sarawak) has decided that fraud need only be proven on a balance of probabilities and not beyond all reasonable doubt.
40. I am satisfied on a balance of probabilities that the Alleged License Agreement had been fabricated by 1st Defendant with the abetment of 2nd

and 4th Defendants. This factual decision is based on the following evidence and reasons:

- (1) Encik Asrul's independent and unchallenged testimony clearly showed that -
 - (a) the digital stamp franking mark on the first page of the Alleged License Agreement was not genuine because the Collector did not use the digital stamp franking machine with the number 02-108 on 23.4.2007;
 - (b) the Revenue Stamp on page 12 of the Alleged License Agreement could not have been stamped on 20.4.2007 because the Revenue Stamp was only introduced on 1.2.2009; and
 - (c) the Collector will not allow Double Stamping of the Alleged License Agreement. Significantly, 1st Defendant did not call the runner in question (Din) to explain the Double Stamping. Such a failure attracts an adverse inference under s 114(g) EA against the Defendants – please see sub-paragraph 43(1) below;
- (2) there are 2 differences between the original copy of the Alleged License Agreement (Exhibit P2) and its copy (Exhibit P14), namely -
 - (a) there were scratch marks on page 1 of Exhibit P14 which were not found on Exhibit P2; and

(b) the digital franking stamp mark on Exhibit P2 was brighter than the same mark on Exhibit P14.

The above differences had not been explained by Defendants and support the inference that both Exhibits P2 and P14 were not genuine;

- (3) clause 5.2 of the Alleged License Agreement referred to “VAT”. Such a clause shows the dubious nature of the Alleged License Agreement because VAT (Value Added Tax) is not imposed in Malaysia;
- (4) no evidence had been adduced by 1st Defendant regarding the performance of the Alleged License Agreement until its purported expiry on 10.4.2012 (the Alleged License Agreement was purportedly in force for 5 years). The lack of post-contract performance of the Alleged License Agreement proves that the Alleged License Agreement is not genuine.

Clause 3.3 of the Alleged License Agreement [**Clause 3.3 (Alleged License Agreement)**] provided that Plaintiff as 1st Defendant’s licensee, “*shall procure that all specifications and descriptive literature*” relating to eVAS System be marked, among others, “© Ahmad Syahril Abdullah / © Syahril Abdullah”. Plaintiff’s documents regarding eVAS System did not comply with Clause 3.3 (Alleged License Agreement) but 1st Defendant did not even issue a demand to Plaintiff to comply with Clause 3.3 (Alleged License Agreement),

let alone file a suit against Plaintiff based on a breach of Clause 3.3 (Alleged License Agreement).

Clause 3.1(b) of the Alleged License Agreement [**Clause 3.1(b) (Alleged License Agreement)**] provided that Plaintiff “*assigns ... absolutely*” the entire copyright and all other rights in any new product in relation to eVAS Information. The 1st Defendant however did not demand for Plaintiff to comply with Clause 3.1(b) (Alleged License Agreement). In fact, 1st Defendant’s Counterclaim is not even based on Clause 3.1(b) (Alleged License Agreement);

- (5) in recital (1) of the Alleged License Agreement, 1st Defendant’s “*business correspondence address*” was stated as “*care-off Office of Chief Technical Officer, [IDCB] at Level 3, Suite M-3-19, Plaza Damas, Seri Hartamas, 50480 Kuala Lumpur*”. According to the records of Suruhanjaya Syarikat Malaysia, IDCB was only incorporated on 20.9.2007 (after the execution of the Alleged License Agreement on 10.4.2007). This clearly shows that the Alleged License Agreement could not have been signed on 10.4.2007;
- (6) on 10.4.2007, 2nd Defendant signed the Alleged License Agreement purportedly as MD/CEO of Plaintiff. As explained in the above subparagraph 37(3), 2nd Defendant was not Plaintiff’s MD on 10.4.2007;
- (7) 4th Defendant witnessed the signatures of 1st and 2nd Defendants on the Alleged License Agreement. The failure of 4th Defendant to

testify in this case supports the Plaintiff's Case and rebuts 1st Defendant's Counterclaim – please see paragraphs 41 and 42 below;

The 2nd Defendant's signatures on AmAssurance Agreement (dated 6.4.2007) and Kurnia Insurans Agreement (dated 9.5.2007) had been witnessed by Plaintiff's GM, Ms. Lee Geok Chin (**Ms. Lee**). The Alleged License Agreement was purportedly signed by 2nd Defendant on 10.4.2007, at about the same time as the execution of AmAssurance Agreement and Kurnia Insurans Agreement, but was not witnessed by Ms. Lee or any senior personnel of Plaintiff. The fact that 2nd Defendant signed Alleged License Agreement in the presence of 4th Defendant (who did not testify in this case) without a witness from Plaintiff's senior management (unlike AmAssurance Agreement and Kurnia Insurans Agreement), showed the dubious nature of the Alleged License Agreement;

(8) the Alleged License Agreement was inconsistent with the following undisputed documentary evidence -

(a) all the Plaintiff's letters dated 22.6.2009, 1.1.2010, 1.7.2010, 21.6.2011, 29.12.2011, 20.6.2012 and 10.6.2013 to 1st Defendant (which offered 1st Defendant to be Plaintiff's consultant in respect of eVAS System and had been accepted by 1st Defendant) did not refer to the Alleged License Agreement. If the Alleged License Agreement was genuine, 1st Defendant would have insisted for Plaintiff to subject his

appointment as Plaintiff's consultant to the Alleged License Agreement;

- (b) by way of letters dated 25.6.2013 and 30.10.2013, Plaintiff offered employment as Head of Special Project to 1st Defendant. These letters did not allude to the Alleged License Agreement and were accepted by 1st Defendant. If the Alleged License Agreement existed, 1st Defendant would not have accepted these employment offers unless these employment offers were subject to the Alleged License Agreement;
- (c) if the Alleged License Agreement was genuine, 1st Defendant would not have entered into Confidentiality Agreement and would have instead insisted that Plaintiff agree not to disclose information regarding 1st Defendant's System by way of a non-disclosure agreement. Furthermore, Clause 8 Confidentiality Agreement has provided that the Confidentiality Agreement would supercede the Alleged License Agreement. Clause 4(b) Settlement Agreement reiterated that 1st Defendant was bound by Confidentiality Agreement;
- (d) 1st Defendant's email dated 8.5.2012 to Encik Ahmad showed that all contracts to be entered into by Plaintiff, have to be vetted by HeiTech Group's internal legal department. There is no evidence that HeiTech Group's Legal Counsel knew, let alone had vetted, the Alleged License Agreement;

- (e) 2nd Defendant's email dated 5.11.2012 updated Encik Harris about eVAS System and yet, 2nd Defendant did not inform or seek approval of Plaintiff's BOD for the Alleged License Agreement;
 - (f) 1st Defendant' Update to Plaintiff's BOD (5.3.2013) concerned the development of the Project. If the Alleged License Agreement existed, there was neither requirement nor need for 1st Defendant to update Plaintiff's BOD regarding the development of the Project;
 - (g) 1st Defendant's lengthy email dated 15.11.2013 did not allude at all to the Alleged License Agreement; and
 - (h) Clauses 3, 4(b) and 5 Settlement Agreement would bar and supercede the Alleged License Agreement;
- (9) if the Alleged License Agreement was genuine in 2007, there was neither reason nor justification for Plaintiff to offer subsequently (from 2009 onwards) consultancy jobs and employment to 1st Defendant;
- (10) there was no evidence regarding any negotiation between Plaintiff and 1st Defendant prior to the conclusion of the Alleged License Agreement. If a contract is genuine, there would be documentary evidence regarding its pre-contract negotiations to show that parties have actually engaged in *bona fide* and at "arm's length"

negotiations to arrive at the terms and conditions of the contract;
and

- (11) if the Alleged License Agreement was genuine, when 1st and 2nd Defendants met or corresponded with Plaintiff's BOD, MOF, MITI, Encik Harris, Mr. Lim and Encik Ahmad, 1st and 2nd Defendants would have alluded to the Alleged License Agreement. This was however not the case.

H. Effect of Defendants' failure to call material witnesses and to adduce material evidence

41. If there is sworn evidence adduced by one party (**X**) in a trial against another party (**Y**) and there is no evidence from Y to rebut X's testimony, the court may rely on X's evidence and decide the case against Y – please see Gopal Sri Ram FCJ's judgment in the Federal Court case of **Takako Sakao v Ng Pek Yuan & Anor** [2009] 6 MLJ 751, at paragraphs 4-6.
42. In this case, 4th Defendant is a material witness for the following reasons:
- (1) 4th Defendant witnessed the signing of the Alleged License Agreement by 1st Defendant and 2nd Defendant (purportedly on behalf of Plaintiff);
 - (2) 4th Defendant owns 50% of the shares in 3rd Defendant (which entered into 3rd Defendant's Tripartite MOU); and
 - (3) 1st Defendant had testified during cross-examination that 4th Defendant is his nominee director in 3rd Defendant and she did not play any role

in 3rd Defendant. Such evidence is rebutted by 3rd Defendant's document entitled "*ELECTRONIC VEHICLE AUTHENTICATION SYSTEM (EVAS) FOR THE USAGE OF BANKING INDUSTRY THROUGH TRIPARTITE COLLABORATION BETWEEN MAI, FIS AND [3rd Defendant]*" (**3rd Defendant's Brochure**). According to 3rd Defendant's Brochure, 4th Defendant is an "*Independent Non-Executive Director*" of 3rd Defendant.

I have not overlooked 4th Defendant's resignation as 3rd Defendant's director with effect from 18.11.2016. Such a resignation is of no consequence because it took effect after the material events regarding this case.

In addition to the above material role of 4th Defendant in this case, she had filed a defence against the Plaintiff's Suit together with 2nd and 3rd Defendants. The 2nd, 3rd and 4th Defendants amended their defence on 1.9.2016 and filed a notice of application to, among others, set aside the *ex parte* APO (**Enc. No. 35**). The 2nd Defendant had also filed 2 affidavits (Enc. Nos. 36 and 40) on behalf of 4th Defendant in support of Enc. No. 35. It is clear that 4th Defendant had actively participated in the proceedings of this case.

The 4th Defendant had been listed as one of the witnesses for the Defendants (Enc. No. 75). This list was dated 21.9.2016 and had not been corrected by Defendants. There is no evidence adduced by Defendants to explain why 4th Defendant could not testify in this case to rebut, among others, the serious allegation by Plaintiff that the Alleged License

Agreement was not genuine. In the circumstances, I am of the view that 4th Defendant's failure to give evidence in this case, supports the Plaintiff's Suit and negates 1st Defendant's Counterclaim – please see **Takako Sakao**.

43. An adverse inference may be drawn under s 114(g) EA against a party for suppressing material evidence – please see the Supreme Court's judgment delivered by Mohd. Azmi SCJ in **Munusamy v Public Prosecutor** [1987] 1 MLJ 492, at 494. I find as a fact that Defendants had suppressed the following material evidence which attracts an adverse inference under s 114(g) EA against the Defendants:

(1) Encik Shaharudin had informed 1st Defendant regarding problems caused by runners in respect of AP and HP Financing. In fact, eVAS System is intended to overcome problems caused by runners and yet, 1st Defendant purportedly relied on a runner (Din) regarding Double Stamping of the Alleged License Agreement! The Double Stamping of the Alleged License Agreement is a material fact which has been relied by this court, among others, to find that the Alleged License Agreement is not genuine. Yet, 1st Defendant did not -

- (a) provide Din's full name;
 - (b) lodge any complaint to the Collector against Din;
 - (c) make any police report against Din;
 - (d) apply for a subpoena to compel Din to give evidence in this case;
- and

- (e) give any evidence to explain why Din could not be compelled by a subpoena to testify in this case.

Based on the above reasons, I have no hesitation to find that Defendants had suppressed material evidence from Din regarding Double Stamping of the Alleged License Agreement; and

- (2) 1st Defendant relied on the Alleged OSA Classification of 3rd Defendant's Tripartite MOU but did not adduce the Alleged OSA Classification. Nor was there any evidence adduced by Defendants to explain why the Alleged OSA Classification could not be tendered in this case. As such, an adverse inference should be made against Defendants for not producing the Alleged OSA Classification.

I. Who owns copyright in eVAS Work?

- 44. Firstly, eVAS Work constituted a "*literary work*" within the meaning of s 3 CA and is eligible for copyright under s 7(1)(a) CA.
- 45. In the Federal Court case of **Lau Foo Sun v Government of Malaysia** [1974] 1 MLJ 28, Ali FJ held that copyright only protects originality of expression in a work and does not protect originality of ideas or thoughts in the work. As such, Encik Shaharudin's evidence that he gave the idea to 1st Defendant to develop eVAS System, is not entitled to copyright protection.
- 46. I find as a fact that 1st Defendant did not create eVAS System because –

- (1) the 1st Defendant's own documents [please see the above subparagraph 36(4)] are inconsistent with his allegation that he authored eVAS System;
- (2) 1st Defendant is not a credible witness – please see the above paragraph 36;
- (3) the Timestamps are not reliable – please see the above Part D;
- (4) the Alleged License Agreement had been fabricated by 1st Defendant – please see the above Part G;
- (5) the 1st Defendant's Workflow Documents included a document dated 1.6.2008 entitled “*Business Plan-MySDI*” which contained a notice (**IDCB's Notice**) as follows:

“Important Notice

Confidential Information of [IDCB]

This document and its contents are the property of and are proprietary to [IDCB]. It must not be disclosed, in whole or in part, without the expressed [sic] written authorization of [IDCB]. It shall not be modified, in whole or in part, for any purpose other than to evaluate this document. This document shall be returned upon request.”

(emphasis added).

Some of 1st Defendant's Workflow Documents expressly stated “© *MySDI – System Copyright & Trademark of IDCB*” (**IDCB's Copyright**

Notice). The 1st Defendant is neither a director nor a shareholder in IDCB. The 1st Defendant's Defence and Counterclaim did not plead that 1st Defendant is the *alter ego*, controller and/or directing mind and will of IDCB. As such, IDCB is a legal person who is distinct from 1st Defendant.

I am of the view that IDCB's Notice and IDCB's Copyright Notice are clearly inconsistent with 1st Defendant's claim that he owned all IP rights in 1st Defendant's Workflow Documents. During re-examination, 1st Defendant attempted to explain that IDCB's documents were merely drafts. I am not able to accept such an explanation because firstly, there was nothing in IDCB's documents to indicate that those documents were merely drafts. More importantly, if a reasonable person owns IP rights in eVAS System and Information, he or she would not have inserted IDCB's Notice and IDCB's Copyright Notice in documents regarding eVAS System and Information which would negative those IP rights; and

- (6) 1st Defendant's Framework and 1st Defendant's eVAS Proposal had expressly referred to "eVAS" System. The 1st Defendant had however described his own creation as "MySDI" System. If 1st Defendant truly owns all IP rights in respect of "MySDI" System, 1st Defendant would have used "MySDI" System (not eVAS System) in 1st Defendant's Framework and 1st Defendant's eVAS Proposal.

47. I am satisfied on a balance of probabilities that Plaintiff owns copyright in eVAS Work. This decision is premised on the following evidence and reasons:

(1) Plaintiff had commissioned MSCL to create eVAS Work under s 26(2)(a) CA. Section 26(2) CA is reproduced below -

“s 26(2) *Notwithstanding subsection 27(6), where a work -*

(a) *is commissioned by a person who is not the author’s employer under a contract of service or apprenticeship;*
or

(b) *not having been so commissioned, is made in the course of the author’s employment,*

the copyright shall be deemed to be transferred to the person who commissioned the work or the author’s employer, subject to any agreement between the parties excluding or limiting such transfer.”

(emphasis added).

The word “*commissioned*” in s 26(2)(a) CA is not defined in CA. In **Aktif Perunding Sdn Bhd v ZNVA & Associates Sdn Bhd** [2017] MLJU 605, at sub-paragraph 33(3), I have followed cases from New Zealand, Australia and UK [which have copyright legislation which is similar to our s 26(2)(a) CA] to construe the word “*commissioned*” in s 26(2)(a) CA to refer to an order or agreement by one person to another person to create the work in question.

The following evidence showed that Plaintiff had commissioned MSCL to create eVAS Work under s 26(2)(a) CA -

- (a) MSCL's costing proposal to Plaintiff;
- (b) MSCL's invoice to Plaintiff;
- (c) 1st Defendant's email dated 15.11.2013; and
- (d) the evidence of Encik Harris and Mr. Lim;

(2) there is evidence adduced in this case to show that MSCL had expended sufficient time and effort to make eVAS Work "*original in character*" within the meaning of s 7(3)(a) CA. I refer to the following evidence -

- (a) documents regarding the Prototypes and MSCL's Workflow;
- (b) Mr. Lim's Report; and
- (c) Mr. Lim's testimony that Mr. Lim's Team (consisting of a web designer, 2 developers and a system architecture designer) had spent over a period of 5 years on eVAS Work;

(3) in accordance with s 7(3)(b) CA, eVAS Work has been reduced to "*material form*" (as defined in s 3 CA);

(4) Plaintiff is a "*qualified person*" within the meaning of s 3(b) CA ("*a body corporate established in Malaysia and constituted or vested with legal personality under the laws of Malaysia*") read with s 10(1) CA;

(5) eVAS Work is made in Malaysia and is eligible for copyright under s 10(3) CA; and

(6) additionally or alternatively, I find that Plaintiff can rely on Encik Harris' SD under s 42(1) CA to prove Plaintiff's copyright in eVAS Work. In the Federal Court case of **Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor** [2015] 1 CLJ 887, at paragraph 29, Jeffrey Tan FCJ decided as follows:

"[29] ... Under s 42(1) [CA], an affidavit or SD made by or on behalf of a person claiming the copyright to any works eligible for copyright must strictly comply with the whole of s 42(1)(a)(i)-(iii). An affidavit or SD that does not, will not be admissible as prima facie evidence. But s 42 [CA] is far from being the be all and end all of proof. For other than by affidavit or SD, a person claiming copyright could adduce oral evidence and tender other evidence, the admission of which is not precluded by the Act. Section 42 provides a means but not the only means of proving copyright. And given that oral evidence, which is open to cross-examination and therefore of higher evidential value than affidavit or SD evidence, we agree with the pragmatic approach adopted by some courts to allow oral evidence to augment, correct, and or even supplant a defective s 42 affidavit or SD."

(emphasis added).

In **Portcullis Trustnet (Singapore) Pte Ltd v George Pathmanathan a/l Micheal Gandhi Nathan** [2017] MLJU 223, at paragraph 135, I have decided as follows -

"I am of the following view regarding s 42 CA:

- (1) *as a matter of stare decisis, I am bound by Federal Court's judgment in Dura-Mine. Cases decided before Dura-Mine, should be read with caution;*
- ...
- (3) *oral and documentary evidence may be adduced at trial to add to, correct any defect or substitute Mr. Chong's SD - please see Dura-Mine. As such, I cannot disregard Mr. Chong's SD but instead, I am duty bound to consider it together with all evidence adduced in this case; ..."*

(emphasis added).

Based on **Dura-Mine**, Encik Harris' SD may be added and/or corrected by documentary evidence [as stated in the above subparagraphs 47(1)(a) to (c), (2)(a) and (b)] as well as by the oral testimonies of Encik Harris and Mr. Lim. Furthermore, as explained in the above paragraphs 36, 37 and 38, this court does not find 1st Defendant, 2nd Defendant and Encik Shaharudin respectively to be credible witnesses. In other words, there is no credible evidence adduced by Defendants to rebut Encik Harris' SD which constitutes *prima facie* evidence under s 42(1) CA.

J. Whether Plaintiff's copyright in eVAS Work has been infringed

48. Section 36(1) CA provides as follows:

"Infringements

36(1) ***Copyright is infringed by any person who does, or causes any other person to do, without the licence of the owner of the copyright, an act the doing of which is controlled by copyright under this Act.***

(emphasis added).

49. I have decided as follows in **Portcullis**, at paragraph 149:

“Section 36(1) CA provides 2 bases for copyright infringement, namely –

(1) when a person (X) does an act which is controlled by copyright under CA (1st Limb); and

(2) when a person causes X to do an act which is controlled by copyright under CA (2nd Limb).”

(emphasis added).

J(1). First limb of s 36(1) CA (1st Limb)

50. The 1st Limb concerns an infringement regarding “*an act the doing of which is controlled by copyright*”. The Plaintiff’s copyright in eVAS Work means that the Plaintiff has the exclusive right under s 13(1)(a) CA to control the “*reproduction*” (defined widely in s 3 CA) of eVAS Work in a “*material form*” (defined in s 3 CA).

51. In the High Court case of **Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise)** [2009] 3 MLJ 525, at paragraph 41, Low Hop Bing J (as he then was) explained the 3 elements of copyright infringement (**3 Elements of Copyright Infringement**) as follows:

“[41] The essential elements constituting copyright infringement have been set out by Sir Raymond Evershed MR in *Purefoy Engineering Co Ltd v Sykes Boxall & Co Ltd* (1955) 72 RPC 89. Prof Dr Khaw Lake Tee adopted these elements in *Copyright Law in Malaysia* [1994] at pp 87 and 88 as follows:

For purposes of direct infringement, it must be established that:

- (a) there is sufficient objective similarity between the original work or a substantial part thereof, and the infringing copy;***
- (b) there is a causal connection between the original work and the infringing copy, that is, the infringing copy must have been copied from the original work, whether directly or indirectly; and***
- (c) what has been infringed must constitute a Substantial Part of The Original Work.”***

(emphasis added).

52. I am of the view that all the Defendants have infringed Plaintiff's copyright in eVAS Work under the 1st Limb. This decision is premised on the following evidence and reasons:

- (1) 1st Defendant had committed the 3 Elements of Copyright Infringement as follows -

- (a) Mr. Lim had testified that 1st Defendant's System had the same essential features, process flow and logical sequence of eVAS Work. Such evidence had not been rebutted by Defendants. Accordingly, there is there is sufficient objective similarity between eVAS Work and 1st Defendant's System;
 - (b) there was a causal connection between eVAS Work and 1st Defendant's System in the sense that 1st Defendant's System had been copied from eVAS Work. This was because 1st Defendant had previously been Plaintiff's consultant and employee regarding eVAS Work; and
 - (c) based on Mr. Lim's testimony, 1st Defendant's System constituted a substantial part of eVAS Work;
- (2) during cross-examination, 1st Defendant testified that he had forwarded the Alleged License Agreement to MAI and had informed MAI that 1st Defendant was the copyright owner of eVAS Work. Subsequently, MAI informed Plaintiff that MAI would not purchase eVAS System from Plaintiff and instead, MAI entered into 3rd Defendant's Tripartite MOU regarding eVAS System. Accordingly, 3rd Defendant had infringed Plaintiff's copyright in eVAS Work by reproducing eVAS Work in a material form within the meaning of s 13(1)(a) read with the 1st Limb (**3rd Defendant's Copyright Infringement**); and

(3) as explained in the above paragraph 29, 3rd Defendant's corporate veil is pierced to reveal the 1st, 2nd and 4th Defendants as the *alter ego*, controllers and/or directing mind and will of 3rd Defendant. Due to the piercing of 3rd Defendant's corporate veil, 1st, 2nd and 4th Defendants are therefore personally liable for 3rd Defendant's Copyright Infringement.

J(2). Second limb of s 36(1) CA (2nd Limb)

53. I am not able to find a previous Malaysian case which has decided on the scope of the 2nd Limb. The 2nd Limb of s 36(1) CA uses the term "*causes*". A person commits copyright infringement under the 2nd Limb when he does not do an act which is controlled by copyright (1st Limb) but "*causes*" another person to do an act which is controlled by copyright.

54. The following countries have employed the term "*authorises*" in their copyright legislation:

- (1) s 16(2) of UK's Copyright, Designs and Patents Act 1988;
- (2) s 31(1) of Singapore's Copyright Act; and
- (3) s 36(1) of Australia's Copyright Act 1968.

It is to be noted that s 51(a)(ii) of India's Copyright Act 1957 uses the term "*permits*".

55. My research reveals the use of the term "*causes*" in the following cases which do not involve copyright infringement:

- (1) in a High Court case regarding the repealed Motor Vehicles (Commercial Use) Regulations, **Tan Teik Leong v R** [1956] 1 MLJ 14, at 15, Spenser Wilkinson J adopted Goddard CJ's decision in the English Divisional Court case of **Shave v Rosner** [1954] 2 WLR 1057, at 1060, as follows:

"The expressions "causing" and "permitting" in connection with the use of motor vehicles are discussed in the case of Shave v Rosner [1954] 2 WLR 1057. The Lord Chief Justice in that case put the matter very clearly when he said (at page 1060):-

"When those two expressions 'causes or permits' are found in contrast or juxtaposition, 'permits' means giving leave and licence to somebody to use the car, and 'causes' involves a person who has authority to do so ordering or directing someone to use it. If I allow a friend of mine to use my motor-car, I am permitting him to use it. If I tell my chauffeur to bring my car round and drive me to the Courts, I am causing the car to be used." "

(emphasis added); and

- (2) in an election petition, **Ali Amberan v Tunku Abdullah** [1970] 2 MLJ 15, at 17, Raja Azlan Shah (as he then was) in the High Court followed, among others, the English House of Lords' judgment in **McLeod v Buchanan** [1940] 2 All ER 187 and decided as follows -

"The petitioner had, therefore, to fall back upon the words 'cause to be printed'. To cause a thing to be done is the same thing as to be the

*causa causans. Causa causans is the real effective cause as contrasted with the sine qua non which is merely an incident which precedes in the history or narrative of event. ... Putting it in a simplified form, to 'cause to be printed' involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case. (See **McLeod (or Houston) v Buchanan** [1940] 2 All ER 187)."*

(emphasis added).

56. I am of the view that the term “causes” in the 2nd Limb should be construed along the lines of cases elaborated in the above paragraph 55. It is my hope that the legislature may consider replacing the term “causes” with the word “authorises” in the 2nd Limb so as to bring our copyright legislation to be consistent with copyright statutes of UK, Singapore and Australia.
57. Adopting the cases explained in the above paragraph 55, I hold that a person (**V**) commits copyright infringement under the 2nd Limb when V “causes” another person (**W**) to commit copyright infringement under the 1st Limb in the following circumstances:
- (1) V has authority over W and V orders or directs W to commit copyright infringement under the 1st Limb – please see **Tan Teik Leong** and **Shave**; or

(2) V has an express or positive mandate to cause W to commit copyright infringement under the 1st Limb and V has caused W to do so – please see **Ali Amberan** and **McLeod**.

58. I am of the view that the following persons have infringed Plaintiff's copyright in eVAS Work under the 2nd Limb:

(1) 1st Defendant "*caused*" 3rd Defendant's Copyright Infringement under the 1st Limb [please see the above sub-paragraph 52(2)] because 1st Defendant is 3rd Defendant's CEO and had authority, express and/or positive mandate to "*cause*" 3rd Defendant's Copyright Infringement. Furthermore, 1st Defendant was present when 3rd Defendant's Tripartite MOU was signed; and

(2) 2nd Defendant is a director of 3rd Defendant and had authority, express and/or positive mandate to "*cause*" 3rd Defendant's Copyright Infringement. The 2nd Defendant was also present at the time of the execution of the 3rd Defendant's Tripartite MOU.

K. Whether Defendants had committed tort of breach of confidence

59. In **Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor** [2016] 6 CLJ 176, at paragraph 31, Richard Malanjum CJ (Sabah & Sarawak) in the Federal Court followed Megarry J's (as he then was) decision in the English High Court case of **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, at 46-47, that the tort of breach of confidence has the following 3 elements:

- (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.

60. It is clear from Mr. Lim's evidence that eVAS Information has the necessary quality of confidence. Furthermore, the Plaintiff's "*Business Plan - eVAS*" had expressly inserted an "*Important Notice*" which stated, among others, that eVAS Information is owned by Plaintiff and "*must not be disclosed*" without Plaintiff's written authorization.

61. The following agreements showed that eVAS Information had been imparted by Plaintiff (through MSCL) to 1st and 2nd Defendants in circumstances wherein 1st and 2nd Defendants owed a contractual obligation of confidence to Plaintiff:

- (1) 1st Defendant's obligation of confidence to Plaintiff regarding eVAS Information was provided in -
 - (a) clauses 2(i), (ii), 3(a), (b), 6 and 8 Confidentiality Agreement; and
 - (b) Clause 4(c) Settlement Agreement stated that 1st Defendant would still be bound by Confidentiality Agreement; and
- (2) 2nd Defendant owed an obligation of confidence to Plaintiff regarding eVAS Information by reason of –

- (a) clause 9 of 2nd Defendant's Employment Contract (2nd Defendant cannot disclose all materials and information related to Plaintiff which came into his possession in connection with 2nd Defendant's Employment Contract); and
- (b) "*Contract For Services Agreement*" between 2nd Defendant and Plaintiff (**2nd Defendant's Service Agreement**) provided as follows -
 - (i) clause 1.1 provided wide definitions of "*Confidential Information*", "*Deliverables*" and "*Materials*" which include eVAS Information; and
 - (ii) 2nd Defendant shall not disclose eVAS Information (clause 16.1) and such an obligation "*shall survive the termination*" of 2nd Defendant's Service Agreement (clause 16.7);

62. As an alternative to the express contractual obligations owed by 1st and 2nd Defendants to Plaintiff regarding eVAS Information (please see the above paragraph 61), I hold that 1st and 2nd Defendants owed an implied duty to Plaintiff in respect of the agreements stated in the above paragraph 61 to keep the confidentiality of eVAS Information – please see Esher MR's (as he then was) judgment in the English Court of Appeal case of **Robb v Green** [1985] 2 QB 315, at 316-317.

63. In addition to the express or implied contractual obligations of confidentiality owed by 1st and 2nd Defendants to Plaintiff regarding eVAS Information (please see the above paragraphs 61 and 62), this court finds

that 1st and 2nd Defendants owed an obligation in Equity to Plaintiff to keep confidential eVAS Information – please see Denning MR’s judgment in the English Court of Appeal case of **Seager v Copydex Ltd** [1967] 2 All ER 415, at 417.

64. I have no hesitation to find as a fact that there was unauthorised use of eVAS Information by 1st and 2nd Defendants to the Plaintiff’s detriment when 3rd Defendant’s Tripartite MOU was concluded. In any event, 1st and 2nd Defendants did not deny their use of eVAS Information but attempted to justify such a use on the ground that 1st Defendant owned all the IP rights in eVAS Information.
65. Based on the above evidence and reasons, this court finds that the Plaintiff has proven on a balance of probabilities that 1st and 2nd Defendants have committed the tort of breach of confidence in respect of eVAS Information against the Plaintiff.

L. Had Defendants unlawfully interfered with Plaintiff’s business?

66. The tort of unlawful interference with a person’s trade is first recognized in Malaysia by Zakaria Yatim J (as he then was) in the High Court case of **H & R Johnson (M) Bhd v H & R Johnson Tiles Ltd & Anor** [1995] 2 AMR 1390. In **Megnaway Enterprise**, at paragraph 48, the High Court laid down the following 4 elements of the tort of unlawful interference with a person’s trade:

“[48] The elements which constitute the tort of unlawful interference with trade or business are:

- (1) ***Interference with the plaintiff's trade or business;***
- (2) ***Unlawful means;***
- (3) ***Intention to injure the plaintiff; and***
- (4) ***The plaintiff is injured thereby.***

(See Bullen & Leake & Jacob's Precedents of Pleadings [1990] p. 464)."

(emphasis added).

67. I am satisfied that Plaintiff has discharged the legal burden to prove on a balance of probabilities that all the Defendants have committed the tort of unlawful interference with Plaintiff's business. This decision is premised on the following evidence and reasons:

- (1) Defendants had interfered with Plaintiff's business regarding eVAS System as follows -
 - (a) 1st, 2nd and 4th Defendants had participated in the fabrication of the Alleged License Agreement (please see the above paragraph 40). Based on the Alleged License Agreement, MAI sent a letter dated 23.1.2015 to Plaintiff to inform the Plaintiff that MAI would not proceed with the Plaintiff regarding eVAS System;
 - (b) MAI and FIS did not proceed with Draft Tripartite MOU with Plaintiff. Instead, 3rd Defendant's Tripartite MOU had been

concluded and this had clearly interfered with Plaintiff's business regarding eVAS System; and

- (c) MAI did not continue with discussion on Draft JCA with Plaintiff;
- (2) unlawful means had been used by 1st, 2nd and 4th Defendants in the form of a fabricated Alleged License Agreement;
- (3) intention to injure the Plaintiff on the part of 1st, 2nd and 4th Defendants could be easily inferred when 1st, 2nd and 4th Defendants took part in the fabrication of the Alleged License Agreement; and
- (4) Plaintiff is injured by the above unlawful interference by Defendants' because -
 - (a) Plaintiff had expended a lot of money, time and effort (through MSCL) to develop eVAS System; and
 - (b) Plaintiff could not conclude Draft Tripartite MOU and Draft JCA.

M. Whether there was a conspiracy by unlawful means against Plaintiff

68. 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 and **SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor** [2011] 4 MLJ 393 regarding the tort of conspiracy by unlawful means. It was decided in **Muniandy**, at paragraphs 18-21, 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.”**

(emphasis added).

69. The Plaintiff has successfully proven on a balance of probabilities that all the Defendants had conspired by unlawful means to injure the Plaintiff. This finding is based on the following evidence and reasons:

(1) there was a combination of efforts on the part of all the Defendants to injure Plaintiff (**Combination**) as follows -

- (a) 1st, 2nd and 4th Defendants had combined their efforts in the fabrication of the Alleged License Agreement (please see the above paragraph 40); and
 - (b) the CD showed, among others, 1st and 2nd Defendants acting on behalf of 3rd Defendant when 3rd Defendant concluded 3rd Defendant's Tripartite MOU;
- (2) the fabrication of the Alleged License Agreement and the execution of 3rd Defendant's Tripartite MOU constituted acts which had been committed to execute the Combination; and
- (3) Plaintiff has suffered damage due to acts done in execution of the Combination as explained in the above sub-paragraphs 67(4)(a) and (b).

N. Remedies

70. Based on the above evidence and reasons, I find –

- (1) all the Defendants jointly and severally liable to Plaintiff for 4 Causes of Action; and
- (2) 1st and 2nd Defendants jointly and severally liable to Plaintiff for tort of breach of confidence.

71. For the 4 Causes of Action –

- (1) Plaintiff prayed for exemplary and aggravated damages in the sum of RM500,000.00;

- (2) Plaintiff elected for an inquiry to be conducted by the learned Registrar (**Inquiry**) to assess damages payable by Defendants to Plaintiff for the loss suffered by Plaintiff (**Compensatory Damages**) due to the Defendants' breaches regarding the 4 Causes of Action (**Defendants' Breaches**). The Plaintiff also applied for Statutory Damages and Additional Damages to be assessed in the Inquiry; and
- (3) Plaintiff applied for an account of profits under s 37(3) CA.

72. The relevant part of s 37 CA is reproduced below:

“Action by owner of copyright and relief

37(1) Infringements of copyrights ..., the court may grant the following types of relief:

- (a) an order for injunction;***
- (b) damages;***
- (c) an account of profits;***
- (d) statutory damages of not more than twenty-five thousand ringgit for each work, but not more than five hundred thousand ringgit in the aggregate; or***
- (e) any other order as the court deems fit.***

...

- (3) In making an award under paragraph (1)(b), the court may also make an order under paragraph (1)(c) for an account of any profits attributable to the infringement or prohibited act that have not been taken into account in computing the damages.***

...

- (7) Where in an action under this section an infringement of copyright ..., the court may, in assessing damages for the infringement or***

commission of the prohibited act, award such additional damages as it may consider appropriate in the circumstances if it is satisfied that it is proper to do so having regard to -

- (a) the flagrancy of the infringement or prohibited act;*
- (b) any benefit shown to have accrued to the defendant by reason of the infringement or prohibited act; and*
- (c) all other relevant matters.*

(8) In awarding statutory damages under paragraph (1)(d), the court shall have regard to -

- (a) the nature and purpose of the infringing act or prohibited act, including whether the infringing act or prohibited act was of a commercial nature or otherwise;*
- (b) the flagrancy of the infringement or prohibited act;*
- (c) whether the defendant acted in bad faith;*
- (d) any loss that the plaintiff has suffered or is likely to suffer by reason of the infringement or prohibited act;*
- (e) any benefit shown to have accrued to the defendant by reason of the infringement or prohibited act;*
- (f) the conduct of the parties before and during the proceedings;*
- (g) the need to deter other similar infringement or prohibited act; and*
- (h) all other relevant matters. ...”*

(emphasis added).

73. Firstly, in **Portcullis**, at paragraph 156, I have decided that s 37 CA has been introduced by Copyright (Amendment) Act 2012 (**Act A1420**) and Malaysian cases decided before the introduction of Act A1420 should be read with caution.

74. In this case, the Plaintiff has the benefit of s 37 CA (statutory remedies for copyright infringement) and remedies provided by case law for tort of breach of confidence, tort of unlawful interference with Plaintiff's business and tort of conspiracy by unlawful means. I am unable to find a previous Malaysian case which has decided on how the court should award damages (compensatory and non-compensatory) and/or order an account of profits for both copyright infringement and commission of torts (such as this case).

75. I am of the following view:

(1) Plaintiff is entitled to an Inquiry for Compensatory Damages because the Defendants are liable to compensate Plaintiff for all loss suffered by Plaintiff due to the Defendants' Breaches;

(2) **if** the court -

(a) orders an Inquiry for Compensatory Damages

(b) makes a separate award for the Plaintiff's claim for exemplary damages, aggravated damages, Statutory Damages and Additional Damages (**Non-Compensatory Damages**); **and**

(c) orders an account of profits

this may –

(i) result in an unjustifiable windfall for the Plaintiff; and

(ii) financially cripple Defendants in an unjust manner

(2 Considerations).

In view of the 2 Considerations, I will not exercise my discretion to order an account of profits in this case. The court has a discretion under s 37(1) and (3) CA **not** to order an account of profits when an Inquiry for Compensatory Damages has been ordered. This is clear from the use of the directory term “*may*” in s 37(1) and (3) CA. Furthermore, according to s 37(3) CA, the court may order an account of any profits which has **not** been taken into account in computing damages. In this case, as explained in sub-paragraph 75(3) below, the court will award Non-Compensatory Damages which will take into account, among others, the profit to be enjoyed by Defendants as a result of Defendants’ Breaches (**Defendants’ Profit**). In other words, there will not be any prejudice to the Plaintiff if the court does not order an account of profits as the Defendant’s Profit had been considered when the court awards Non-Compensatory Damages; and

- (3) the court has a discretion to award a global sum of Non-Compensatory Damages because -
- (a) under s 37(1)(e) CA, the court may make any order “*as the court deems fit*”, including an award of one global sum of Non-Compensatory Damages; and
 - (b) the court’s discretion to award Additional Damages and Statutory Damages is clear from the use of the directory term “*may*” in s 37(7) and (8) CA respectively.

I exercise my discretion to award one global sum of Non-Compensatory Damages amounting to RM300,000.00. The exercise of this discretion is based on the following evidence and reasons -

- (i) 1st, 2nd and 4th Defendants had conspired to fabricate the Alleged License Agreement. Such a conduct is *mala fide*, malicious and pre-meditated – please see s 37(8)(c) and (f) CA;
- (ii) Defendants' Profit should be disgorged from the Defendants – please see s 37(7)(b), (8)(e) CA and Lord Devlin's judgment in the House of Lords case of **Rookes v Barnard** [1964] 1 All ER 367, at 410-411;
- (iii) there is a need for the court to deter future breaches which may be similar to Defendants' Breaches – please see s 37(8)(g) CA;
- (iv) the nature and purpose of Defendants' Breaches was of a commercial nature – please see s 37(8)(a) CA; and
- (v) the 2 Considerations [relevant under s 37(7)(c) and (8)(h) CA].

O. Court's decision

76. Premised on the above evidence and reasons -

- (1) Plaintiff's Suit is allowed with the following orders -

- (a) a perpetual prohibitory injunction is granted to restrain Defendants from utilizing, disclosing and/or dealing with eVAS Information;
- (b) a perpetual mandatory injunction is ordered to compel Defendants to deliver up upon oath and surrender to Plaintiff within 14 days from 8.5.2017 (date of settlement of terms of the judgment in this case) –
 - (i) eVAS Information; and
 - (ii) any other document belonging to Plaintiff which had been copied, removed or extracted by 1st and 2nd Defendants from Plaintiff
 - in the possession, custody or control of Defendants;
- (c) Plaintiff has liberty to use any affidavit, SD, information, article, material and document obtained in this case for the protection of Plaintiff's rights or interest in or out of Malaysia;
- (d) an Inquiry to assess Compensatory Damages;
- (e) costs of Inquiry shall be assessed by Registrar and shall be paid by Defendants, jointly and severally, to Plaintiff;
- (f) interest at the rate of 5% per annum on Compensatory Damages and shall be paid by Defendants, jointly and severally, to Plaintiff from the date of filing of Plaintiff's Suit until the date of full payment of Compensatory Damages; and

(g) Defendants, jointly and severally, shall pay RM300,000.00 as Non-Compensatory Damages to Plaintiff with interest at the rate of 5% per annum on Non-Compensatory Damages from 8.5.2017 until full payment of Non-Compensatory Damages;

(2) 1st Defendant's Counterclaim is dismissed;

(3) costs of Plaintiff's Suit and 1st Defendant's Counterclaim shall be paid by Defendants, jointly and severally, to Plaintiff (**Costs Sum**) with interest at the rate of 5% per annum on Costs Sum from 8.5.2017 until full payment of Costs Sum; and

(4) an allocatur fee shall be imposed on Costs Sum.

77. I end this judgment with my gratitude to Ms. Goh and Mr. Suaran for their professionalism and competence in the discharge of their duties to the court and their clients.

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

DATE: 16 AUGUST 2017

*Counsel for Plaintiff: Ms. Cindy Goh Joo Seong, Mr. Keong Ming Wai,
Mr. Lam Kian Yip, Mr. Lim Kuan &
Ms. Christine Ding Yean Joon (Messrs Cheang & Ariff)*

*Counsel for Defendants: Mr. Suaran Singh, Mr. Robin Lim Fang Say &
Mr. Pravind a/l Suppiah (pupil)
(Messrs Azri, Lee Swee Seng & Co)*