IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
[CIVIL APPEAL NO.: 02(f)-49-05/2019(B)]

BETWEEN

CATAJAYA SDN BHD
(Company No: 555443-U) … APPELLANT

AND

1. SHOPPOINT SDN BHD
(Company No.: 629690-D)

2. TEE HUAT
(I.C No.: 500221-10-5035)

3. TEE CHEE CHONG
(I.C No.: 770928-10-5637) … RESPONDENTS

[In the matter of the Court of Appeal of Malaysia
Civil Appeal No: B-02 (NCvC) (W)-6-01/2018

Between

Catajaya Sdn Bhd
(Company No : 555443-U) … Appellant

And

1. Shoppoint Sdn Bhd
(Company No: 629690-D)

2. Tee Huat
(IC No: 500221-10-5035)

3. Tee Chee Chong

(IC No.: 770928-10-5637) … Respondents]

[In the High Court of Malaya at Shah Alam in the State of Selangor Darul Ehsan
Civil No. 22NCVC-32-01/2015

Between

1. Shoppoint Sdn Bhd
(Company No.: 629690-D)

2. Tee Huat
(IC No.: 500221-10-5035)

3. Tee Chee Chong
(IC No.: 770928-10-5637) … Plaintiffs

And

Catajaya Sdn Bhd
(Company No.: 555443-U) … Defendant]

CORAM: MOHD ZAWAWI SALLEH, FCJ
IDRUS HARUN, FCJ
NALLINI PATHMANATHAN, FCJ
ZALEHA YUSOF, FCJ
HASNAH MOHAMMED HASHIM, FCJ

JUDGMENT OF THE COURT

Introduction

[1] This appeal raises the questions whether the law in Malaysia regarding termination clauses ought to be strictly interpreted, and whether headings in a contract can be used to assist in the interpretation of that contract.

[2] On 9.5.2019 this Court granted leave in respect of these two (2) questions:

> **Question 1**
>
> Whether the law in Malaysia should be that termination clauses ought to be construed strictly; and
>
> **Question 2**
>
> Whether headings in a contract can be used to assist in the interpretation of the contract.

[3] At the commencement of the hearing of this appeal, learned counsel for the Appellant had applied by an oral application to include an additional question for this Court's consideration and determination. This oral application, however, was objected by learned counsel for the Respondents. The proposed additional question is as follows:

> In a sale of shares of a company (that is in liquidation), whether time for payment of the balance purchase consideration is suspended in the face of the operation of section 223 Companies Act 1965 (**CA**).

[4] In support of his application, learned counsel for the Appellant argued that the operation of section 223 CA was a legitimate concern at the material time when payment of the balance purchase consideration was due and the purported termination of the agreement between the Appellant and the Respondents. There were winding up petitions filed against Mampu Jaya Sdn Bhd (**Mampu Jaya**), the previous owner of the Land, and that the Land, a subject matter of this appeal, was sold after the winding up process. In the light of the winding up of Mampu Jaya the balance purchase price would first be finalised.

[5] Learned counsel for the Respondents objected to 3rd question as not only was the question proposed at the eleventh hour but more

importantly it had bypassed the whole leave process application. According to learned counsel the 3rd question proposed is based on a completely new argument, different from the arguments raised and considered in the Courts below. The issue relating to the sale of the Land and that Mampu Jaya was in liquidation was an afterthought. The Appellant knew when they entered into the Share Sale Agreement (**SSA**) that Mampu Jaya was in liquidation. In support of this learned counsel for the Respondents referred to the letter of the solicitor dated sometime in March 2009 after the termination notice.

[6] We agreed with learned counsel for the Respondents' contention that the additional 3rd question had indeed bypassed the leave process. The central issue in this appeal as reflected in the leave question is the purported termination of the agreements between the parties in particular the interpretation of the termination clause in the agreement. Therefore, the Appellant's application to add the 3rd leave question is dismissed.

[7] The appeal before us essentially relates to the interpretation of the terms under the SSA dated 29.8.2008 entered between the Appellant, Catajaya Sdn Bhd and the Respondents. The Appellant, the Defendant in the High Court, was sued by the Respondents in respect of the termination of the SSA and a Power of Attorney cum Agreement (**PA**) for the sale of Respondents' respective shares in the 1st Respondent to the Appellant. The 2nd and 3rd Respondents were the only shareholders of the 1st Respondent. The Appellant had also filed a counter-claim against the Respondents seeking reliefs under the SSA. The learned High Court Judge after a full trial allowed the claim and dismissed the counterclaim with costs of RM70,000.00 to the Respondents. Aggrieved with the decision of the High Court the Appellants appealed to the Court of Appeal. The Court of Appeal dismissed the appeal.

The Factual Background

[8] Mampu Jaya was the previous owner of a piece of land measuring

approximately 1.189 hectares held under Geran No GM 817 Lot 1423, Tempat 3 ¼ Petaling Road, Mukim Kuala Lumpur (**the Land**). On 9.1.2008, Shoppoint Sdn Bhd (**1st Respondent**) purchased the said Land from Mampu Jaya. The Land was the sole asset of the 1st Respondent at that material time with Tee Huat (**2nd Respondent**) and Tee Chee Chong (**3rd Respondent**) as the shareholders of the 1st Respondent, holding one (1) share each. Approximately seven (7) months after the purchase of the Land, the Respondents offered the sale of the entire issued and paid up shares in the 1st Respondent to the Appellant. The parties executed the SSA where the Appellant agreed to purchase all of the 1st and 2nd Respondents' issued and paid-up capital of RM2.00 held for a **total consideration of RM 17,063,660.00.** The principal terms agreed by the parties encapsulated in the SSA are as follows:

(a) the sum **RM 9,963,660.00** for the sale of the shares under the SSA;

(b) **RM5,000,000.00** as repayment for the shareholders' advances, which the 2nd and 3rd Respondents had advanced for the purchase of the Land**;**

(c) **RM2,100,000.00** under the Early Surrender of Vacant Possession Agreement granting the Appellant immediate excess to the Property;

(d) the purchase of the Land is by acquiring the shares in the 1st Respondent;

(e) the total purchase price shall be RM 17,063,660.00 on an 'as is where is' basis; and

(f) the completion date to settle the balance purchase price is **on or before 31.12.2008**.

[9] Simultaneous with the execution of the SSA, the 2nd and 3rd

Respondents executed the Power of Attorney to surrender vacant possession of the Land in favour of the Appellant, with immediate access to the Land. It was also agreed that the 1st Respondent's lawful attorney will make all the necessary applications to the relevant authorities for the development of the Land.

[10] Between 5.8.2008 and 29.8.2008 the Appellant paid a total of **RM1,706,366.00** as the agreed deposits to the Respondents:

a) Earnest Deposit in the sum of **RM360,000.00** pursuant to Section 2.1.1 of the SSA;

b) Balance Deposit of **RM1,136,366.00** pursuant to Section 2.1.2 of the SSA; and

c) **RM210,000.00** as deposit for the Early Surrender of Vacant Possession Agreement.

[11] The Appellant failed to pay the balance of the purchase price by the agreed **Completion Date** of 31.12.2008 as stipulated under the SSA. The Appellant had applied for an extension of time *vide* a letter dated 24.12.2008 which was rejected by the Respondents on even date, on the basis that time was the essence of the SSA. Upon the rejection of the extension of time, the Appellant lodged a private caveat on the said land *vide* Presentation No. 13/2009 on 5.1.2009. By a letter dated 12.1.2009, the 2nd and 3rd Respondents through their solicitors, notified the Appellant that they wanted to exercise their right of termination pursuant to Section 11 of the SSA and to forfeit the deposit:

> We regret to note that we have yet to receive any reply from your goodselves in respect of the expiry of the Completion Date on 31st December 2008 or any payment for the settlement of the total sum of RM15,357,294.00.
>
> As time shall be of the essence and your client has failed to comply

with its obligation in the Sale and Purchase Agreement dated 29th August 2008, in particular Section 2.1.3 in settling the balance purchase price, our client shall exercise its rights under section 11 of the Sale and Purchase Agreement dated 29th August 2008.

[12] As a consequence, the Respondents proceeded to file an action to remove the caveat seeking the following reliefs as summarised by the Court of Appeal in its Grounds of Judgment (GOJ):

"22.1 a declaration that the Share Sale Agreement dated 29.8.2008 between the Tee Huat and Tee Chee Chong and Catajaya has been lawfully terminated;

22.2 a declaration that Tee Huat and Tee Chee Chong are discharged from performing all obligations under the Share Sale Agreement;

22.3 a declaration that the Power of Attorney Agreement dated 29.8.2008 entered into by Tee Huat and Catajaya has been lawfully terminated;

22.4 a declaration that Tee Huat is discharged from performing all obligations under the Power of Attorney Agreement dated 29.8.2009;

22.5 an order that the Private Caveat *vide* Presentation No. 13/2009 which was lodged by Catajaya on 5.1.2009 over the land is wrongful and/or unlawful and be hereby struck-off and/or removed;

22.6 that the Registrar of the Land Office is instructed to remove the said Caveat from the Register and/or Title upon it being adjudicated by this Court to have been wrongfully and/or unlawfully entered;

22.7 that Catajaya do pay the respondents (and or any one or more of them) damages which has been incurred by the respondents (and

or any one or more of them) which is to be assessed by the Deputy Registrar and/or the Senior Assistant Registrar as a result of the wrongful lodgment of the said Caveat;

22.8. that Catajaya and/or their agents and/or their employees be prevented from lodging any further caveats over the Land from the date of the order to be made without securing leave from this Court."

(See: paragraph 4 of the GOJ)

[13] Michael Joseph Monteiro and Heng Ji Keng (**the Liquidators**) were appointed as provisional liquidators of Mampu Jaya. The Appellant contended that they had no inkling that Mampu Jaya was in liquidation and only came to know of the liquidation on 22.9.2008, which was after the SSA and the PA were executed. This was followed by a request by the Appellant on **12.1.2009** for a written confirmation by the Liquidators that they had no intention to set aside the sale of the Land.

[14] The legal advisor of the Appellant, Ong Kok Keng, testified that he had requested the Respondents' solicitors, Joe Yap, to provide due diligence documents and a written confirmation by the Liquidators that there would not be any action to set aside the sale of the Land by Mampu Jaya to the 1st Respondent. This was supported by the testimony of Pang Sor Tin, the personal assistant to Tan Hock Keng, a director of the Appellant, who had requested Ong Kok Keng to demand the supply of the due diligence documents. However, right up to the agreed Completion Date as stipulated under the SSA, there was no response by the Liquidators to confirm that action would not be taken to set aside the sale of the said land by Mampu Jaya to the 1st Respondent.

[15] Despite the Letter of Termination of the SSA dated on **12.1.2009** being issued to the Appellant, the parties continued to negotiate with regards to the completion of the SSA. By a letter dated **19.1.2009,** the

2nd and 3rd Respondents had requested for payment of 20% of the total purchase price as well as late interest as consideration for any extension of time.

[16] The Appellant disputed the stand taken by the 2nd and 3rd Respondents in their letters dated 12.1.2009 and 19.1.2009, and requested for the due diligence documents, in particular the written confirmation by the Liquidators which they have requested through their solicitors before. The 2nd and 3rd Respondents responded on **3.2.2009** and confirmed that they had in fact complied with Clause 4.1 and Schedules IV and V of the SSA. In addition, they reiterated the payment of 20% of the total purchase price and late interest for them to consider the Appellant's request for further extension.

[17] This was followed by a letter dated **16.2.2009** whereby the 2nd and 3rd Respondents notified the Appellant of their intention to terminate the SSA because of the failure by the Appellant to settle the balance purchase price on or before the Completion Date despite the numerous reminders given. In the same letter, the Respondents told the Appellant they were unable to provide any written confirmation from the Liquidators and a copy of previous SPA as they were of the view that both were neither necessary nor relevant.

[18] By a letter sent to the Appellant's solicitor on **12.3.2009,** the 2nd and 3rd Respondents had indicated that they were still open to consider any proposal for extension of time and late interest payment for their consideration:

> "……. If your client is sincere and keen in continuing with the said acquisition, kindly let us have your proposed extension of time and late interest payment on or before 19.3.2009 for our client consideration…"

The High Court

[19] The Respondents sought various declaratory orders to validate the termination of the SSA and the removal of the private caveat lodged by the Appellant. The Appellant denied that they breached the SSA and alleged that the breach was actually committed by Respondents when they failed to provide due diligence documents as agreed under Schedule 1 of the SSA. As a consequence, their obligation to pay the balance of the purchase price only arises after the due diligence documents has been supplied to them as well as compliance with the other matters as provided in the Schedules specified under section 4.1 of the SSA. In its counter-claim, the Appellant alleged that following Respondents' failure to furnish it with the due diligence documents, there were breaches of the warranties:

(i) no other party would have the right to the land on the completion date (See: paragraph 5.1.3 of Schedule 1); and

(ii) upon completion of the SSA there would be no encumbrance affecting the land and there would be no claim made by any person entitled to the land (See: paragraph 5.1.18 of the same Schedule 1).

[20] The Appellant was unable to complete the sale due to the termination of the SSA by the Respondents, and as a result suffered losses. The Appellant had sought for a declaration, inter alia, that the SSA was still binding and for specific performance of the SSA. There was also an alternative prayer to rescind the agreement, for damages to be assessed and monies paid under the agreement to be refunded. The Appellant also prayed for an injunction to restrain the Respondents from dealing with the Land or to transfer the very same shares to a third party.

[21] As alluded to before**,** by a letter dated 12.1.2009, the 2nd and 3rd Respondents had exercised their rights to terminate the SSA and forfeited

all the payments made under the SSA pursuant to Section 11 of the SSA. It is the Respondents' case that based on the terms of the SSA, the SSA can be terminated by issuing the termination letter pursuant to Section 11 of the SSA without any prerequisite compliance with Section 12 of the SSA. The Respondents argued that Section 11 of the SSA is a stand-alone provision which can be invoked when completion had not taken place and the Completion Date had lapsed without any extension of time having been granted by the 2nd and 3rd Respondents. Furthermore, under the terms of the SSA there is no provision for an extension of time and it is expressly provided that time is of the essence. Therefore, the Respondents had correctly exercised their rights under the agreement to terminate.

[22] The learned High Court Judge said that due to the failure by the Appellant to settle the purchase price by the Completion Date, the 2nd and 3rd Respondents were at liberty to terminate the SSA. His Lordship further elaborated that under the circumstances, recourse to the two tier process under Section 12 would lead to ludicrous consequences as it would in effect allow time to the Appellant to complete the purchase beyond the Completion Date:

> …would lead to ludicrous consequences as it would in effect allow time to the purchaser to complete the purchase beyond the completion date under the contract binding on both parties.

[23] The learned High Court Judge held that the provision of Section 11 of the SSA is an independent and stand-alone provision with the main purpose to effect a valid termination of the SSA in the event of a fundamental breach of the agreement, in this instant the failure of the Appellant to settle the full purchase price by the agreed Completion Date. The learned High Court Judge concluded that the termination of the SSA by the 2nd and 3rd Respondents was valid and effective.

[24] The Appellant further contended that due diligence was a central

feature and condition precedent that the 2nd and 3rd Respondents failed to comply. The Appellant relied principally on the relevant clause in Schedule 1 of the SSA as the basis of their entitlement to due diligence. It was argued by the Appellant that the failure by 2nd and 3rd Respondents to adhere strictly to the said terms of the SSA would defeat the provision of time being of the essence as the Completion Date is no longer applicable and become indefinite until the due diligence exercise was completed.

[25] The learned High Court Judge, however, opined that the 1st Respondent's obligation under the SSA was only to provide the necessary information and assistance required by the Appellant to conduct a due diligence on the company. In order for the Appellant to invoke the above as a ground to preclude the Completion Date from being enforced against it, the Appellant must show affirmatively that they had requested the Respondents for the necessary documents, information and/or assistance for the stated purpose:

> "[38] Apart from there being no evidence of a formal request for the impugned documents, from a plain reading of the provisions of the SSA, with special reference to its material terms and conditions, particularly the Schedule relating to the issue of Due Diligence, and giving the words of the said provisions their natural and ordinary meaning, there was no doubt at all that the Due Diligence exercise was not intended by the parties to the SSA to assume the status of a condition precedent to the parties' due performance of their contractual obligations therein, including Catajaya's explicit responsibility to make full payments of the purchase price within the completion date. Neither could it be used as a ground to depart from the strict timelines prescribed clearly in the SSA that is binding on both parties. There is no merit in the proposition that in substance Clause 5.20.1 of the Schedule indicates otherwise.

[26] Throughout the trial, there were conflicting oral evidence with regards to the Appellant's request for necessary documents for the evidence and documents. Based on evidence adduced, the learned Judge concluded that there was no formal request made, whether orally or in writing, or documents given necessary for due diligence. Neither did the Appellant produce any evidence to specifically identify the documents in question but merely relied on general statements. As alluded to earlier, the 1st Respondent's obligation under the terms of the SSA was only to provide all necessary information and assistance as required by the Appellant to enable them to conduct a due diligence. In order for the Appellant to invoke the above as a ground to preclude the completion date from being enforced against it, it is incumbent for the Appellant to show affirmatively that they had through their solicitors requested the Respondents the necessary documents, information and/or assistance for the purposes of due diligence.

[27] From a plain reading of the provisions of the SSA and the Schedule relating to the issue of due diligence, and given the words used in the said provisions in their natural and ordinary meaning, the learned High Court Judge concluded that the due diligence was not intended by the parties as condition precedent under the SSA. The High Court took the view that due diligence should only be confined when there is a review of the share certificates, resolutions.

[28] On the issue of the validity of the transaction between Mampu Jaya and 1st Respondent, the learned Judge held that the Validation Order dated 19.12.2014 had validated the transaction and therefore puts to rest the issue raised by the Appellant. Since the order has retrospective effect, the transaction is therefore validated since its very inception. In other words, the Appellant has no right to terminate the SSA having had conducted a due diligence on the sale of said land from Mampu Jaya to the 1st Respondent.

[29] Having considered the facts and evidence before him and in the light

of the aforementioned conclusions, the learned High Court Judge allowed the Respondents' claim with damages to be assessed by the Registrar. The counterclaim by the Appellant was dismissed with cost of RM 70,000.00 to the Respondents. The caveat entered by the Appellant was ordered to be removed.

The Court of Appeal

[30] At the Court of Appeal, the learned counsel for Appellant raised five issues for the Court's consideration –

a. Whether the termination of the Share Sale Agreement without giving a 30 days cure notice is a valid termination?

b. Whether a proper reading of the termination letter dated 12.1.2009 shows an intention to actually terminate the agreement?

c. Whether due diligence is a condition precedent to the completion of the Share Sale Agreement?

d. Whether the Appellant requested for the due diligence documents?

e. Whether the learned High Court Judge made proper findings based on the evidence before him?

[31] With regards to the reading of Section 11 and Section 12 of the SSA, the Court of Appeal agreed with the learned counsel for Respondents that Section 11 and Section 12 SSA in essence accommodated two different termination scenarios. Section 11 of the SSA is applicable in a situation when the agreement has been completed, whilst Section 12 termination can be effected by either party prior to the completion date:

> [24] As alluded to earlier Catajaya did not pay the balance of the purchase price on or before the 31/12/2008 and their application for

> extension of time *vide* letter dated 24/12/2008 had been rejected by Shoppoint in a letter of even date. Therefore, Shoppoint is entitled to utilize or invoke the said section 11 for it must be remembered and as reminded by Shoppoint's said rejection letter, time has been made an essence of the contract under Section 13.1 which provision we had reproduced earlier. Viewed in this light, the argument of Catajaya's counsel that section 12 is redundant, even if that was how the Share Sale Agreement is to be interpreted, does not with respect, hold water for it is clear that section 12 caters for termination by either parties before the completion date i.e. an early termination of the agreement and by clause 12.2 the parties have intended that the same consequences in section 10 and 11 would apply. Given the clear and unambiguous intention of the parties as derived from and spelt out by the words in the aforesaid sections, there was no necessity to choose, in the words of Zainun, FCJ in *SPM Membrane's case (supra) "between two competing interpretation"* and for the court to adopt one "*which makes more commercial sense."* No such doubt arises here when we read the aforesaid sections together.

[32] The Court of Appeal did not agree with the arguments put forward by the Appellant's counsel that the word "completion" in Section 11 of the SSA does not refer to the Completion Date as it does not stand with the definition of "completion" under Section 7 of the SSA.

[33] The learned counsel for Appellant argued that there was no termination letter sent by the Respondents as parties were in the midst of negotiation. The Court of Appeal accepted the 1st Respondent's letter dated 12.1.2009 as being the notice of termination as the letter had made reference to Clause 11 SSA:

> As time shall be of the essence and your client has failed to comply with its obligation in the Sale and Purchase Agreement dated 29th August 2008, in particular Section 2.1.3 in settling the balance

> purchase price, our client **shall exercise its right under Section 11 of the Sale and Purchase Agreement dated 29th August 2008.**
>
> (Emphasis added)

[34] The Court of Appeal concluded that when time is an essence of the contract, the non-compliance with the agreed timeline would render the contract voidable at the option of innocent party:

> …..where time has been made the essence of the contract, non-compliance with the dateline or timeline as specified in it renders the contract voidable at the behest of the innocent party. That is, in our view, the situation here in this appeal.

[35] On the issue of interpreting and construing the termination clause, learned counsel for the Appellant agreed with the decision in *DC Contractor Sdn Bhd v. Universiti Pertahanan Malaysia* [2014] 11 MLJ 633 which held that a strict approach has to be adopted when interpreting and construing the termination clauses. The Court of Appeal agreed with the Appellant's contention that a strict approach must be adopted when interpreting and construing on termination clause. This is because of its decisive and far reaching implications to the relationship and contractual obligations of the contracting parties but went on to say that, *"adopting such an approach does not mean that the general rule of interpretation of the contract as enunciated in Berjaya Times Square's case (supra) should not be adhered too. Therefore the clear meaning and intent of section 11 read with section 13 must be given effect and considered against the backdrop of the parties' intention during the negotiation leading to the agreement."*

[36] The justices of the Court of Appeal agreed with the view taken by the learned High Court Judge that the parties had intended Section 11 and Section 12 SSA to cater for two different scenarios of termination. The notice under Section 12.2 would have the effect of granting the Appellant

an extension of time (which was not the intention of the parties) as the Appellant was fully aware of the strict adherence with regards to the agreed dateline for payment of the purchase price. There was no waiver or extension whatsoever granted as shown by the 1st Respondent's decision to reject the application for extension of time applied for as alluded to earlier:

> We completely agree with him that it is so but to us adopting such an approach does not mean that the general rule of interpretation of the contract as enunciated in *Berjaya Times Square's case (supra)* should not be adhered too. Therefore the clear meaning and intent of section 11 read with section 13 must be given effect and considered against the backdrop of the parties' intention during the negotiation leading to the agreement.

[37] Based on **'....** a holistic interpretation..' of the relevant provisions of the SSA and 'the factual matrix surrounding it..' the Court of Appeal dismissed the appeal with costs of RM 20,000 to the Respondents.

Our Analysis and Decision

[38] We heard this appeal on 24.2.2020. As we needed time to consider the submissions of the parties and the records of appeal, we had indicated to parties that we will inform them of our decision once we are ready to do so. This is our decision and our reasons for having so decided.

Question 1

Whether in Malaysia termination clauses ought to be construed strictly

[39] We will first deal with the first question which called for a determination whether in Malaysia termination clauses ought to be construed strictly. We are of the view that when interpreting a written agreement the Court must identify the intention of the parties to the

agreement. Thus, the terms of the SSA represents the true intention of the parties, defining the obligations and commitments of the parties under the agreement.

[40] The Appellant as the purchaser is required to settle the balance purchase price on or before the Completion Date. This is expressly provided under Section 2 of the SSA:

> SECTION 2 – CONSIDERATION
>
> …….
>
> 2.1.3 the Purchaser shall settle the balance purchase price amounting to Ringgit Malaysia Eight Million Four Hundred and Sixty-Seven Thousand Two Hundred and Ninety Four (RM8,467,294.00) (hereinafter referred to as "the balance purchase price") … **on or before 31st December 2008 (hereinafter referred to as "the Completion Date").**
>
> (emphasis added)

[41] As required under the SSA, the Appellant paid the sum of RM360,000.00 as part payment on 5.8.2008 and the balance of deposit sum of RM1,346,366.00 was paid on 29.8.2008. It is further stipulated in Section 7 of the SSA that the completion of the sale and purchase of the sale of the shares shall be on the date as agreed by the parties:

> Section 7 – Completion:
>
> 7.1. The Completion of the Sale and Purchase hereunder of the Sale Shares shall take place... on a date agreed by the parties occurring on or before the Completion Date upon receipt by the Vendors' Solicitors of the shareholders' advances and the Balance Purchase Price together with payment payable to the Vendors under the Power of Attorney granted by the Vendors to the Purchaser (subject to clearance of payments) ...

[42] Under the SSA and the PA, the parties had agreed that the deposit of RM210,000.00 will be paid upon execution of the agreement and the balance of the consideration of RM1,890,000.00 to be paid on or before the Completion Date.

[43] It is also expressly provided under the SSA that if the Respondents for any reason whatsoever fail to comply with any of their obligations under the SSA, the Appellant shall be entitled to specific performance:

> Section 10 – Vendors' Breach
>
> 10.1. In the event that the Purchaser shall has complied with all terms and conditions herein contained but the Vendors fail to comply with any of their duties and obligations hereunder for any reason whatsoever the Purchaser shall be entitled to specific performance against the Vendors and all costs and expenses incurred in connection therewith (including solicitor's cost on a solicitor and client basis) shall be borne by the Vendors.

[44] Schedule 1 of the SSA provides for due diligence to be conducted. The relevant clauses in the said Schedule are Clauses 5.1.20 and 5.2(ii) which reads:

> Subject to receipt of the full Purchase Price, shareholders advances and the all payment under the Power of Attorney, the Vendors hereby represent and warrant to the Purchaser that save as otherwise specifically disclosed in writing by the Vendors to the Purchaser:
>
> .....
>
> 5.1.20 the **Vendors shall** provide or cause to be provided to the Purchaser, its advisers, servants or agents **all necessary information and assistance required to conduct a due diligence on the Company and/or any matter or action necessary to**

complete the sale of the Sale Shares.

5.2. The Vendor shall:

(ii) prior to completion it shall sign all documents and do all acts incumbent on it to do as beneficial owners of the Sale Shares and shall render its co- operation to ensure full access by the Purchaser, its agents and representatives to conduct a due diligence exercise on the Company and that **the Purchaser and/or its agents, accountants and solicitors are given promptly on request all such facilities and information in that regard and as may be reasonably required.**

(emphasis added)

[45] Under the SSA if the Appellant breaches any of its obligations under the SSA, the Respondents may by notice in writing terminate the SSA and forfeit as agreed liquidated damages an amount equivalent to ten per cent (10%) of the payments for Purchase Price, shareholders advances and payment made under the PA as well as refund any other monies. If on the agreed Completion Date, the balance purchase price has not been paid the SSA shall cease to have any further effect or force and neither party shall have any further claim against the other save for antecedent breach. This is expressly provided under Section 11 of the SSA**:**

SECTION 11 – PURCHASER'S BREACH

11.1 **In the event that the Purchaser shall breach any of its obligations** herein, **the Vendors may by notice in writing terminate this Agreement** and forfeit as agreed liquidated damages an amount equivalent to ten per cent (10%) of the payments for Purchase Price, shareholders advances and payment made under the Power of Attorney and to forthwith refund any other monies paid to the Vendors or the Vendors' Solicitors to the Purchasers provided always that Completion has not taken place

whereupon this Agreement shall forthwith cease to have any further effect or force and neither party shall have any further claim against the other save for antecedent breach."

[46] Section 12 of the SSA provides that the SSA shall continue to be valid and binding until completion via receipt of the full Purchase Price, shareholders advances and payment made under the PA, by the Respondents as well as the transfer of the Sale Shares to the Appellant as purchaser and full effective control of the 1st Respondent by the Appellant:

SECTION 12 – TERMINATION

12.1 This **Agreement shall continue to be valid and binding until completion via receipt of the full Purchase Price,** shareholders advances and payment made under the Power Attorney, by the Vendors and via the transfer of the Sale Shares to the Purchaser and the full effective control of the Company by the Purchaser unless terminated earlier pursuant to Section

12.2 hereunder.

12.2 This Agreement **may be terminated by either party by notice in writing to the other and wherein the consequences under Section 10 and Section 11 shall be applicable to the Purchaser and the Vendor respectively:**

i) if either of the parties hereto shall commit any material breach of its obligations under this Agreement and shall fail to make good such breach within thirty (30) days from the date of receipt of notice from the other party requiring it to do so; or

ii) if either party shall go into liquidation (except for voluntary liquidation for the purpose of reconstruction

or amalgamation) or a Receiver is appointed over all of its assets".

[47] However, in anticipation of not being able to pay on or before the Completion Date, the Appellant had applied for extension of time *vide* letter dated 24.12.2008. The application was rejected by the Respondents *vide* a letter on the same date.

[48] Before us learned counsel for the Appellant argued that the Appellant as the purchaser of the entire issued and paid up share capital of the 1st Respondent was entitled to verify the assets of the Respondents and that the request for written confirmation from the Liquidators was in fact legitimate. The delay in the final payment was because due diligence was still being conducted by the Appellant's lawyers.

[49] In any written agreement there must be strict adherence to the agreed terms of the agreement by the parties unless expressly provided otherwise. The SSA represents the intention of the parties, defining the obligations and commitments of the parties. Whether there was a valid termination would be based on whether in the first place there was a valid reason to terminate as stipulated by the terms of the agreement. There must be a proper construction of the terms of the agreement, in this case the SSA. The reasons or grounds for termination are defined with particularity in the SSA. Section 11 of the SSA gives a right of notice to rectify the breach. If no notice is given the party allegedly in breach would not have any knowledge of the breach complained of and thus unable to take the necessary steps to rectify.

[50] In *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 MLJ 464 the Federal Court reversed the decision of the High Court and the Court of Appeal on the central issue on the interpretation of an agreement and held that the termination of the agreement therein was wrongful. Zainun Ali, FCJ quoted an article by Professor Richard Hooley, 'Implied Terms After Belize Telecom' [2014] 73 CLJ 315 at pp

324-325 summarising Lord Hoffman's principles in Belize:

(1) A court has no power to improve the instrument it is asked to construe whether to make it fairer or more reasonable. It is concerned only to discover what the instrument means.

(2) That meaning is what the instrument would convey to a 'reasonable person' or 'reasonable addressee' having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. This objective meaning of the instrument is what is conventionally called the intention of the parties or of whoever is the deemed author of the instrument.

(3) The question of implication arises where an instrument does not expressly provide for what is to happen when some event occurs. In most cases, the usual inference is that nothing is to happen, and the express provisions of the instrument continue to operate undisturbed. If the event causes loss to one of the parties, the loss lies where it falls.

(4) In some cases, however, the 'reasonable addressee' of the instrument will conclude that the only meaning which the instrument can have, consistent with its other terms and the relevant background is that something is to happen in response to the particular event that has not been expressly provided for in the instrument's terms. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs.

(5) Nevertheless, that process does not add another term to the instrument; it only spells out what the instrument means. In other words, the implication of a term is an exercise in the construction of the instrument as a whole.

(6) It follows that in every case of implication, the single question

> for the court is whether the implied term would spell out in express words what the instrument, read as a whole against the relevant background, would reasonably be understood to mean.

[51] The Federal Court in *SPM Membrane (supra)* emphasised that there must not only be a valid reason to terminate but communication of that reason to the other party to the agreement:

> [23] It is trite law **that there is a need for there to be a valid reason to terminate, and that reason must have existed at the time of termination, even if the wrong reason was given at that time** (see Chitty on Contract, 31st edn, E. Peel (eds) at 24-014). At common law, that usually means repudiatory breach, or breach of condition, or that there is a particular circumstance which gives rise to a contractual right to terminate. However, there appears to be no need for termination, where it happens by notice, to include particularised reasons as a matter of general common law, unless there are circumstances that give rise to a duty to do so, as in the case of a statutory duty or by the terms of a contract upon proper construction

[52] Zainun Ali, FCJ went on further to explain:

> [41] Thus in addition to the above in interpreting the contract, the court must approach it holistically. No term is to be taken or interpreted in isolation. This canon of construction is so long established, it is almost banal. See for instance *Chamber Colliery Ltd v. Twyerould* [1893] [1915] 1 Ch 268 (Note):
>
> > ... the application of the well-known (sic) rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation

> does no violence to the meaning of which they are naturally susceptible.

[53] Lord Hoffman observed in *Attorney General of Belize v. Belize Telecom* [2009] UKPC 10:

> The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. If it is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed... It is this objective meaning which is conventionally called the intention of the parties or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[54] In *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 Lord Pearson remarked:

> ….the court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable. An unexpressed term can be implied if and only if courts finds that the parties must have intended that term to form part of their contract.

[55] In so far as construction of the terms of an agreement the role of the Court is merely to interpret the terms by examining the words and language used as well taking into consideration the factual matrix of the case. The Court must not even attempt to improve the words used in the clauses which the parties have made themselves, however desirable the improvement may be. His Lordship Dato Gopal Sri Ram JCA (as he then was) in *Charles Grenier Sdn. Bhd. v. Lau Wing Hong* [1997] 1 CLJ 625 elucidated:

> ……a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loop-hole and commerce would come to a virtual standstill.

[56] In his judgment Gopal Sri Ram cited the speech of Lord Wright in *Hillas & Co. v. Arcos Ltd* [1932] All ER (Rep.) 494, where his Lordship had said:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the Court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the

contractual intention is clear but the contract is silent on some detail.

[57] The terms and conditions of an agreement that have been agreed to by the parties of the agreement cannot be simply brushed aside and ignored. This Court through the judgment of Azahar Mohammad FCJ in the case *Lucy Wong Nyuk King (F) & Anor v. Hwang Mee Hiong (F)* [2016] 3 MLJ 689 explained the principle of construing a contract as follows:

> … it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract (see *National Coal Board v. Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ Rep 37 and *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 MLJ 357; [2003] 4 CLJ 294). In *Australian Broadcasting Commission v. Australasian Performing Right Association Limited* [1973] 129 CLR 99, it was held that the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another.

[58] The Federal Court in *SPM Membrane (supra)* set out with acuity the approach the Court must take when construing contracts to determine the true intent of the parties:

> [34]. Where the natural meaning of the contract is not clear and in the particular absence of words to the effect mentioned above, the

principles in ICS in their qualified form……, remain applicable and relevant to the construction of the construct such as to enable the court to objectively determine "the meaning which the contract would convey to a reasonable person having all the background knowledge... available to the parties.

[35] The principles of Lord Hoffman were summarised in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 at p. 296 CLJ; [42] 620G (MLJ). Gopal Sri Ram FCJ, who delivered the leading judgment of the court stated:

> Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix which forms the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.

[59] In *Belize (supra)* Lord Hoffmann suggested that the process of implying terms into a contract was part of the exercise of the construction, or interpretation, of the terms of the contract…..*' one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean*?'

[60] The judicial observations in the authorities as we have stated above represent a clear, consistent and principled approach that termination clauses in a contract must be interpreted strictly. Both the High Court and the Court of Appeal in the instant appeal viewed that termination clauses must be interpreted strictly. In fact the Court of Appeal in its

Judgment reminded itself that:

> ……. adopting such an approach does not mean that the general rule of interpretation of the contract as enunciated in *Berjaya Times Square's case (supra)* should not be adhered too. Therefore the clear meaning and intent of section 11 read with section 13 (sic) must be given effect and considered against the backdrop of the parties' intention during the negotiation leading to the agreement.

[61] Both the Courts below had, however, interpreted Section 11 of the SSA as a stand-alone provision and that Section 12 is in effect inoperative. We are unable to agree with the judgment of the learned justices of the Court of Appeal interpretation of Section 11 and Section 12 of the SSA and with respect to the careful reasoning of the Courts below, we consider that interpretation of both Section 11 and Section 12 SSA compels a different view. The provision of Section 11 SSA cannot be read in isolation. In interpreting the provision of Section 11 as a stand-alone provision both Courts had disregarded the words used in both the provisions. The provisions of Section 11 and Section 12 of the SSA are clear, unambiguous and complement each other. The SSA must be read in its entirety and none of the provisions under the SSA should be interpreted in isolation of the other clauses. Instead, the provisions under the SSA must be read harmoniously. Section 12 of the SSA referred to Section 11 and expressly stipulates that not only notice must be given to the party that breaches the terms but that the party is given 30 days to rectify the breach:

> ….either party by notice in writing to the other and wherein the consequences under Section 10 and Section 11 shall be applicable to the Purchaser and the Vendor respectively:
>
> > i) If either of the parties hereto shall commit any material breach of its obligations under this Agreement and **shall fail to make good such breach within thirty (30) days from the**

date of receipt of notice from the other party requiring it to do so,…..'

(emphasis added)

[62] Against the factual matrix of the case before us and after upon careful perusal of the terms of the SSA, with respect we are of the considered view that both the Court of Appeal and the High Court did not accord sufficient judicial appreciation of the terms of the SSA and had failed to take into account the prerequisites of termination under Sections 11 and 12 SSA as well as misconstrued the provision of the aforesaid clauses in particular, the non-adherence of Section 12 SSA by the Respondents.

[63] Reading the terms of the SSA in its entirety, we find that there is no latent ambiguity; the obligations of the parties are specifically defined. Termination is not permitted unless as expressly stipulated under SSA. Notice must be given to the Appellant to rectify the identified breach and take steps to rectify that breach within the prescribed time as agreed. There must be strict adherence to the clauses in an agreement which relates to termination.

[64] Termination of an agreement results in the end of the parties obligations. Reading the provisions of Sections 11 and 12 of the SSA the party in breach must be notified of the identified reason for termination as well as be given the opportunity to rectify the breach. The Federal Court in *SPM Membrane (supra)* emphasised the importance of giving effect to the specific requirements of a termination clause, failing which a notice of termination would be defective:

> [64] Under cl. 9, the review procedure gives the opportunity for the respondent to review the appellant's performance, but this is by no means unilateral as a matter of procedure. The terms of cl. 9 make this clear. Clause 9.1 for instance, oblige the parties to agree upon

> the terms and conditions of the review prior to any review occurring. This is clearly meant to protect the interests of both parties, that is to say the interest of the respondent in ensuring that the unsatisfactory situation is remedied (whether by the appellant, or where there is discharge or termination, by its substitute), and the interest of the appellant in avoiding breach and termination of the contract. Arguably the purpose of this clause leans in favour of protecting the position of the appellant against wilful termination for one, and to provide an added layer of protection in that it is given the opportunity to "remedy the unsatisfactory situation" in 30 days. It cannot be the case that the respondent is allowed to circumvent the purpose of cl. 9 by invoking unilateral termination under cl. 8.1 (b) when cl. 9.3 itself refers to 8.1(b) as a means of protecting the respondent's interests. In this regard, cl. 9.3 provides that if the State Government finds the unsatisfactory situation is not remedied at the end of 30 days... the State Government shall have the option of treating the unsatisfactory performance as an event of default which entitles the State Government to terminate this agreement pursuant to cl. 8.1(b) and accordingly the State Government shall be entitled to all reliefs provided under cl. 8.

[65] In interpreting a clause in an agreement it is pertinent to take into consideration the context of the agreement as a whole, to examine the relevant clauses in detail and to consider the relevant factual matrix to give guidance as to the true intent of the parties. When one has to choose between two rival interpretations, the one which made more commercial sense should be preferred if the natural meaning of the words were unclear. In this case the provisions of the SSA are clear and unambiguous. The Appellant have paid a substantial sum as deposit for the purchase the shares and the Land therefore, it makes commercial sense that the Appellant be given the opportunity to rectify the purported breach as envisaged under Section 12 of the SSA. The parties were still negotiating despite the issuance of the notice of termination. Lord Hodge

in *Wood (Respondent) v. Capita Insurance Services Limited (Appellant)* [2017] UKSC 24 summarised the Court's task in the construction of the terms of a contract:

> 10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v. Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

[66] For the reasons adverted to above, we take the view that termination clause in an agreement ought to be construed strictly. In light of the foregoing, the 1st question must be answered in the positive.

Question 2

Whether headings in a contract can be used to assist in the interpretation of that contract

[67] Headings are like marginal notes in a statute. Its function is merely to serve as a brief guide to the content of the section and for reference and identification purposes only (See: *Foo Loke Ying & Anor. v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511). The headings to a particular provision in an agreement will not have any effect on the interpretation of that agreement or have any substantive meaning or interpretive value.

[68] In *SBJ Stephenson Ltd v. Mandy* [2000] FSR 286, Bell J held that the Court could look to the heading and be able to tell at a glance what the clause was about. The 2nd question is therefore answered in the negative.

Conclusion

[69] In consequence, we allow the appeal with costs of RM150,000.00 subject to payment of allocatur. The orders of the Court of Appeal and High Court are set aside.

Dated: 17 DECEMBER 2020

(HASNAH MOHAMMED HASHIM)
Judge
Federal Court of Malaysia Putrajaya

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