

IN THE SESSIONS COURT OF KUALA LUMPUR
IN THE FEDERAL TERRITORY OF MALAYSIA
CIVIL SUIT NO: WA-B52NCC-392-06/2019

BETWEEN

MODALKU VENTURES SDN BHD
(Company No: 1190299-X)

...PLAINTIFF

AND

1. RELIANCE SHIPPING & TRAVEL AGENCIES
(SARAWAK) SDN BHD
(Company No: 203716-T)
2. GAN ENG KWONG
(IC. No. 500624-10-5689)

...DEFENDANT

GROUND OF JUDGMENT

INTRODUCTION

- [1] The plaintiff files an application to enter summary judgment against the defendants pursuant to Order 14 rule 1 of the Rules of Court 2012 [ROC] for the sum of RM595,221-57 as at 02 April 2019 to be paid by the defendants to the plaintiff.

CAUSE PAPERS

- [2] For the purpose of the application, this court refers to the following cause papers filed herein:

- (a) Plaintiff's amended writ of summons and statement of claim;
- (b) Defence;
- (c) Reply;
- (d) Plaintiff's notice of application for summary judgment;
- (e) Plaintiff's affidavit in support;
- (f) Defendants' affidavit in reply; and
- (g) Plaintiff's affidavit in reply.

LAW ON SUMMARY APPLICATION

- [3] The law on summary judgments is provided under Order 14 rule 1 ROC as follows:

“Where in an action to which this rule applies a statement of claim has been served on a defendant the plaintiff may, on the ground that defendant has no defence to a claim included in the summons, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.” [emphasis added]

- [4] The guiding principles to grant summary judgments were propounded by the Federal Court in *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 1 CLJ (Rep) 283 at page 285 as follows:

“For the purposes of an application under O14 the preliminary requirements are:

- (i) the defendant must have entered an appearance;
- (ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of r2 of the O14.

If the plaintiff fails to satisfy either of these considerations the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him.”

[5] The purpose of having a law on summary judgment was explained in the Supreme Court case of Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 2 MLJ 183 as follows:

“The underlying philosophy in the O.14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.” [emphasis added]

[6] The Court of Appeal in Ismail bin Abdullah v. Tenaga Nasional Berhad [2010] MLJU 1616 also explained the principle as follows:

“[19] Thus, where an issue raised in an Order 14 application is one of law and is clear-cut, it should be disposed off forthwith instead of going to trial.

“[20] And this is the right approach to adopt notwithstanding that, "The effect of Order 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no bona fide triable issue" (per Gopal Sri Ram JCA (later FCJ) in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, at page 287).

SALIENT FACTS

- [7] The plaintiff is a market operator registered with and supervised by the Securities Commission.
- [8] As a registered market operator, the plaintiff is in the business of managing and facilitating peer to peer [P2P] financing to SME's businesses by bringing in investors including institutional investors to do the investment. It is noted that the plaintiff is also commercially known as "FUNDING SOCIETIES".
- [9] The documentation involved in the financing are formal application, letter of offer, investment note facility agreement, utilisation request, investment note certificate etc.
- [10] Being interested with the loan, the 1st defendant submitted an application for the fund for the sum of RM650,000-00 to the plaintiff. The money was to be utilized as a working capital for the 1st defendant [see the agreement TFL-2 affidavit in support]. For this purpose, the guarantor was the 2nd defendant who was also a director of the 1st defendant.

[11] On 23 August 2018 the plaintiff approved the application and issued a letter of offer to the 1st defendant [exhibit TFL-1] as follows:

“Reliance Shipping & Travel Agencies
(Sabah) Sdn Bhd (116454-V)
Unit E-5-4, Level 5, Block E
Southgate Commercial Centre
No.2 Jalan 2, Off Jalan Chan Sow Lin
55200 Kuala Lumpur

Dear Dato’ Gan

Business Term Facility Offer (“Facility Offer”)

Thank you for submitting your financing application to Funding Societies. Pursuant to your application, we are pleased to extend you a Facility Offer per the below financing terms and subject to our standard Terms and Conditions (available on www.fundingsocieties.com.my).

Financing Terms of Facility Offer

- Financing Amount RM650,000-00
- Tenor 6 months
- Interest 12.5% p.a with
monthly Repayments
-
- Security/support Personal Guarantee
and indemnity for all
the monies from
1) Gan Eng Kwong

.....

This offer will lapse after 3 business days from the date of this facility offer. Please indicate your acceptance by signing and returning to us a duplicate copy of this Facility Offer.

...

We hereby accept this Facility Offer and Terms and Conditions set out on the Funding Societies website.

Signature and stamp

For and on behalf of Reliance Shipping & Travel Agencies (Sabah) Sdn Bhd" [emphasis added]

- [12] On 28 August 2018, the investment note facility agreement was signed by the parties [TFL-2]. The plaintiff, 1st defendant and 2nd defendant are the signatories to the agreement in their capacities as the agent, the issuer and the guarantor respectively. The investors are listed in the Schedule 1 of the agreement.
- [13] Under the agreement, the investors agrees to grant such a facility for the sum of RM650,000-00 to the issuer with the interest of 12.5% per annum and the issuer agrees to make six (6) monthly repayments to the agent beginning October 2018 until March 2019. The issuer's particular bank account number for disbursement as well as the agent's bank account number for payment are also provided for in the agreement [Schedule 2 of TFL-2].

[14] To be specific, the 34 pages agreement is signed by the following individuals:

- (a) on behalf of the investor – the respective chief executive officer and credit risk director of the plaintiff, Wong Kah Ming and Tai Fook Loong; and
- (b) on behalf of the issuer – the directors of the 1st defendant, Gan Eng Kwong [2nd defendant] and Tan Kai Seng.

[15] The plaintiff signs the agreement on behalf of the investor. The signing is done based on the authorization by the investor pursuant to their respective subscription agreement [TFL-2].

[16] This court notes that there are some other detailed written terms provided in the agreement such as the provisions of late payment fee and interest [Clause 7], events of default [Clause 8], agent's actions upon the occurrence of the event of default [Clause 9], guarantee and indemnity [Clause 11], notices [Clause 13] and other terms which are provided in the funding societies website - www.fundingsocieties.com.my.

[17] On 28 August 2018, the 1st defendant issued a utilisation request to the plaintiff [TFL-2]. The request states as follows:

“We wish to obtain funding on the following terms:

Proposed Utilisation Date	:	29 th August 2018
Currency of Facility	:	Ringgit Malaysia (RM)
Amount	:	RM650,000-00
First Repayment Date	:	1 st October 2018

We confirm that each condition specified in Clause 3 [Drawdown of the Facility) of the Facility Agreement is satisfied on the date of this Utilisation Request.

We shall issue an Investment Note as evidence of our indebtedness owed to the Investors on Utilisation Date, and we hereby irrevocably and unconditionally authorise the Agent to enter the date on the Investment Note Certificate which shall be kept in the custody of the Agent for and on behalf of the Investors.

This Utilisation Request is irrevocable.

Yours faithfully

For and on behalf of
Reliance Shipping & Travel Agencies

Authorised signatory	Authorised signatory
<u>Name: Gan Eng Kwong</u>	Tan Kai Seng”

[18] An investment note certificate was also issued by the 1st defendant [TFL-2]. The certificate states as follows:

- “1. This certificate (the "Certificate") evidences the total aggregate indebtedness owed to investors of the Issuer.
2. This Certificate:
 - (a) was issued pursuant to resolution of the Board of Directors of the Issuer passed on 28 August 2018,
and
...
3. This Certificate has the benefit of the Facility Agreement.

4. Any expression used in this Certificate has the same meaning as in the Facility Agreement.
5. For any value received, subject to the Facility Agreement, the Issuer unconditionally promises to pay to the bearer of this Certificate:
 - (b) the sum of RM650,000.00 on 1st March 2019 or such earlier date as the sum may be repayable In accordance with the Facility Agreement;
 - (c)

Signed by

Gan Eng Kwong

Director

Reliance Shipping & Travel Agencies (Sarawak) Sdn Bhd

Tan Kai Seng

Director

Reliance Shipping & Travel Agencies (Sarawak) Sdn Bhd”

[19] On 02 October 2018, as agreed, the 1st defendant paid the first monthly installment to the plaintiff for the sum of RM6,770-83. See statement of account of the plaintiff [TFL-5].

[20] On 09 October 2018, the plaintiff through its credit administrator, Thava Malar sent a letter to the 1st defendant confirming the disbursement of RM650,000-00 which was made on 28 August 2018 into the latter’s bank account [see the letter TFL-7]. The letter also states the followings:

First repayment date: 1st October 2018
Repayment due date: 1st March 2019
Repayment amounts: RM6770.83 X 3 months
RM223,437.50 X 2 months
RM223,437.51 X 1 months

- [21] On 01 November and 03 December 2018, the 1st defendant paid to the plaintiff the monthly installments of RM6,770-83 as agreed. See statement of account [TFL-5].
- [23] On 24 January 2019, the 1st defendant paid monthly installment of only RM110,000-00 and not RM223,437-50 as agreed in the agreement. See statement of account [TFL-5].
- [24] Due to the default, on 21 February 2019, the plaintiff issued a letter of demand to the 1st defendant [TFL-3]. The plaintiff claimed that there was an outstanding amount of RM341,070-62 as at 21 February 2019. The letter gave notice to the 1st defendant for the outstanding amount to be paid within seven (7) days from the date. The letter was signed by Siow Kar Mun, the credit administrator of the plaintiff.
- [25] On 04 April 2019, since no repayment being made, the plaintiff through its solicitors issued a letter of demand to the 1st defendant [TFL-4]. The letter gave the 1st defendant seven (7) day notice for the payment of the outstanding amount. A copy of it was sent to the 2nd defendant.

[26] Since no repayment had been made, on 08 April 2019, another letter of demand was issued by the solicitors for the plaintiff to the 2nd defendant [TFL-4]. A copy was sent to the 1st defendant.

[27] The detailed plaintiff's statement of account showing the total outstanding amount including late interest due from the 1st defendant for the facility granted as at 02 April 2019 is RM595,221-57. See statement of account [TFL-5].

[28] Following the demands, on 12 April 2019, the 1st defendant made repayment of only RM19,528-44 to the plaintiff.

[29] In an effort to settle the issue, the defendants had sent emails to the plaintiff appealing for the extension of time and reschedule of payment to repay the facility on the ground of slow collection from its customer. But the application was turn down by the plaintiff. The emails as well as replies by the plaintiff on the appeal were made on 26 December 2018, 16 January 2019, 13 February 2019, 20 February 2019, 01 March 2019 and 11 April 2019. See exhibit B-1 plaintiff affidavit in reply.

[30] To further appreciate the communications between both parties, the email from the 1st defendant to the plaintiff dated 16 January 2019 states as follows:

“Dear Thava,

Further to below email, we wish to request for further extension of time to make payment to your good company due to the delay in our collection.

.....

We trust you could make our request favorably. Should you require further information, please do not hesitate to contact us.

Thank you
Best Regards

S Pei Ling”

[31] In another email from the 1st defendant to the plaintiff dated 20 February 2019, the former proposed the followings:

“Dear Thava,

Further to our below email dated 13 Feb 2019, we are please to attach herewith our new Payment Schedule (in blue) for your kind attention.

Outstanding to Modalku	RM
1....	
2....	
3. Reliance Shipping & Travels Agencies (Sarawak) Sdn Bhd	560,312-50

Proposed settlement date

1....	
2....	
3. 30 April 2019	[200,000-00]

In view of the forthcoming peak season, we will have good collection. We seek your kind consideration to

agree with the Payment Schedule and to waive the late payment penalty and interest charges.

Thank you

Best Regards

S Pei Ling”

[32] On 15 March 2019, the plaintiff replied to the proposal by the 1st defendant as follows:

“Dear Peiling,

Follow up on yesterday meeting, RSTA request:

1. 4 weeks internal structure on the cash flow and provide us the payment commitment.
2. To release RM50,000 within 2 weeks.
3. Waiver of the late penalty and interest.

However, as mentioned RM50,000 for 4 accounts is hard to accept since the earlier proposal is RM200,000 for 4 accounts and the late interest cannot be waived as this agreement with investors.

We are expecting of

1. RM200,000 (RM50,000) each account can be released on time as proposed in 2 week time.
2. RM150,000 repayment of each account in 4 weeks.
3. The remaining balance of 4 accounts which including all outstanding fees in 8 weeks.

Please contact me if you have any problems.

Thank you
Regards

Victor Lam
Collection Manager”

[33] As for repayments, it is also significant to note that the 1st defendant had issued 6 postdated cheques dated between 29 September 2018 until 29 February 2019 totaling RM690,624-99 in which three (3) had been deposited into the plaintiff’s account. As for the remaining three (3), the 1st defendant had asked the plaintiff not to bank them in. See the copies and bank slip deposits [TFL-8]. The particulars of the above mentioned cheques issued by the 1st defendant were summarized as follows:

Cheque No.	Date	Total (RM)	Status
MBB655475	29 Sep 2018	6,770.83	Deposited
MBB655476	29 Oct 2018	6,770.83	Deposited
MBB655477	29 Nov 2018	6,770.83	Deposited
MBB 655478	29 Dec 2018	223, 437.50	1 st defendant instructed not to deposit

MBB655479	29 Jan 2019	223,437.50	1 st defendant instructed not to deposit
MBB655480	29 Feb 2019	223,437.50	1 st defendant instructed not to deposit
TOTAL		690,624.99	

AFFIDAVITS

[34] The affidavit in support of the application is deposed by Tan Fook Long, the director of the credit risk management of the plaintiff while the affidavit in reply by the defendants objecting to the application by the 2nd defendant.

[35] The affidavit in reply has objected the summary application on the grounds that there are triable issues.

[36] On the grounds contented by the defendants, this court will address them at the later part in this grounds of judgment.

ANALYSIS BY THE COURT

[37] This court has considered the issues raised by the learned solicitors for the defendants. To this Court, no human made case is 100 percent absolutely perfect as compared to a divine or god made

case. Therefore one can easily find issues in a case built up by human. But what is legally required for this court to consider under the summary application law is whether the issues are triable or not. In this regard, it is useful to refer to the Federal Court in the case of Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241 which addressed the issues as follows:

“... it is not enough for the respondent in answer to the appellants’ application to sign final judgment, to raise an issue, or any issue. He must, however, raise such issue as would require a trial in order to determine it. In other words, the issue raised must be an arguable issue.”

[38] After carefully perusing the cause papers, this court has to say that it has no doubt that this is a clear cut case that no triable issues has been raised.

[39] The agreement speaks very clearly in that firstly, the 1st defendant has borrowed the sum of RM650,000-00 from the plaintiff, secondly, the 2nd defendant is the guarantor and thirdly, the 1st defendant has defaulted in making repayments as agreed.

ISSUES RAISED BY THE DEFENDANT

[40] The learned solicitors for the defendants submits that there are triable issues as stated below.

WHETHER THE FACILITY AGREEMENT IS VALID OR NOT

- [41] It is the contention of the defendants that the facility agreement is illegal pursuant to the Moneylenders Act 1951 and Moneylenders (Amendment) Act 2003 ["Money Lenders Acts"] because the plaintiff is not licensed to carry out money lending activities.
- [42] The court has considered the issue and finds that however, the defendant fails to submit any case law adjudicated by any court that the type, nature and business carried out by the plaintiff is illegal.
- [43] To the humble opinion of this court, the business of the plaintiff should not be looked in a narrow perspective in that since there is a sum of money being lent to the defendants, then the plaintiff is subjected to the Money Lenders Acts.
- [44] Carefully learning and following the financing systems, this court is satisfied that the plaintiff is in the business of managing with other peers to manage funds for capital raising. The borrowing or lending involved a large sum of money which is done by investors or corporations that has large amounts of wealth at their disposal.
- [45] On this issue, it is useful to refer to an article in THE ASIAN BANKER by Neeti Aggarwal published on 04 October 2019 which said:
- “Traditionally, the options were limited to raising funds through friends and family or through financial institutions where SMEs may not be the key target segment. Banks often require collaterals and prefer to give loans to prime

credit borrowers aside from longer-term loans and lengthy processing time. Unfortunately, there are SMEs that do not have these collaterals, probably due to low credit history, and thus find it difficult to raise funds.

This led to SME and micro SME (MSME) segments to become financially underserved. According to the International Monetary Fund's Financial Access Survey, the outstanding loans to SMEs from banks was only 6.54% of GDP in Indonesia in 2018.

In order to solve this market inefficiency, several peer-to-peer (P2P) lending companies brought individual lenders and borrowers together on their platform and these flourished.

Soon after, P2P lending in Indonesia experienced rapid growth. Based on data from the OJK, the Financial Services Authority of Indonesia, the P2P online lenders have channeled loans totaling to \$3.52 billion (IDR 49.79 trillion) as of July 2019, a 119% increase year-to-date.

Modalku is among the pioneers and it operates across three countries in South East Asia: as Modalku in Indonesia and under the brand Funding Societies in Singapore and Malaysia.”

See-<http://www.theasianbanker.com/updates-and-articles/p2p-lender-modalku-grows-to-disburse-1-million-loans>

[46] The above opinion is further fortified by the fact that the plaintiff is registered as a recognized market operator under section 34 of the Capital Market and Services Act 20017 [CMSA].

[47] For the purpose of convenience, section 34(1) CMSA provides as follows:

“Section 34. Recognized market operator.

(1) For the purposes of paragraph 7(1)(e), the Commission may upon application by a person, register the person as a recognized market operator subject to any terms and conditions as the Commission considers necessary.”

[48] The list of registered recognized market operators are detailed out in the official website of the Securities Commission and they are as follows:

LIST OF REGISTERED RECOGNIZED MARKET OPERATORS

General

1. Bay Supply Chain Technology Sdn Bhd
2. Bursa Malaysia Bonds Sdn Bhd
3. Citibank Berhad

Equity Crowdfunding (ECF)

1. Leet Capital Sdn Bhd
2. Ata Plus Sdn Bhd
3. Crowdo Malaysia Sdn Bhd
4. Ethis Ventures Sdn Bhd
5. Eureeca SEA Sdn Bhd
6. FBM Crowdtech Sdn Bhd
7. Fundnel Technologies Sdn Bhd

8. MyStartr Sdn Bhd
9. Pitch Platforms Sdn Bhd
10. Crowdplus Sdn Bhd

Peer-to-Peer Financing (P2P)

1. Bay Smart Capital Ventures Sdn Bhd
2. B2B Finpal Sdn Bhd
3. Capsphere Services Sdn Bhd
4. Crowd Sense Sdn Bhd
5. Ethis Kapital Sdn Bhd
6. FBM Crowdtech Sdn Bhd
7. MicroLEAP PLT
8. Modalku Ventures Sdn Bhd
9. Moneysave (M) Sdn Bhd
10. Peoplender Sdn Bhd
11. QuickKash Malaysia Sdn Bhd

[49] The position is further strengthened by the provision of non application of the Money Lenders Act 1951 to any person licensed, registered or regulated under the CMSA. This can be seen clearly under section 2A(1) read together with Item 10 of the First Schedule of the Money Lenders Act 1951.

[50] Section 2A(1) and the First Schedule provides as follows:

“Section 2A. Non-application of Act and exemption therefrom.

(1) This Act shall not apply to a person specified in the First Schedule, and such person shall be subject to any written law governing his business or activity.”

“FIRST SCHEDULE

1. ..

2. ..

.....

10. Any person licensed, registered or regulated under the Capital Markets and Services Act 2007.”

[51] For the foregoing reasons, the court has no doubt that agreement is clearly valid under the law.

WHETHER THE PLAINTIFF HAS PROVEN THAT THE FACILITY HAS BEEN RELEASED TO THE 1ST DEFENDANT

[52] The learned solicitors for the defendant contends that the plaintiff has failed to show that the facility has been released to the 1st defendant. There is no evidence on money trail adduced to prove the disbursement.

[53] This court finds it extremely hard to accept the argument.

[54] The letter emailed by Thava Malar to the 1st defendant on 09 October 2019 [TFL-7] clearly suggesting that the loan has been disbursed.

“Dear Reliance Shipping & Travel Agencies
(Sarawak) Sdn Bhd

Please note that we have performed the disbursement as per details below.

Date : 28 August 2018

Amount : RM650,000-00

Bank : Maybank Berhad

[55] The law presumes that the common course of the transaction has taken place and the money has been received by the defendant. See section 114(f) of the Evidence Act 1950. The Court is also satisfied that the presumption under the section has never been rebutted by the defendant ie that the email systems or the bank account of the defendant has been hacked. In this relation, it is useful to refer to the recently reported case of Siti Khadijah Apparel Sdn Bhd v. Ariani Textiles & Manufacturing (M) Sdn Bhd [2019] 7 MLJ 478 which explained as follows:

“[10] Firstly, pursuant to s 114(f) of the EA, the court may presume that the common course of business has been followed in a particular case — please see the Federal Court’s judgment delivered by Edgar Joseph Jr FCJ in Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 MLJ 465 at pp 519-520. Relying on s 114(f) of the EA as interpreted in Pekan Nenas Industries, I find that there is a rebuttable presumption as follows:

- (1) there had been a purchase of the defendant’s telekung in exhs P2 and P3 from CJ WOW Shop; and
- (2) CJ WOW Shop had sent exhs P2 and P3 in exh P4 (‘rebuttable presumption’).

[11] Section 4(1) of the EA provides as follows:

4 Presumption

- (1) Whenever it is provided by this Act that the court may presume a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it. (Emphasis added.)

[12] According to s 4(1) of the EA, when the EA provides that the court may presume a fact (such as the facts presumed by an application of s 114(f) of the EA), the court may 'regard the fact as proved unless and until it is disproved'. Accordingly, based on s 4(1) read with s 114(f) of the EA, once the court presumes that the common course of business (regarding exhs P2, P3 and P4) has been followed:

(1) the rebuttable presumption arises and exhs P2, P3 and P4 are admissible as evidence. Hence, the defendant's application to expunge exhs P2, P3 and P4 cannot succeed; and

(2) the evidential burden then shifts to the defendant to adduce evidence to rebut the rebuttable presumption. No evidence has been produced by the defendant to rebut the rebuttable presumption. Accordingly, I find that the facts presumed in the rebuttable presumption (please see the above para 10) have become irrebuttable."

[56] The court also finds that the totality of evidence; ie the existence and execution of the agreement, the issuance and exchange of correspondences, the previous and subsequent conduct of the parties, the appeal to extend time by the defendant, facts forming of the same transaction, the implied admission, the inference and the existence of a course of business, conclusively shows that the money has been released.

[57] The learned solicitors for the defendant cites the case of Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 2 MLJ

229 as an authority and submits that a statement of account is not sufficient to prove damages.

[58] As explained earlier, the Court is not solely relying on any particular document in concluding that the money has been disbursed to the 1st defendant.

[59] Upon perusing the case cited, the court is of the considered view that what happened in Sony Electronics [supra] was that the respondent's services were terminated by the appellant. The respondent claimed that as a result of the termination, it had suffered a loss and claimed damages against the appellant. In the trial, the respondent adduced inter alia statement of account to prove the loss. It was decided by the Court of Appeal that the audited statements only showed profit and subsequently not sufficient to prove a loss. It was held by the COA as follows:

“It was clear that the statements of account exhibited were by themselves not sufficient to establish the respondent's claim for damages. They only showed profit for 1996 and 1997. They did not show how the alleged loss had come about. The respondent failed to prove the contents and show how their contents were related to the alleged breach of the agreement. No evidence whatsoever was led by the respondent with regard to the computation or breakdown of the loss allegedly suffered therefrom flowing from the breach.”

[60] It is the considered view of the court that the claim in the case cited is a claim for the loss due to termination of contract which is entirely

different from the present case which is a claim based on the outstanding loan. The evidence of the money disbursed is overwhelming. Therefore this Court finds it difficult to apply the case as an authority on the issue.

WHETHER THE PLAINTIFF HAS LOCUS STANDI TO BRING THIS ACTION ON BEHALF OF THE INVESTORS

- [61] The defendant submits that the plaintiff has not suffered any loss because the money does not belong to him, but to the investors. Accordingly, it should be the investors who should file the present suit against the defendant.
- [62] This court has considered the submission and finds it hard to accept. Under the circumstances of the present case, it is surely not a straight and simple conventional scheme of financing and lending money. It is a newly created scheme to raise capital fund which has its own characteristic.
- [63] Furthermore, it is clear that the present action is based on a breach of contract whereby the plaintiff is the agent of the investors under the agreement. In fact it is the plaintiff who has issued the offer letter to the 1st defendant. To further strengthening the finding, the 1st defendant even made partial and monthly installments to the plaintiff.
- [64] The defendants relies on the case of Datuk Mohd Ali bin Haji Abd Majid & Anor (both practicing as Messrs Mohd Ali & Co) v. Public Bank Berhad [2014] 4 MLJ 465 as an authority to submit that one must have suffered a loss in order to have the locus to file a suit.

[65] The court has considered the authority and is of the view that the facts in the case law does not in any manner discuss the issue of locus standi of any party. Accordingly, this Court finds it difficult to accept the defendants' contention.

[66] Further, the court agrees with the submission of the learned solicitors for the plaintiff that sections 9.6 and 14.2 (e) of the agreement clearly provide that the plaintiff is authorized to act on behalf of the investors in all legal or arbitration proceedings relating to the financing documents and to commence legal proceedings.

[67] For the purpose of convenience, section 9.6 provides as follows:

“If the Issuer does not repay all outstanding amounts due and payable despite demand being made, the Agent (acting for and on behalf of the Investors) or the Investors themselves (where the Agent falls to act despite being authorised to do so, by the Investors), may at their own respective individual discretion, commence legal proceedings against the Issuer and the costs and expenses of such proceedings shall be borne by the Issuer. Notwithstanding the aforesaid, the Investors agree and acknowledge that they shall not, at any time, make any direct demand or contact the Issuer for payment, whether through electronic mail, telephone calls, letters, physical meetings, cold calling or otherwise.”

[68] Also section 14.2(e) provides as follows:

“The Agent is authorized to act on behalf of the Investors (without first obtaining the investors'

consent) in any legal or arbitration proceedings relating to any Finance Document.”

[69] Based on the above sections, the court is satisfied that the defendants’ contention on this issue has no merit.

WHETHER THERE IS A CONSIDERATION BETWEEN THE PLAINTIFF AND THE 2ND DEFENDANT

[70] The defendants submit that there is no valid consideration between the plaintiff and the 2nd defendant since the agreement is void as it is against the Money Lenders Acts.

[71] The Court has considered the issue of illegality earlier and is of the opinion that the agreement is valid.

[72] The defendant further submits as follows:

“Selanjut dan secara alternatifnya, Defendan-Defendan berhujah bahawa jika pun terdapat apa-apa jaminan yang timbul oleh Defendan Kedua selepas tarikh Perjanjian Kemudahan tersebut, jaminan tersebut adalah dibatalkan (“void”) kerana ketiadaan balasan yang baru (“fresh consideration”).

[73] On the above submission, the learned solicitors for the defendants specifically relied on the illustration (c) of the section 80 of the Contract Act 1950 which provides as follows:

“(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.”

[74] With respect, this court cannot accept the contention. Clearly this is not a case where the 2nd defendant is in the same situation as explained in the illustration (c) above.

[75] To further fortify this court's finding on the issue, the 2nd defendant is not simply a guarantor to the agreement, but he does have an interest in the whole loan by virtue of the fact that he is also a director of the 1st plaintiff. He too places his signature in a number of loan documentations in the transaction on behalf of the 1st defendant.

[76] For the foregoing reasons, this court is satisfied that the issue has no basis in law.

THE AGREEMENT IS VERY CLEAR

[77] Upon considering the agreement, this court finds that the written facility agreement is very telling. The purposely selected words and sentence provided in the agreement are derived from the intention of the parties of what to expect from each other. It is thus clear that it has been the intention of the 1st defendant to borrow the sum of RM650,000-00 from the plaintiff. It is clear that it has been the intention of the 2nd defendant to be the guarantor for the facility and finally it is also clear that the defendants have intended to agree for the consequences in case of default.

[78] Section 8 of the agreement states a clear provision on events of default as follows:

“8.1 For the purpose of this Agreement, the following events are Events of Default:

- (a) the Guarantor fails to pay any amount due from it hereunder on the due date for payment or on demand;
- (b) the Issuer stops, threatens to stop, or is otherwise unable to pay an amount equal to or more than the aggregate of four (4) Periodic Repayment Amounts (consecutive or otherwise) and accrued interest thereon (disregarding any fees payable under Clause 7 above);”

[79] On this issue, Dato Visu Sinnadurai in his book “THE LAW OF CONTRACT IN MALAYSIA AND SINGAPORE: Cases and Commentary Second Edition says at page 27 as follows:

“Sometimes disputes may arise between the parties as to whether in fact a legally binding contract had been concluded between the parties. The task of so determining whether a contract is fully binding is then left to the courts to determine. In arriving at its conclusion, the paramount factor which the court takes into consideration is the intention of the parties as evidenced in the written contract.”

SERVICE OF THE NOTICE HAS BEEN MADE PURSUANT TO THE AGREEMENT

[80] The court finds that all the letters of demand have been sent and served to the 1st defendant according to the clause 13 (a) to (c) of the agreement.

[81] Clause 13(a) (b) and (c) of the agreement provides as follows:

“NOTICES

- (a) All notices, demands or other communications required or permitted to be given or made hereunder shall be made in writing and delivered personally or via electronic mail, or sent by prepaid registered post, addressed to the intended recipient at his or its address as may be notified to the Party from time to time.
- (b) Any notice or communication given as provided in this Clause shall be deemed received by the party to whom it is addressed:
 - (i) if delivered by hand, when so delivered;
 - (ii) if send by pre-paid post, on the third (3rd) Business Day after posting;
 - (iii) if by facsimile, upon the issue of the sender of a transmission control or other like report from the despatching facsimile machines which shows the relevant number of pages comprised in the notice to have been sent if such report is issued on or before 5.00pm on a Business Day, or on the next Business Day if such report is issued after 5.00pm; or

- (iv) if by electronic mail, when actually received in readable form and if it is received after 5.00pm (or on a day which is not a Business Day) in the place of receipt, It shall be deemed received on the following Business Day of the place of receipt.
- (c) Any demand for payment or service of any legal process may be made or effected by prepaid registered or ordinary post addressed to the Obligors or each of the Obligor at his address specified herein or at the last known place of business or registered address and such demand or legal process shall be deemed to have been duly served on the fifth (5th) day following that on which it is posted, notwithstanding that the said demand or legal process may subsequently be returned undelivered by the postal authorities. "Legal Process" shall mean all forms of originating process, pleadings, interlocutory applications of whatever nature, affidavits, orders and such documents, other than the aforesaid, which are required to be served under any legislation or subsidiary legislation or by the terms of this Agreement."

[82] It is a trite law that when a party complies with the service clause in a contract, the deeming provision in the contract will apply. The Court of Appeal in *Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd) v. HIB-C Industries Sdn Bhd & Ors* [2013] 3 MLJ 41 explained the principle in the following term:

“In our judgment, cl 12 of the letter of guarantee is crystal clear and devoid of any ambiguity. The onus on the appellant is merely to show that the notice of demand to the second and third respondents was sent by post addressed to them at their addresses as stated in the letter of guarantee or at their last known place of business or abode. The demand notice or notice so sent shall be deemed to be served on the day following that on which it is posted. In proving such service it shall be sufficient to prove that the notice of demand was properly addressed and put in the post notwithstanding that the said notice or demand may subsequently be returned undelivered by postal authorities.”

NO REPLY TO THE LETTER OF DEMAND

- [83] After failing to get the due repayments from the defendants and later on resorting to appoint a legally trained solicitors to issue a letter of demand, it signifies a clear and serious signal from the plaintiff to the defendants that the former would not hesitate to ask the state through the court of law to order for the remedy against the defendants. Reasonably, if there are bona fide defences, similar seriousness should be responded by the defendants.
- [84] After carefully considering the evidence, this court finds that there has been no prompt denial and reply to the letter of demand issued by the plaintiff's solicitor. The principle of law is settled that in a business and commercial transaction, the failure of a party to deny

a solicitor's demand by the opposing party amounts to an implied admission.

[85] The above principle can be found in the Court of Appeal case of David Wong Hon Leong v. Noorazman bin bin Adnan [1995] 4 CLJ 155, at 159, Gopal Sri Ram JCA (as he then was) gave the following judgment:

“During argument, we registered our surprise at the learned Judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.

In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr. J. in Tan Cheng Hock v. Chan Thean Soo [1987] 2 MLJ 479-487:

In Wiedemann v. Walpole [1891] 2 Q.B. 534, 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher M.R., in his judgment, remarked,

Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise.' (Emphasis added). Earlier, in his judgment, he said, 'Now there are cases - business and mercantile cases in which the Courts

have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.”

THE DEFENDANTS HAVE NEVER PROTESTED TO THE PLAINTIFF – AFTERTHOUGHT DEFENCE

[86] Based on the evidence, this court is clear that the defendants have never lodged any complaints and protests to the plaintiff on all the issues prior to the present case being filed. Accordingly all the issues raised are without doubt, outright afterthoughts. In *Shinning Crest Sdn Bhd (Appointed Receiver and Manager) & Ors v. Malaysia Building Society Bhd* [2018] 10 MLJ 491, the High Court of Kuala Lumpur observed to the following effect:

“[47] In the instant case before me, the plaintiffs never registered any protest against the consent judgment before. In fact, their conduct demonstrated the opposite. As mentioned earlier, the plaintiffs had actually issued the cheque for RM2m in purported compliance with the terms of the consent judgment on the requirement for the initial payment. Plainly therefore, they had sought to act on the very terms of the consent judgment. This bolsters the defendant’s submission that the attempt to now set aside the consent judgment by the plaintiffs is nothing but an afterthought and a desperate attempt to restrain the

defendant from pursuing its rights under the consent judgment.”

[87] This Court is clear that all the issues have been only raised for the first time after the present writ being filed by the plaintiff against the defendant.

[88] To this Court, it has certainly failed to rebut the genuine and contemporaneous agreement that was made when the parties were discussing and negotiating the transaction professionally and trustworthily, and not when the party is under the pressure to make a defence to the court and risks a legally enforceable judgment.

THE DEFENDANTS HAVE MADE BARE ALLEGATION

[89] After considering the overall circumstances, this court is also satisfied that all the allegations and issues raised are bare allegations. No reliable supporting documents exhibited.

[90] It is trite law that a bare allegation does not amount to a triable issue. See *Perbadanan Pembangunan Ekonomi Sarawak v. Sarawak Motor Industries Bhd* [1989] 3 MLJ 246 at 249, HC per Haidar J (later CJ (M)); *Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Yong* [1987] 1 MLJ 139 at 141, HC, per Chong Siew Fai J (later CJ (Sabah & Sarawak)).

THE DEFENDANTS ARE ESTOPPED FROM RAISING THE ISSUES

[91] It is settled law that since the issues have never been raised to the plaintiff, the defendants are then estopped from raising them at this

stage. In respect of this principle, it is useful to refer to the judgment of the Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 which addressed the principle as follows:

“Now the evidence reveals that the very first invoice carrying the indorsement was sent to and received by the appellant in April 1990. That invoice was honoured without complaint. The appellant did not lodge any protest with the respondent about the latter's right to impose the 14-day limit. Then, for a period of about seven months many invoices bearing the identical indorsement were sent by the respondent to the appellant. Throughout this period there was not a whisper from the appellant about the validity of the indorsement. In these circumstances was the respondent entitled to assume that the appellant had accepted the 14-day time limit as a term of the factoring arrangement? We apprehend that the answer to this question lies in the proper application of the doctrine of estoppel.”

[92] It is significant to note the rationale behind this principle as can be found in the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers PLC v. News (UK) Ltd and others* [1990] 3 All ER 376 at pages 383-384 as follows:

“There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having

elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.”

CONCLUSION

[93] After considering the cause papers, evidence and submissions from the parties, this court is satisfied that the plaintiff's application for summary judgment against the defendants has complied with the preliminary requirements under Order 14 ROC.

[94] The Court is also satisfied that the plaintiff has established a very clear cut case and the defendants have no bona fide defence.

[95] Based on the above finding, the judgment for the plaintiff should not be further unfairly delayed and accordingly the summary application is allowed with cost.

Prepared by:

SGN

(Zulqarnain bin Hassan)

Sessions Judge

Sessions Court 6

Kuala Lumpur

Dated: 18 November 2019

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