IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

SUIT NO.: WA-22NCvC-528-08/2020

BETWEEN

1. CC LAND RESOURCES SDN BHD
   (Company No.: 917673-K/201001033750)

2. SHA CHAIM CHUAN
   (NRIC No.: 580921065225) ...PLAINTIFFS

AND

GEO WIN SDN BHD ...DEFENDANT
(Company No.: 1176012-T /201601005086)

GROUNDS OF JUDGMENT

A. INTRODUCTION

1. The Plaintiffs are seeking to enforce the Letter of Undertaking dated 6-4-2016 that requires the Defendant to (a) pay the 1st Plaintiff or its nominee the sum of RM 300,000.00 and (b) deliver to the 2nd Plaintiff or his nominee one of the semi-detached units sold by the Defendant.

2. The Defendant denies that the terms of the Letter of Undertaking are enforceable. It contends that the Letter of Undertaking is illegal as it breaches section 223 and / or section 221 of the Companies Act 2016 as it benefits the 2nd Plaintiff without him having to disclose the said agreement and his interest therein to the directors and shareholders of the 1st Plaintiff before the said agreement was executed.

3. The Defendant also contends that as it is a substantial disposal of an asset of the 1st Plaintiff, the said agreement should have been executed with the express approval from the shareholders and the board of directors of the 1st Plaintiff. Having failed to obtain such consent, the said agreement is allegedly void by virtue of section 223 of the Companies Act.

4. The Defendant further contends that the said agreement is also void as the Plaintiffs are attempting to avoid their tax obligations.

5. Finally, the Defendant contends in the alternative that even if the said agreement is not illegal, the Plaintiffs have failed to show that the terms have been fulfilled. Thus, the said letter of undertaking cannot be enforced due to the inability to comply with all the obligations therein.

B. Summary of the Decision of this Court

6. Having heard the witnesses, and considering all the documents, witness statements, and submissions by counsels, I believe that the Defences raised by the Defendant does not justify a refusal of the claims against it. I believe that the Plaintiffs are entitled to have the Letter of Undertaking enforced against the Defendant. I am therefore allowing part of the Plaintiffs' claim against the Defendant with costs of RM 50,000.00 subject to the required allocator. My reasons are stated in the following paragraphs.

C. Background Facts

7. The 1st Plaintiff and the Defendant executed a Joint Venture Agreement dated 6-4-2016 for the development of a piece of land measuring 2.5 acres in Mukim Bukit Tinggi, Daerah Bentong, Pahang.

8. Parties agreed that the Defendant shall build several units of double-storey semi-d shops on the land that will be sold to the public. Initially

parties agreed that the profits from the said venture will be shared between them as stated in clause 5 of the said Joint Venture Agreement.

9. A letter of undertaking was executed by the Defendant addressed to the 1st Plaintiff dated 6-4-2016. The material terms of which are as follows: -

1) In consideration of you agreeing to enter into a joint venture agreement dated 6-4-2016 with us jointly develop a project of Double Storey Semi-D Shops on a piece of government land measuring 2.5 acres in Mukim Bukit Tinggi, Daerah Bentong, Pahang Darul Makmur ("JVA"), we GEO WIN SDN. BHD. (Company No. 1176012-T) hereby irrevocably agree and undertake to:

(a) Pay Ringgit Malaysia Three Hundred Thousand (RM300,000.00) only in cash to you or to your nominee(s) or any person(s) or company (ies) as may be designated or instructed by you, upon execution of the joint venture agreement dated 6-4-2016 between the Owner and the Developer ("JVA"), the amount of which shall be fully refunded to us (free of interest) in the event that the Joint Venture is terminated due to non-fulfillment of the conditions precedent in the JVA ;

AND

b) deliver, convey or transfer one (1) complimentary double storey semi-D shop ("the Unit") to SHA CHAIM CHUAN 9NRIC No.580921-08-5225 or his nominee(s) ("Transferee'), subject to the following terms and conditions:

(i) the Unit will be granted to the Transferee in the event: -

(aa) sixteen (16) or more unit of shops, each of which has a maximum front width of 38 feet, are capable of being approved or are approved by the Appropriate Authorities on the Project of the said Land; OR

(bb) the Developer decides to develop or has developed the commercial shops with shop lot front width exceeding 38 feet on the Project of the said Land ; OR

(cc) the Developer decides to provide or has provided additional facilities and amenities to the Project other than the standard facilities and amenities required by the Relevant Authorities;

(ii) the Unit to the Transferee shall be selected from the intermediate lots by way of balloting on the date of the pre-launching, soft launching or launching the shop units for sale, whichever date is earlier;

(iii) the Developer shall execute a sale and purchase agreement with the Transferee for the delivery of the complimentary Unit to the Transferee, at the time when the sale and purchase agreements are first entered into between the Developer and the other end-purchasers.

Clause 25 and 28 in Joint Venture Agreement

SALE OF THE UNITS

25. As from the Unconditional Date, the Developer shall be entitled and be at full and complete liberty to enter into sale agreements with intending purchasers in respect of the Project or any one or more thereof upon such terms and conditions at the prices determined by the Developer.

OWNER'S UNDERTAKINGS AND REPRESENTATIONS

28. Subject to Clause 9 thereof, the owner shall upon execution of this Agreement execute a separate valid registrable Power of Attorney as hereto attached in Appendix B ("POA") appointing the Developer as its lawful attorney ("Attorney") and in its name or otherwise to act and conduct and manage its affairs, interest, rights and title in and to the Land and confer upon the Developer the power to act on its behalf in all matters relating to the Land.

The duly signed POA shall be deposited with the Owner's Solicitors ***as stakeholder****. The parties hereby agree that the Owner's Solicitors shall be authorized, and hereby undertake to release the POA to the Developer's Solicitors to date the POA, and submit it for registration with the High Court of Malaya and the Appropriate Authority AFTER the Land has been registered in the name of the Owner and that the Developer has paid full Consideration stated in Clause 6 (a)-(c) to the Owner. The Owner shall prior to the registration of the POA undertake to sign and/or execute such document as may be necessary and/or required for the purpose of the Project.*

10. Parties subsequently varied the terms of the Joint Venture Agreement via a Letter of Variation dated 23-2-2017. Material terms of which are as follows: -

(D) Both the Developer and the Owner agreed to make variations and/or amendments to the JVA as follows:

1) In consideration of the Developer agreeing:

(a) THAT the Developer paid or is to pay Ringgit Malaysia Two Hundred Thousand (RM200,000.00) only ("Earnest Deposit') to the Owner for payment of earnest deposit which was already paid by the Owner to

Perbadanan Setiausaha Kerajaan Pahang pursuant to the Approval Letter ; AND

b) THAT the Developer paid or is to pay Ringgit Malaysia Two Million (RM2,000,000.00) only to the Owner for payment of the estimated land premium (hereinafter referred to as the "Land Premium'), when such land premium is requested or demanded by Perbadanan Setiausaha Kerajaan Pahang which, shall in all circumstances to be on or before the Cut Off Date or such extended period as may be agreed by the Parties. For the avoidance of doubt, such payment shall be made before issuance of the qualified title.

(the 'Earnest Deposit" and "Land Premium shall collectively be referred to as 'PSK Payment").

The Owner agree that it shall, subject to receipt of the PSK Payment, assign absolutely unto the Developer its 20% Development Profits under Clause 5 of the JVA, subject to the terms and conditions of Clauses 1A and 1B below.

1A) The earnest Deposit will be refunded by Perbadanan Setiausaha Kerajaan Pahang to the Owner upon completion of the Project. It is agreed by the parties that such refund will be made to the Owner and the Owner undertakes to remit the Earnest Deposit free of interest to the Developer within one (1) month from the date of its receipt of the fund from Perbadanan Setiausaha Kerajaan Pahang due to non-completion of the Project, non-fulfillment of the terms and conditions imposed by the Appropriate Authority or for any whatsoever reason not attributable to the misconduct of the Owner, the owner shall not be held liable to repay the sum equivalent to the Earnest Deposit to the Developer.

1B) The estimated land premium to be paid to Perbadanan Setiausaha Kerajaan Pahang is Ringgit Malaysia Two Million (RM2,000,000.00) only. The Owner undertakes that it shall, at its own costs, make or cause to be made an appeal to reduce the Land Premium. If the appeal is successful, the differential sum between the estimated land premium and the actual land premium shall be distributed between the Owner and the Developer based on the ration of 2/3 and 1/3.

2) The foregoing amendments shall apply mutatis mutandis to the Clause 17 of the JVA (Additional Land), to the extent that the assignment of the 20% Development Profit under Clause 5 of the JVA unto the Developer shall be affected only upon (a) the Owner's receipt of the full Aggregate Consideration from the Developer AND b) the Developer having paid the estimated land premium applicable to the Additional Land to Perbadanan Setiausaha Kerajaaan Pahang or the Appropriate Authority.

11. A Power of Attorney was duly executed by the parties on 5-8-2019. The terms of which are as follows: -

4. To sign and execute all sale and purchase agreements and memorandums of transfer for the sale/transfer of the units/parcels constructed on the said Land (hereinafter referred to as "the said Parcels) and all incidental documents in respect thereof (herein collectively referred to as "the Sale Agreement') and to issue any undertakings, letter of confirmation, letter of consent and all other necessary documentation to all relevant parties as shall be deemed necessary by the Attorney and to endorse consent on the assignment of the said Parcels.

5. To effect any registration and do all other things as maybe necessary or as may seem to the Attorney advisable in order to procure any financing or loan facilities necessary for the development, implementation and successful completion of the development on the said Land, and to complete, execute, and deliver all instruments of charge of the Land in favour of any band and/or financial institutions.

12. Parties agree that the first planning permission for the project was granted by Jabatan Perancangan Pembangunan Majlis Perbandaran Bentong on 6-10-2017 for 16 shop units. The width of the shops based on the First Pelan Perancangan is attached as Attachment 1 for ease of convenience.

13. Parties also agree that the second planning permission for the project was granted by the same body on 8-10-2019 for 14 shop units. The width of the shops based on this second plan is attached as Attachment 2 for ease of convenience.

D. Issues for Determination

14. There are 4 main issues raised by the Defendant to oppose the Plaintiffs' claim. They are as follows: -

14.1 Whether the Letter of Undertaking is void pursuant to sections 221 and 223 of the Companies Act.

14.2 Whether the Letter of Undertaking is enforceable against the Defendant.

- whether the terms have been fully realized by parties justifying its enforcement

14.3 Whether the Defendant did agree to the transfer of the chosen unit by the 2nd Plaintiff and is now estopped from denying its validity.

14.4 Whether the 2nd Plaintiff is entitled to enforce the terms of the letter of undertaking – the issue of privity.

E. Decision of this Court

(I) 13.1 Whether the Letter of Undertaking is void pursuant to sections 221 and 223 of the Companies Act.

15. For convenience I reproduce ***sections 221 and 223 of the Companies Act***.

Section 221

(1) Subject to this section, every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall, as soon as practicable after the relevant facts have come to the director's knowledge, declare the nature of his interest at a meeting of the board of directors.

.....

(6) Every director of a company who holds any office or possesses any property where duties or interests may be created in conflict with his duties or interests as director shall declare the fact and the nature, character and extent of the conflict at a meeting of the directors of the company.

(7) The declaration shall be made at the first meeting of the directors held-

(a) after he becomes a director; or

(b) if already a director, after he commenced to hold the office or to possess the property, as the case requires.

(8) The secretary of the company shall record every declaration made under this section in the minutes of the meeting at which the declaration was made.

...

(10) A contract entered into in contravention of this section shall be voidable at the instance of the company except if it is in favour of any person dealing with the company for any valuable consideration and without any actual notice of the contravention.

(11) Except as provided in subsection (3), this section shall be in addition to and not in derogation of the operation of any provision in the constitution restricting a director from having any interest in contracts with the company or from holding

offices or possessing properties involving duties or interests in conflict with his duties or interests as a director.

(12) Every officer and any other person or individual who contravene this section commit an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding three million ringgit or to both.

Section 223

(1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for-

(a) the acquisition of an undertaking or property of a substantial value; or

(b) the disposal of a substantial portion of the company's undertaking or property;

unless-

(A) the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or

(B) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution.

(2) For the purposes of subsection (1)-

(a)the term "undertaking or property" includes the whole or substantially the whole of the rights, including developmental rights, benefits or control in the undertaking or property;

(b) in the case of a company where all or any of its shares are quoted on a stock exchange, or its subsidiary, the term "substantial value" or "substantial portion"

shall mean the same value prescribed in the listing requirements of the stock exchange where approval of the shareholders at a general meeting is required;

(c) in the case of an unlisted subsidiary whose holding company is a listed company, the directors of such holding company shall procure the shareholders' approval of the holding company in a general meeting for the arrangement or transaction by the unlisted subsidiary in addition to the shareholders' approval of the unlisted subsidiary in a general meeting procured by the directors of the unlisted subsidiary.

(3) In the case of any company other than a company to which subsection (2) applies, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if-

(a) its value exceeds twenty-five per centum of the total assets of the company;

(b) the net profits, after deducting all charges except taxation and excluding extraordinary items, attributed to it amounts to more than twenty-five per centum of the total net profit of the company; or

(c) its value exceeds twenty-five per centum of the issued share capital of the company, whichever is the highest.

(4) The Court may, on the application of any member of the company, restrain the directors from entering into or carrying into effect an arrangement or transaction which is in contravention of subsection (1).

(5) An arrangement or transaction which is in contravention of subsection (1) shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.

(6) This section shall not apply to proposals for disposing of the whole or substantially the whole of the company's undertaking or property made by a

receiver or receiver and manager of any part of the undertaking or property of the company appointed under a power contained in any instrument or by a Court or a liquidator of a company appointed in a voluntary winding up.

(7) Any director who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding three million ringgit or to both.

16. It is imperative that I note that section 221 only renders a contract that contravenes the said requirement of the said statute voidable and not automatically void as suggested by the Defendant. The contract or transaction only becomes voidable at the option of the 1st Plaintiff.

17. In this case as the 1st Plaintiff is seeking to enforce the said Letter of Undertaking, it cannot be said that the said entity has chosen to void the transaction undertaken with the Defendant. Instead, it is clear to me that the 1st Plaintiff is affirming the agreement and seeks the performance of the letter of undertaking agreed to by the Defendant.

18. Therefore, even if the said letter of undertaking did contravene section 221 of the Companies Act, it only attracts penal sanction pursuant to section 221 (12) of the Companies Act. It does not render the whole transaction void. The option to avoid the said transaction lies with the 1st Plaintiff and it has chosen to affirm it instead.

19. On the issue of the invalidity of the letter of undertaking pursuant to section 223 of the Companies Act, it is important to ascertain whether the letter of undertaking constitutes a disposal of a substantial portion of the assets of the company.

20. I am of the opinion that any disposal of the assets or property of the company lies with the execution of the Joint Venture Agreement, the letter of Variation and the Power of Attorney. These agreements, when read as a whole cause the power to dispose of the land to subsequent purchasers and the right to receive payments for the future sale of the semi-detached units developed on the land with the Defendant. These transactions were not challenged by the Defendant and are deemed valid.

21. It is only the letter of undertaking that is being challenged. I find that the letter of undertaking does not dispose of any asset or property of the 1st Plaintiff. Instead, it is the Defendant who bears an obligation to convey or transfer one (1) complimentary double-storey semi-detached shop to the 2nd Plaintiff if the terms and conditions of the letter of undertaking are fulfilled.

22. The arguments raised by the Defendant are also legally incorrect in my view. It is clear to me that under the terms of the Joint Venture Agreement, the letter of Variation and the Power of Attorney, the land shall be dealt with solely by the Defendant. The said entity is

empowered to sell any of the units developed on the land to any party it wishes, and the Defendant is given the power of attorney to execute any document to manage "the affairs, interests and title in and to the land" and confer on the Defendant the power to act on its behalf. The Defendant is entitled to sell the units at whatever price it finds fit to any third party without conferring or obtaining any form of consent from the 1st Plaintiff. This is seen in Clause 25 and Clause 28 of the Joint Venture Agreement.

23. Therefore, even if there is any form of disposal of the property of the company, this was undertaken fully at the time when the Joint Venture Agreement, the letter of Variation and the Power of Attorney were carried out. Once the 1st Plaintiff had received the consideration as stated in the said agreements, i.e., the sum of RM 2,000,000.00 as stated in clause 6 of the Joint Venture Agreement and that the deposit and premiums payable are complied with, as seen in clause D (1) of the letter of Variation, then for all intends and purposes, the property had been disposed of to the Defendant. The Plaintiff cannot deal with the said land in any way whatsoever unless the terms of the Joint Venture Agreement have been breached by the Defendant. That scenario does not arise in the circumstances of this case.

24. Instead, it is the Defendant who now has to dispose of the unit to the 2nd Plaintiff as agreed under the terms of the letter of undertaking. It is not the 1st Plaintiff who will be empowered or has the right to sell or

transfer the 1 unit of semi-detached unit to the 2nd Plaintiff. That right rides solely with the Defendant and it is incorrect for this Court to find that this letter of undertaking constitutes the disposal of an asset by the 1st Plaintiff as suggested by the Defendant. The obligation and power to undertake the same lies solely with the Defendant pursuant to the terms of the agreements referred to earlier.

25. I note that the term "undertaking or property" has been defined under section 223 of the Companies Act as follows: -

(a) the term "undertaking or property" includes the whole or substantially the whole of the rights, including developmental rights, benefits or control in the undertaking or property;

26. This further reinforces this Court view on the effect of section 223 and whether the said letter of undertaking breaches the said proviso.

27. The interpretation indicated in the said proviso itself suggests that the issue of control and the right to either develop or benefit from the property is indicative of whether there has been a disposal of the property or otherwise. The property, as in this case, may lie in the registered name of the 1st Plaintiff, but as the powers to deal with it and control it has since been assigned absolutely and irrevocably to the Defendant, then the said asset would have been disposed of at the time when the said agreements were performed. It is not at the time

when the letter of undertaking was executed by the Defendant in favor of the 1st Plaintiff benefiting the 2nd Plaintiff.

28. For the above reasons I do not find that the said letter of undertaking breaches section 223 of the Companies Act as suggested by the Defendant.

29. On this issue I find that the letter of undertaking does not breach either section 223 or 221 of the Companies Act. For the same reason, the issue of illegality and reliance on an illegal agreement as suggested by the Defendant does not come into play and is hereby rejected.

Whether the Resolutions executed by the Directors are valid – issue of the validity of Mohd Puteh bin Mat Yassin's signature.

30. A subsidiary issue that was raised by parties concerns the validity of the Board of Directors resolutions and Members' written resolutions both dated 13-6-2016 and the general notice issued by the 2nd Plaintiff to the Board of Directors.

31. As I have found that there are no breaches of section 221 and section 223 of the Companies Act, this subsidiary issue is now academic.

32. However, on the assumption that I am wrong on the main issue, I find that I prefer the evidence of Mr Lim Yok Chaw, the expert presented by the Plaintiffs and find that the signature appearing in Board of Directors resolutions and Members Resolutions are those that of Encik Mohd Puteh bin Mat Yassin.

33. I find that both experts agree that the Encik Mohd Puteh signature varies and changes from time to time. Both experts (Mr Lim Yok Chaw (for the Plaintiffs) and Miss Tay Eue Kam (for the Defendant) state that the sample signatures provided to them show that Encik Mohd Puteh could be described as a variable writer. The difference between the two lies in the mechanism in which they utilized in identifying and ascertaining whether the impugned signatures in the Resolutions identified earlier were those of Encik Mohd Puteh.

34. Having considered the affidavits, the opinion of both witnesses and their testimony during cross-examination, I am of the opinion that the methodology adopted by the Plaintiffs' witness is correct and I therefore find that the said signatures appearing in the resolutions are those of Encik Mohd Puteh.

35. I find that the methodology adopted by the Defendant's witnesses skewed the finding in favor of not recognizing the validity of the said signatures. Instead of identifying the essential characteristics of the signatures of Encik Mohd Puteh, the said expert had instead

immediately identified the differences that appear between the impugned signatures and the samples that were chosen. I find, as identified by the Plaintiff's expert, the method adopted by the Defendant's expert did not identify the essential features of the signatures of Encik Mohd Puteh as a whole. This is an important step that should have been taken, especially when Encik Mohd Puteh samples signatures changes and as agreed by them, he is a variable writer.

36. Therefore, the method adopted by the Plaintiff's expert is correct. I am aware that the Defendant's expert had also undertaken a statistical test of the samples and the impugned signatures and did criticize the methodology adopted by the Plaintiff's expert as to the date of the signatures and the alleged failure to consider the movement and arrangement of the impugned signatures. However, I find that, the method adopted by the Plaintiffs' expert did explain how he came to the conclusion as to the master pattern of the Encik Mohd Puteh's signature from the outset and compared that to the impugned signatures.

37. I have also considered the evidence of Encik Mohd Puteh and his denial as to the validity of the said signatures. I find his evidence is not credible, as I find that he had simply acted as instructed by Mr Tan Boon Shen. His evidence shows that he was unhappy with the manner he was summarily dumped by the 1st Plaintiff on the instruction of the

2nd Plaintiff and had chosen to now seek financial assistance from the Defendant and Mr Tan Boon Shen.

38. I also find that the messages exchanged between Mr Tan Boon Shen and Encik Mohd Puteh such as "*En Puteh, saya selalu tolong kamu. Jangan Lupa*" and where Encik Puteh said "*Untuk Mr Tan dan Mr Leong saya akan tolong apa cara sekalipun don't worry ckp saja apa yang perlu saya buat*" indicates to me that his evidence is tainted, and I cannot accept his evidence and find that he did sign the documents referred to earlier.

39. For the above reasons, I find that the board of directors' resolutions and members' written resolutions dated 13-6-2016 as well as the directors' resolutions dated 13-8-2020 and members' written resolutions bear the actual signature of Encik Mohd Puteh. I therefore admit the said documents into evidence and find that the said Encik Mohd Puteh did execute the said documents as suggested by the Plaintiffs.

40. As such, even if I am wrong concerning the application of section 223 and section 221 of the Companies Act, I find that as the required resolutions and notices have been given to the 1st Plaintiff and approved by the members by way of an agreed resolution, the said letter of undertaking and the transactions therein are not illegal as suggested by the Defendant.

(II) Whether the Letter of Undertaking is enforceable against the Defendant.

- whether the terms have been fully realized by parties justifying its enforcement

41. For the Plaintiffs to be entitled to specific performance of the letter of undertaking, it must be shown that clauses 1 (b) (i) (aa) or (bb) is fulfilled.

42. This requires the said clauses to be interpreted by this Court based on trite legal principles as identified by the Court of Appeal in ***Hewlett-Packard (M) Sdn Bhd v Agih Tinta Sdn Bhd [2022] 9 CLJ 15***. I reproduce parts of the judgment of See Mee Chun JCA: -

"[39] It has been said in Rainy Sky SA and Others v. Kookmin Bank [2012] 1 All ER 1137 at para. 23 "Where the parties have used unambiguous language, the court must apply it" and at para. 30 "where a term of contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is more consistent with business common sense".

[40] In Arnold v. Britton And Others [2015] UKSC 36 the following was stated:

[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v. Persimmon Homes Ltd [2009] UKHL 38, [2009] 4 All ER 677, [2009] AC 1101 (at [14]). And it does so by focusing on the meaning

of the relevant words, in this case cl 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence....

[16] For present purposes, I think it is important to emphasise seven factors.

[17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg, in Chartbrook, paras [16] [26]) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision.

[18] Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning....

[19] The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language, Commercial common sense is only relevant to the extent of how matters

would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made....

[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed....

[21] The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties....

[22] Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. in such a case, if it is clear what the parties would have intended, the court will give effect to that intention...

[41]SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177; [2016] 1 MLJ 464 at p. 478, para. 27 stated that ICS provided a helpful starting point to the principles of interpretation of contracts. It also considered Arnold and agreed on "the natural meaning of the words when giving effect to a contract" (at [39]). The Federal Court further held that "when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear." (at [178]). It was also affirmed at para. [92] that "if the parties had used unambiguous language, the court must apply the language."

43. I also refer to the decision of the Federal Court in ***Michael C Salle v United Malayan Banking Corporation {1984] 1 CLJ 267*** where the Court held: -

"The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole agreement."

44. For ease of convenience I reproduce clauses 1 (b) (i) (aa) and (bb).

1) In consideration of you agreeing to enter into a joint venture agreement dated 6-4-2016 with us jointly develop a project of Double Storey Semi-D Shops on a piece of government land measuring 2.5 acres in Mukim Bukit Tinggi, Daerah Bentong, Pahang Darul Makmur ("JVA"), we GEO WIN SDN. BHD. (Company No. 1176012-T) hereby irrevocably agree and undertake to:

(b) Pay Ringgit Malaysia Three Hundred Thousand (RM300,000.00) only in cash to you or to your nominee(s) or any person(s) or company (ies) as may be designated or instructed by you, upon execution of the joint venture agreement dated 6-4-2016 between the Owner and the Developer ("JVA"), the amount of which shall be fully refunded to us (free of interest) in the event that the Joint Venture is terminated due to non-fulfillment of the conditions precedent in the JVA ;

AND

b) deliver, convey or transfer one (1) complimentary double storey semi-D shop ("the Unit") to SHA CHAIM CHUAN (NRIC No.580921-08-5225) or his nominee(s) ("Transferee'), subject to the following terms and conditions:

(i) the Unit will be granted to the Transferee in the event: -

(aa) sixteen (16) or more unit of shops, each of which has a maximum front width of 38 feet, are capable of being approved or are approved by the Appropriate Authorities on the Project of the said Land; OR

(bb) the Developer decides to develop or has developed the commercial shops with shop lot front width exceeding 38 feet on the Project of the said Land; OR

Clause 1 (b) (i) (bb)

45. Having considered the above clauses, I find that the facts show that the requirements of clause 1 (b) (i) (bb) have been fulfilled.

46. I am aware that the Defendant contends that the clause requires that all the units must be developed with each of the unit's frontage area to be more than 38 feet. Whereas, as agreed between parties, not all the units developed and to be sold have frontage exceeding 38 feet.

47. I find that the said clause does not require that the frontage of all the units developed must exceed 38 feet. When I compare clause 1 (b) (i) (aa) to clause 1 (b) (i) (bb), I find that parties had intentionally left out

the words "each of which" that appears in the earlier clause. In the said clause, there is a clear intention that for the said proviso to apply, the Plaintiffs must show to this Court that each of the 16 units developed has a maximum front width of 38 feet. In other words, the parties agreed that the obligation to transfer a unit of the semi-detached shop to the 2nd Plaintiff will only arise if all 16 units' front widths do not exceed 38 feet. These words were not stated in clause 1 (b) (i) (bb) and parties could have easily added those words if that was the intention to ensure that all the units sold had their front width exceeding 38 feet.

48. Therefore, applying the principles of interpretation of contract as identified earlier, I find that the objective reading of the words appearing in the said clause 1 (b) (i) (bb) and considering the letter of undertaking holistically, parties intended that the said clause to be applicable if substantial parts of the semi-detached units developed had their front width exceeding 38 feet. This makes more commercial sense as it would be impossible to ascertain from the outset that the front width of the said shop lots to be developed would be more than 38 feet. If that was the intention, then that intention should have been stated clearly as seen in clause 1 (b) (i) (aa).

49. I also find that the argument by the Defendant that the frontage of the shop lots should be considered based on the area facing Jalan Bukit Tinggi to be incorrect. I accept that Jalan Bukit Tinggi is the road by

which potential customers and owners of the unit sold will access the said property as seen in the Kebenaran Merancang dated 12-9-2019.

50. However, when I consider the said Kebenaran Merancang, it is clearly stated that the Jalan Perkhidmatan is the part of the property facing Rezab Karak Highway and the part facing Jalan Bukit Tinggi is referred to as Lorong Belakang. I have also considered the sample of the Sale and Purchase Agreements executed by the Defendant concerning one of the units built based on the Kebenaran Merancang. In the said document, the frontage of the unit sold is identified as part of the building facing Karak Highway and not as suggested by the Defendant. The rear elevation faces Jalan Bukit Tinggi.

51. For the above reasons, I find that the Plaintiffs' arguments are correct regarding clause 1 (b) (i) (bb), and that the Defendant should have complied with the terms of the letter of undertaking.

Clause 1(b) (i) (aa)

52. Even if I am wrong on the above, I also find that in the alternative clause 1(b) (i) (aa) is fulfilled in any event.

53. Clause 1 (b) (i) (aa) states that there must have been at least 16 units that is approved or capable of being approved by the authorities with at least 38 feet front width. It does not state that the said units need to be built or is the finalized plan by the Defendant.

54. In this case, when I peruse the first "Kebenaran Merancang" dated 6-10-2017, the authorities did approve the development of 16 units on the land with the front width of more than 38 feet.

55. This was subsequently changed to the current plan. This however does not mean that the said clause has not been fulfilled. Clause 1(b) (i) (aa) only says that as long as the authorities did provide approval or that the land could have been developed with 16 units each of which has its front width of 38 feet then the said clause is fulfilled.

56. As the Plaintiffs have shown to me that this original plan was approved then the said clause 1(b) (i) (aa) is fulfilled. I also find that the said front width is not the Jalan Belakang as suggested by the Defendant but is the Jalan Perkhidmatan as stated in the Kebenaran Merancang dated 6-10-2017.

57. For the above reasons, I find in favour of the Plaintiffs.

(III) Whether the 2nd Plaintiff is entitled to enforce the terms of the letter of undertaking – the issue of privity.

58. On this issue, I agree with the Defendant that the 2nd Plaintiff is not privy to the terms of the letter of undertaking and the agreements referred to earlier.

59. This does not mean that the 1st Plaintiff is not entitled to have the letter of undertaking specifically performed. The Defendant admits that, save as to the issue of illegality which I have dealt with earlier, the said letter of undertaking is binding on it and that the 1st Plaintiff. It is trite law that parties to a contract are entitled to have the terms enforced or even seek damages for breach of the same, even if the contract benefits a third party.

60. I refer to the celebrated decisions of Lord Denning in ***Jarvis v Swan Tours Ltd [1973] QB 233*** and ***Jackson v Horizon Holidays Ltd [1975] 1 WLR 1468***.

61. I, therefore, find that the fact the 2nd Plaintiff is not privy to the terms of the letter of undertaking does not mean that the 1st Plaintiff is not entitled to have the terms of the same enforced.

(IV) Whether the Defendant did agree to the transfer of the chosen unit by the 2nd Plaintiff and is now estopped from denying its validity.

62. On the issue of whether the Defendant did agree to transfer the chosen unit, I do not believe that the Plaintiffs have shown an unequivocal admission by the Defendant. It is not sufficient to just point to an emoji sent via way of a WhatsApp message between parties at that time. The emoji, as explained by the Defendant's witness, is merely to indicate that he has taken note of the request and he still requires approvals from his other partners for the project.

63. I, therefore, reject the said proposition as suggested by the Plaintiffs.

F. Orders made by this Court

64. On the balance of probabilities, I find that the Plaintiffs have discharged their burden of proof justifying an order for specific performance of the letter of undertaking- joint venture agreement dated 6-4-2016 in particular Clause 1 (b).

65. The Defendant is directed to prepare, execute, and hand over to the Plaintiffs copies of agreement and/or transfer instruments necessary for the transfer of the 2-storey semi-detached shop unit developed on

the Land known as HS(M) 8128, PT23188, Tempat Bukit Tinggi, Mukim Bentong, Daerah Bentong, Pahang Darul Makmur in favour of the 2nd Plaintiffs as the transferee, within 30 days from the date of this judgment; and

66. The Defendant is directed to deliver vacant possession of 1 unit of 2-storey semi-detached shop unit on the Land to the 2nd Plaintiff, within a period of 30 days from the date of issue of Certificate of Completion and Compliance of the shop lots; and

67. Costs of RM 50,000.00 to be paid by the Defendant to the 1st Plaintiff subject to allocator.

Dated 7th June 2023

Dato' Indera Mohd Arief Emran bin Arifin

Judicial Commissioner

High Court Malaya Kuala Lumpur

NCvC 8

Leong Sher-How together with Corina Koh for the Plaintiffs

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Advocates and Solicitors

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