DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO.: B-02(NCVC)(W)-369-03/2023

ANTARA

WORLDWIDE PLATINUM RECORDS SDN. BHD.
(NO. SYARIKAT: 938730-H) **…PERAYU**

DAN

TAN SEW CHENG
(NO. K/P: 660521-10-5312/A0402521) **... RESPONDEN**

(Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
Guaman No.: BA-22NCvC-31-01/2022

Antara

Worldwide Platinum Records Sdn. Bhd.
(No. Syarikat: 938730-H) ... Plaintif

Dan

Tan Sew Cheng
(No. K/P: 660521-10-5312/A0402521) ... Defendan)

CORAM

CHE MOHD RUZIMA BIN GHAZALI, JCA

AZIMAH BINTI OMAR, JCA

AZHAHARI KAMAL BIN RAMLI, JCA

MAJORITY JUDGMENT

A. INTRODUCTION

[1] This present appeal before this Court was filed against the decision of the Learned Judicial Commissioner **("Learned JC")** dismissing the Appellant - Plaintiff's claim against the Respondent-Defendant with costs of RM10,000.00.

[2] The Appellant - Plaintiff claimed for the return of a sum of 1 million Euros (which is equivalent to approximately RM4.82 million) which was supposedly remitted by the Appellant - Plaintiff to the Respondent - Defendant as an agent to an American corporate entity, Noble Mettle LLC **("Noble")** under the terms of a Loan Agreement for a fantastical amount of One Hundred and Two Million Euros (102, 000, 000.00 Euros).

[3] The parties hereinafter will be referred to as they were in the high court.

[4] The Plaintiff (**"Worldwide Platinum Records Sdn Bhd"**) had entered into a Loan Agreement for a **102 MILLION EUROS (MORE THAN RM500,000,000.00)** with Noble via the agency and representation of the Defendant, an individual by the name of **"Tan Sew Cheng"**.

[5] Despite a whopping **HALF A BILLION RINGGIT** loan amount which Noble had agreed to extend to the Plaintiff, the Plaintiff had pleaded that Noble still inexplicably required the Plaintiff to pay a processing and due diligence fee of two (2) million Euros (which one (1) million Euros be paid upfront and the remainder one (1) million Euros be paid from the first drawdown of the half a billion ringgit).

[6] I must also remark the puzzling 'split' manner in which the first tranche of the processing and due diligence fee was paid by the Plaintiff on 31.12.2016. The Plaintiff first directly paid to Noble the sum of 100,000.00 Euros via *wire transfer*. However, despite being able to pay directly the 100,000.00 Euros via *wire transfer*, the Plaintiff had claimed that the remainder sum of 900,000,00 Euros were paid to Noble in following manner:

a. **VIA LUMP SUM CASH PAYMENT IN FOREIGN SGD CURRENCY; and**

b. **INDIRECTLY TO THE DEFENDANT** (for onwards transmission to Noble).

[7] When the promised half a billion-ringgit loan was not forthcoming from Noble, **instead of actively pursuing Noble for the release of the larger pool of money**, the Plaintiff was bent on securing a 'refund' of the monies paid to the Defendant (as agent of Noble).

[8] The Plaintiff's peculiar abandonment of the half a billion ringgit loan (from Noble) and tenacity to instead chase after the markedly lesser 1 million Euros processing fee (from the Defendant) was so peculiar to the extent that the Court of Appeal had already put the legitimacy of this Loan Agreement to serious question (and postulated the 'likelihood' that the fantastical features of this Loan Agreement was a mere smokescreen of a moneylending or money laundering scheme).

[9] The bizarre facts and features underlying the logic-defying Loan Agreement had already been put to serious question at the Court of Appeal level when the Court of Appeal had reversed a prior High Court Decision (which initially allowed a Summary Judgment entered in favour of the Plaintiff). The Court of Appeal in allowing the appeal by the Defendant (against the decision granting the Plaintiff summary judgment) had reversed the High Court decision and ordered a Full Trial with **specific issues to be tried to scrutinise and examine the stupefying and illegal features rife within the impugned Loan Agreement.**

[10] At the end of the Plaintiff's case, the Plaintiff had obviously failed to discharge its own legal burden to prove a legally enforceable Loan Agreement to seek for a refund. Thus, considering the Plaintiff's absence of a case, the Defendant opted to submit a no case to answer (and elected not to call any witness from the Defendant's side). Upon full trial and the Plaintiff's outright refusal to call key and material witnesses to testify on the stupendous Loan Agreement, the Learned JC had rightfully and astutely dismissed the Plaintiff's claim.

[11] Dissatisfied with the Learned JC's dismissal of its claim, the Plaintiff appealed to the Court of Appeal.

[12] In any case, it is only apt for me to first set out the facts underlying the Plaintiff's bizarre claim before proceeding to analyse into the Learned JC's decision.

B. BACKGROUND FACTS OF THE CASE

[13] The Plaintiff via its Managing Director, **Dato' Law Eng Hock** had entered into a Loan Agreement dated 11.12.2016 **("impugned Loan Agreement")** with a supposedly American Company, **Noble**.

[14] The Defendant (**"Tan Sew Cheng")** was the supposed Malaysian representative of Noble. Under the impugned Loan Agreement, Noble had agreed to grant a loan of 102,000,000.00 Euros (half a billion ringgit) to the Plaintiff. Despite the astounding liquidity of Noble (to the extent that it was in a financial position to disburse half a billion ringgits in loan facility), Noble somehow required that the Plaintiff remit a sum of 2,000,000.00 Euros (2 Million Euros) as administrative and due diligence fee **("supposed Fee")**.

[15] The first 1,000,000.00 Euros of the supposed Fee was required to be paid upfront while the remainder shall be deducted from the first drawdown of the initial 1,000,000.00 Euros of the half billion-ringgit loan.

[16] Adding further peculiarity to the Plaintiff's claim, was the manner in which the first 1,000,000.00 Euros of the supposed Fee was paid by the Appellant. Instead of directly paying Noble the first half of the supposed Fee, the Plaintiff inexplicably had split the payment in the following manner:

a. **Direct Wire Transfer of 100,000.00 Euros** from the Plaintiff directly to Noble on 30.12.2016; and

b. Remainder 900,000.00 Euros **paid by cash in the form of foreign Singaporean Dollar (SGD) currency (1,362,850.00 SGD)** indirectly paid to Noble via the Respondent **("foreign SGD payment")**.

[17] It was never explained by the Plaintiff as to the logical reasoning behind its peculiar decision to use cash payment in foreign SGD currency when it had already been established that the Plaintiff had direct account details and credentials to directly wire payments to Noble.

[18] It was immensely more bizarre that the Defendant would somehow issue an Undertaking dated 30.12.2016 to 'indemnify' the multimillion-dollar American company, Noble by undertaking to fully 'refund' the paid-up portion of the supposed Fee in the event that Noble breaches the impugned Loan Agreement **("1st Inexplicable Undertaking")**. It was markedly peculiar that a mere agent or representative (not even a Director or Shareholder of Noble) would put herself at personal risk especially considering the seemingly 'robust' financial standing of Noble.

[19] It was undisputed that Noble had failed to make good of its promise under the impugned Loan Agreement. The stupefying half a billion-ringgit loan was not forthcoming from Noble (which to me was hardly a surprise considering the dubious features of the entire transaction). Even after all that song and dance, the Plaintiff somehow was not so much perturbed by Noble's blatant breach of the impugned Loan Agreement (and deprivation of the promised half a billion-ringgit loan), and instead was adamant to embark on a 'side quest' to instead

pursue the measly foreign SGD payment that was remitted to Noble via the Defendant.

[20] The Plaintiff embarked on a full pursuit against the Defendant to obtain a 'refund' of the foreign SGD payment. Adding further peculiarity to the Plaintiff's claim, the Defendant somehow had signed another undertaking dated 23.10.2017 **("2nd Inexplicable Undertaking")** while she was detained in police lock-up in Penang.

[21] The Plaintiff by and large attempted to **isolate** the two inexplicable Undertakings from the underlying and inextricably woven background of the impugned Loan Agreement. It was upon these two inexplicable Undertakings that the Plaintiff initially felt misguidedly assured and confident to obtain Summary Judgment (on the pretext of the Defendant's supposed admission of indebtedness via the two inexplicable Undertakings). Instead, the Court of Appeal was quick and astute to disagree with the Plaintiff and identify the bizarre and peculiar features of the impugned Loan Agreement.

[22] It is opportune here for me to reproduce the Court of Appeal's grounds of decision as reported in ***Tan Sew Cheng v Worldwide Platinum Records Sdn Bhd*** **[2020] MLJU 248**:

> ***[9]*** *Here, the* ***defence is not one of mere platitude; it raises serious issues on the validity of the very agreement which the respondent entered with Noble Mettle, that the undertaking is necessarily one which is to be read together with that agreement****, whether contextual or more; that divorced of the underlying agreement between the respondent and Noble Mettle, there really would have been no need for such an undertaking, written or even verbal.*
>
> ***…***
>
> ***[11] However****, despite that payment which was acknowledged many months later in October of the following year for unexplained reasons,* ***which delay is not disputed or even the subject of any complaint by the respondent****, the respondent did not obtain that loan of €102 million.*

[12] The *appellant has raised concerns and questions over the respondent's payment of the €900,000 in cash of SGD1,362,850.00.* ***Prior to this payment, the respondent had itself remitted directly to Noble Mettle the sum of €100,000****.* ***The sum of SGD1,362,850.00 was given in cash by the respondent's director to the appellant*** *to remit to Noble Mettle.*

[13] *The agreement, though seemingly simple and straightforward was without legal assistance, and this has raised concerns as to the propriety of the agreement and the related arrangements including the undertaking by the appellant and the payment and onward remittance of €900,000 by the appellant to Noble Mettle.*

[14] This *€900,000 is a very substantial sum by any measure and the* ***circumstances surrounding its payment and the arrangement for its payment and remittance to Noble Mettle, a foreign institution merits proper examination and consideration through a tria****l.* ***EVEN THE LOAN SUM OF €102 MILLION REQUIRES EXAMINATION.*** *The payment of €900,000 would, amongst others,* ***be relevant to the issue of whether there are any violations or contraventions of any monetary regulations including those under the Financial Services Act 2013, Exchange Control Act and even under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001****. The appellant has adduced evidence to the effect that the respondent's director who made the payment was fully aware of the* ***strict enforcement by Bank Negara and that its approval would be required before the monies could leave or enter our shores.***

[15] *It would seem to us that* ***if that payment of SGD1,362,850.00****, paid by the respondent to Noble Mettle under its agreement with Noble Mettle* ***was in any way contrary to any of those laws mentioned****, then surely* ***any refund would similarly suffer the same fate under the principle of ex turpi causa non oritur actio and that the respondent may possibly be***

in pari delecto to the illegality or wrongful act, *or at the very least, this issue warrants further examination.*

[16] It was also erroneous for the learned Judge to say that the loan agreement with Noble Mettle had no connection whatsoever with the letter of undertaking; the two were plainly and obviously inter-related*. At this point, we are incline to say that the appellant has raised very real and serious questions of illegality which must be examined properly for its full facts and circumstances. The respondent's knowledge or awareness of those facts would also be material to that determination.*

[17] We cannot shut our eyes to THE PLAINLY UNUSUAL ARRANGEMENTS PERTAINING TO THE SUBSTANTIAL LOAN IN A FOREIGN CURRENCY WHICH REQUIRED PRIOR PAYMENT from the potential borrower in the person of the respondent even before it receives any part of that substantial loan*; and which suggest some* ***real concerns on its validity and legality that must be scrutinized*** *by the Court. The lending transaction in the agreement is even questioned as being* ***an unauthorized transaction or even an ILLEGAL MONEY LENDING/LAUNDERING TRANSACTION****. See cases such as Norihan Talib & Ors v Mohd Nasir Hassan & Ors [2017] MLRAU 1 and Lim Xue Shan & Anor v Ong Kim Cheng [1990] 3 MLJ 449. (Emphasis added.)*

[23] The Plaintiff **did not appeal against the Court of Appeal's decision** to the Federal Court. Thus, the Plaintiff's claim then was remitted back to the High Court for full trial on the following specific premises and questions posed by the Court of Appeal **("threshold issues")**:

a. The two inexplicable Undertakings **must be conjunctively read and examined together** with the impugned Loan Agreement between Noble and the Plaintiff so as to appreciate the true context in which the inexplicable Undertakings were entered into;

b. The Plaintiff must justify and explain its inexplicable delay and nonchalance against the 10 months' delay between the cash foreign SGD Payment (30.12.2016) and Noble's delayed acknowledgment of receipt (on 9.10.2017);

c. The Plaintiff must justify and explain its inexplicable insistence to chase after the refund of the foreign SGD Payment against the Defendant instead of pursuing the larger half a billion-ringgit loan disbursement against Noble;

d. The Plaintiff must justify and explain the inexplicable terms of the impugned Loan Agreement in which Noble somehow still required a comparatively measly 2,000,000.00 Euros in supposed fees to be paid before Noble would disburse the half a billion-ringgit loan under the impugned Loan Agreement;

e. The Plaintiff must justify and explain the features of the impugned Loan Agreement which were in contravention of monetary regulations under the Financial Services Act 2013 **("the FSA")**, the Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 **("AMLATFPUA"),** Exchange Control Act 1953 **("ECA")** and numerous guidelines and bye-laws issued by the Ministry of International Trade and Industry **("MITI")** and Bank Negara Malaysia **("BNM");** and

f. The Plaintiff must justify and explain the Plaintiff's insistence to indirectly pay the supposed fee via cash in foreign SGD currency to the Defendant, when the Plaintiff supposedly was already able to directly wire transfer the initial 100,000.00 Euros to Noble.

[24] With all the threshold issues laid down by the Court of Appeal, the Plaintiff's legal burden to prove its claim must withstand and overcome the threshold of all of the issues raised by the Court of Appeal. Despite the obvious hurdles that the Plaintiff was supposed to overcome, the Plaintiff ultimately only proffered one singular clueless witness while intentionally withholding a key and material

witness (being the signatory of the impugned Loan Agreement itself, one **Dato Law Eng Hock).**

[25] The Learned JC found that the lone clueless witness was evasive at best, and was unable to shed any light whatsoever into any of the questions posed by the Court of Appeal (during cross-examination by the Defendant's counsel).

[26] The only material testimony he proffered was that the proper person to be asked these questions was actually Dato Law Eng Hock (the exact person the Plaintiff refused to tender or produce before the High Court).

[27] At the closing of the Plaintiff's case, the Defendant was confident (and I am in agreement) that the Plaintiff had either failed to discharge its legal burden to prove a legitimate and enforceable Loan Agreement or that even if the Plaintiff's evidence were admitted at face value, the Plaintiff still failed to establish a case against the Defendant. Thus, the Defendant rightfully and understandably opted to submit no case to answer. Unsurprisingly, the learned JC accordingly dismissed the Plaintiff's claim.

C. THE PRESENT APPEAL

[28] I have perused the Plaintiff - Appellant's Memorandum of Appeal, Records of Appeal, and the parties' respective written submissions and I am of the view that the appeal before this Court can be appropriately be disposed of by determining the following issues:

a. **1st issue:** Whether or not the Learned JC was correct to conjunctively or collectively read the impugned Loan Agreement together with the two inexplicable Undertakings; and

b. **2nd issue:** Whether or not the Learned JC was correct to find that the Plaintiff ultimately failed to prove the validity and enforceability of the impugned Loan Agreement (and consequently the validity and enforceability of the two

inexplicable Undertakings) despite the Defendant submitting a no case to answer.

D. 1st Issue: WHETHER OR NOT THE LEARNED JC WAS CORRECT TO CONJUNCTIVELY OR COLLECTIVELY READ THE IMPUGNED AGREEMENT TOGETHER WITH THE TWO INEXPLICABLE UNDERTAKINGS.

[29] In actuality, it was no longer open for the Plaintiff to contend on the isolated and separate reading of the two inexplicable Undertakings from the impugned Loan Agreement. It must be highlighted that the Court of Appeal (when reversing the High Court's prior Summary Judgment) **had made clear finding and pronouncement that the undertakings must be read together with the impugned Loan Agreement for proper context**. Since this decision by the Court of Appeal was not appealed against, then it must only mean that the Plaintiff admits the correctness of the Court of Appeal's finding that the inexplicable undertakings cannot be read in isolation from the impugned Loan Agreement. Suffice we refer to the **Federal Court** decision in **Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461**:

"The plaintiff did not appeal against the decision of the learned judge striking out the first suit. ***The failure to appeal meant*** *that the* ***plaintiff accepted the correctness of the decision to dismiss its suit****". (Emphasis added.)*

[30] Thus, the Plaintiff cannot maintain its stance that it was sufficient for it to merely prove the Defendant's supposed 'admission of indebtedness' via the two inexplicable Undertakings.

[31] I must emphasise that the threshold of the Plaintiff's Legal Burden of proof remains that the Plaintiff must necessarily prove the legality and validity of the impugned Loan Agreement itself, before the inexplicable Undertakings can find any semblance of legitimacy.

[32] In any case, an isolated reading of the two inexplicable undertakings would indubitably yield a commercially insensible and nonsensical result. It does not and cannot make any sense that the Defendant would intentionally 'admit' to an indebtedness without any spec of context or 'genesis' underlying the supposed indebtedness.

[33] I must emphasize and reiterate and that our courts have adopted the business common sense rule of contractual interpretation especially in cases where mere literal semantics of a contract would lead to an absurd result. In such cases, it is only just that the Court looks beyond the written terms of a contract, and consider all surrounding facts and documents to ascertain the true genesis of the contractual relationship. Suffice to refer to the salutary words of the **Federal Court** in ***Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770*****:**

*"**In this case, we would also assert that no businessman, who had not taken leave of his senses, would intentionally enter into an agreement which exposed him to unfair trading** and the kind which is actionable in a passing off action. We would also adopt the same reasoning to say that we should not manipulate the contractual word 'competition' used in cl 5 to say that the appellants cannot be restrained from unfair competition. We would also quote and adopt the following words of Lord Diplock in yet another recent case of Antaios Compania Naviera SA v Salen Rederierna AB:11*

***… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense**." (Emphasis added.)*

(see also **Kuan Kong Hong v Ng Kim Cheong & Anor [2023] 5 MLJ 644; Orion Choice Sdn Bhd v Bellajade Sdn Bhd [2023] 5 MLJ 437**)

[34] In view of all the aforementioned deliberations I hereby answer **the 1st issue in the POSITIVE.** The Learned JC was indeed correct to conjunctively or

collectively read the impugned Loan Agreement together with the two inexplicable Undertakings.

E. 2nd issue: WHETHER OR NOT THE LEARNED JC WAS CORRECT TO FIND THAT THE PLAINTIFF ULTIMATELY FAILED TO PROVE THE VALIDITY AND ENFORCEABILITY OF THE IMPUGNED AGREEMENT (AND CONSEQUENTLY THE VALIDITY AND ENFORCEABILITY OF THE TWO INEXPLICABLE UNDERTAKINGS) DESPITE THE DEFENDANT SUBMITTING A NO CASE TO ANSWER

[35] Considering my positive answer in the 1st issue, it remains imperative for the Plaintiff to discharge its Legal Burden of proof to prove that the impugned Loan Agreement itself was valid and enforceable. However, instead of appropriately furnishing evidence and explaining the dubious features of the impugned Loan Agreement, the Plaintiff had staunchly and desperately clung onto the contention that the Defendant had 'admitted' her indebtedness via the two inexplicable Undertakings. Thus, here I am faced with the conundrum of a debt that was both:

a. an **ADMITTED** debt owed; and

b. an **ILLEGAL** debt owed.

[36] Adding further nuance to the case, the **dubious nature and the legality of the debt was put to serious question by the Court of Appeal** when the Court of Appeal first overturned the High Court's decision to allow the Plaintiff 's Summary Judgment Application. From the last Hearing, I am moved to examine further as to where and how does the burden of proof (both Legal and Evidential) shifts in this case.

[37] A dissonance arose because this Court was faced with **1)** the general and trite rule that the party who asserts illegality shall bear the burden of proof to prove

the existence of the illegality; and **2)** the fact that the Defendant had opted to not call any evidence and submitted a no case to answer:

a. **The Plaintiff argued** based on the **general rule** that **the party who asserts illegality must bear the burden to prove said illegality**. Thus, arguably since the Defendant has not called any evidence, it cannot be said that the Defendant had discharged its burden of proof to prove illegality;

b. **The Defendant argued** that following the same general rule as the Plaintiff, the Defendant had discharged its evidential burden of proof to prove illegality **when the Defendant had posited questions on the illegal and dubious nature of the transaction during the cross-examination of the Plaintiff's sole witness (OF WHICH THE WITNESS FAILED TO ANSWER OR JUSTIFY ALL and ANY OF THE ILLEGALITIES RAISED)**;

c. Alternatively, considering the unique circumstance of this case (where the Court of Appeal had already called the Plaintiff out to explain the illegalities) **the Plaintiff (EVEN BEFORE THE SHIFT OF EVIDENTIAL BURDEN OF PROOF TO THE DEFENDANT) already bears the LEGAL burden of proof to prove the legitimacy and legal actionability of the debt.**

[38] Thus, to my mind the case can be deliberated from two distinct angles:

a. Illegality in the instance of the general or classical shift of EVIDENTIAL burden of proof; or

b. Illegality in the instance of the Plaintiff's own LEGAL Burden that does NOT SHIFT.

E(i) ILLEGALITY IN THE INSTANCE OF THE GENERAL OR CLASSICAL SHIFT OF EVIDENTIAL BURDEN OF PROOF

[39] It is trite law that there are two types of burden of proof. The first being **LEGAL BURDEN** of proof **("LB")** that does NOT SHIFT and always lies on the Plaintiff

to prove its claim. On the other hand, when the Plaintiff discharges the initial LB, the **EVIDENTIAL BURDEN** of proof (onus of proof) **("EVB")** shifts onto the Defendant to refute the Plaintiff's case. This has been astutely explained by the **Federal Court** in the landmark decision in **Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697**:

"[51] *There is an essential distinction between burden of proof and onus of proof,* ***burden of proof lies upon the person who has to prove a fact and it NEVER SHIFTS****, but the onus of proof shifts' (Addagada Raghavamma And Anr v Addagada Chenchamma And Anr 1964 SCR (2) 933).*

[52] *The 'burden of proof' in s 101 is the burden to establish a case which rests throughout on the party who asserts the affirmative of the issue. The 'burden of proof' in s 102 is the burden to adduce evidence, to make out or rebut the claim. The 'burden of proof' in s 102 shifts from one side to the other according to the weight of the evidence.* ***To differentiate the sense used, the 'burden of proof' in s 101 is 'burden of proof', while the 'burden of proof' in ss 102 and 103 is dubbed 'onus of proof'. In some jurisdictions, the s 101 'burden of proof' is labelled 'legal burden' while the s 102 burden of proof' is referred to as 'evidential burden'****."*

[40] Now, the Plaintiff was adamant that **EVB** had already shifted onto the Defendant when the Plaintiff discharged its **LB** by proving the Defendant's indebtedness via an 'admission' by way of the two inexplicable Undertakings. The Plaintiff further argued that the Defendant had failed to discharge its **EVB** to prove illegality as the Defendant had not led any evidence and chose to submit no case to answer.

[41] Assuming that I should follow the classical and trite shifting of the EVB subsequent to the Plaintiff's discharge of its LB, then the Plaintiff must first discharge its LB.

[42] I shall first explore the hypothesis that the Plaintiff had hypothetically discharged its LB by merely proving the Defendant's indebtedness via the two inexplicable Undertakings (which in truth there was no such admission). Thereafter, the EVB shall shift onto the Defendant to rebut this indebtedness. And since the Defendant's rebuttal against the indebtedness was illegality, then the EVB lies on the Defendant to prove illegality.

[43] Following this classical shifting of EVB, can the Plaintiff simply argue that the Defendant had not discharged its EVB merely because the Defendant had not called any witnesses after the close of the Plaintiff's case?

[44] Now, can the Plaintiff argue that the Defendant cannot discharge its EVB during the Plaintiff 's case before the close of the Plaintiff's case? A **Federal Court authority** have **long held that the Plaintiff's supposition is WRONG** in law.

[45] It is not at all any rule of law that a Defendant must and can only discharge its EVB during the stage of the Defendant's case. It is not at all the law that the Defendant cannot discharge its EVB via cross-examination during the Plaintiff's case. I need only refer to the **Federal Court** case of ***Keruntum Sdn Bhd v The Director of Forests & Ors*** **[2017] 3 MLJ 281**. In **Keruntum**, the Defendant also submitted a no case to answer.

> ***[78]*** *It is settled law that the* ***burden of proof rests throughout the trial on the party on whom the burden lies****. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party (see UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4).* ***When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies*** *or by calling witnesses or by giving evidence himself or by a combination of the different methods.*

[46] The *ratio* above clearly held that a Defendant can discharge its EVB even as early as the Plaintiff's case by cross-examining the Plaintiff's witnesses during the stage of the Plaintiff's case. This was exactly the instance in this case. The

Defendant had sought to discharge its EVB to prove illegality by questioning the illegal features of the transaction to the Plaintiff's sole witness. **Thus, when the Plaintiff's sole witness was unable to explain the illegalities of the transaction, THE RESPONDENT WOULD HAVE SUCCESSFULLY DISCHARGED ITS EVB TO PROVE ILLEGALITY**.

[47] This is squarely in line with the instructive **Federal Court** decision in ***Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619*** that the Court must be vigilant of illegality **"AT ALL STAGES" of a case** even if illegality was not pleaded. It is thus clear that the Defendant was well within its legal rights to prove illegality (discharge its EVB) during the stage of Plaintiff's case well before closing the Defendant's case by submitting no case to answer:

> ***"[35] Clearly, therefore, courts are bound AT ALL STAGES to take notice of illegality, WHETHER EX FACIE OR WHICH LATER appears, even though not pleaded, and to refuse to enforce the contract****. In that regard, we endorse the following statement of law by the Court of Appeal per Hamid Sultan JCA, delivering the judgment of the court, in China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1:*
>
> > ***At the outset we must say that the trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality … whether or not it is the pleaded case of the parties*** *or whether the issue was raised during the trial." (Emphasis added.)*

[48] On the same note, the Learned JC was also right to draw an adverse inference under **section 114(g) of the Evidence Act 1950** at the end of the Plaintiff's case for the Plaintiff's inexplicable refusal to put forth the signatory to the impugned Loan Agreement who was also the Plaintiff's **Managing Director, Dato Law Eng Hock**. Instead, the Plaintiff opted to produce one **Chua Yu Sheng (who was the supposed Project Advisor to the CEO of Ivory Properties Group Berhad)** who had nothing to do whatsoever with the

impugned Loan Agreement. Nor did the Plaintiff's sole witness had any material involvement or knowledge as to the terms and underlying facts surrounding the impugned Loan Agreement. The Learned JC had rightfully appreciated that Chua Yu Sheng's lacklustre testimony had only gone as far as saying that he does not know anything, and that all these questions should be asked to Dato Law Eng Hock.

E(ii) ILLEGALITY IN THE INSTANCE OF THE PLAINTIFF'S OWN LEGAL BURDEN THAT DOES NOT SHIFT

[49] I am also of the considered view that totally separate and distinct of the Defendant's EVB, the Plaintiff itself had failed to discharge its own LB to prove the validity and enforceability of the impugned Loan Agreement. As had been clearly explained by the **Federal Court** in **Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697**, a Plaintiff's claim does not automatically become legitimate merely if the Defendant had not put on a strong defence. Having to shoulder a permanent LB to prove its claim, the Plaintiff's claim must also necessarily live and die by the Plaintiff's own evidence (or lack thereof):

*"**[57]** The rule is that 'the **onus of proof of any particular fact lies o**n the party who alleges it, **NOT ON HIM WHO DENIES** it; et incumbit probation qui decit, nonqui negat, Actori incibit probation … **The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect, the court will not assist him. Hence the maxim Potior est condition defendantis**. **A plaintiff cannot obviously advantage himself by the weakness of the defence**. **A PLAINTIFF'S CASE MUST STAND OR FALL UPON THE EVIDENCE ADDUCED BY HIM**." (Emphasis added.)*

[50] Therefore, notwithstanding and apart from the Defendant's decision to submit no case to answer, it was still strictly incumbent upon the Plaintiff to prove that the impugned Loan Agreement was a valid and legal agreement (and not a sham moneylending or money-laundering scheme rife with inexplicable features). This LB had always been and always will be laid upon the Plaintiff's

shoulders as the Plaintiff. The salutary words of the **Federal Court** in ***Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim*** **[2015] 3 MLJ 609**:

*"…**the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement** (see Ranbaxy (Malaysia) Sdn Bhd v EI Du Pont De Nemours And Co [2011] MLJU 1135; [2011] 1 AMCR 857). In other words, **it was upon the plaintiff itself, and CERTAINLY NOT THE DEFENDANT, to discharge the burden of showing the settlement agreement had come into existence**. It is for the plaintiff to prove its case and satisfy the court that its claim is well-founded before the court grants judgment on the claim (see The Fordeco Nos 12 And 17; The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 And Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10 [2000] 1 MLJ 449, Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd And Other Appeals [2004] 4 MLJ 105 and Teh Swee Lip v Jademall Holdings Sdn Bhd [2013] 6 MLJ 32). **It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses DID NOT ABSOLVE THE PLAINTIFF FROM DISCHARGING ITS BURDEN IN LAW**. (Emphasis added.)*

[51] From the get go the Court of Appeal had already set the threshold of the Plaintiff's LB to prove its case. The bar of the Plaintiff's Legal Burden is NOT ONLY to prove the debt he claimed, BUT ALSO that the debt owed was **legally enforceable or actionable under the law**. It must be reiterated that the Court of Appeal explicitly reversed the Plaintiff's Summary Judgment and **called out the Plaintiff to explain or 'disprove' the many illegalities plaguing the impugned Loan Agreement.**

[52] Considering the above, the present case is not the typical case of illegality in that the illegality was the 'alter ego' masquerading as a legitimate debt or transaction. A typical case of 'underlying' illegality where an illegality was concealed by the façade of a primary form of legitimate transaction would be:

a. SPA and Land Transfer instrument (primary form) used to conceal underlying illegal money-lending transaction (secondary illegality) (see ***Mahmood bin Ooyub v Li Chee Loong and another appeal*** **[2020] 6 MLJ 755**); or

b. Joint Venture Agreement (primary form) used to conceal underlying illegal money-lending transaction (secondary illegality) (see ***Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another [2018] SGCA 5*** **[2018] 1 SLR 363**);

[53] In cases where a transaction's primary form was an allegedly legitimate transaction (i.e. SPA or JVA), then the Plaintiff's Legal Burden can be discharged **by merely proving facts of the alleged legitimate transaction**.

[54] However, the case before us deals with the **illegality of the PRIMARY FORM itself** from the outset. The primary form of foreign SGD Payment was already illegal by contravening prevailing laws and guidelines in force. Therefore, since the Plaintiff is claiming for damages arising from this illegal primary form itself, **the Plaintiff's own LB from the outset would require the Plaintiff to prove that the foreign SGD Payment was a LEGAL transaction that was not in contravention with any laws.**

[55] In the most succinct and simplest explanation possible: Entirely distinct and separate from the Defendant's EVB to disprove the legality of the impugned Loan Agreement, the Plaintiff had already failed to discharge its own Legal Burden to prove that the impugned Loan Agreement and the two inexplicable Undertakings were genuine, legitimate, valid, and enforceable agreements.

[56] Thus, independent from the shifting of the EVB, it becomes incumbent upon the Plaintiff's own prior LB that the Plaintiff must prove the legality and actionability of its claim. **This is squarely in line with the celebrated maxim that he who comes to the aid of the law must come with clean hands.** It remains the Plaintiff's own LB to prove that the primary form of the claim was legitimate and legally claimable by law. That would entail that the Plaintiff must sufficiently explain and justify the numerous illegalities identified by the Court of Appeal in reversing the Plaintiff's Summary Judgment prior. It is no longer sufficient that the Plaintiff only proves the Defendant's admission of indebtedness as the entire legality of the transaction was already impugned *ex facie*. (*ex turpi causa non oritur actio*).

[57] It must sternly be minded that the LB of proof upon the Plaintiff under **section 101 (1) of the Evidence Act 1950** is for seeking a Judgment for a ***"LEGAL right or liability"***. Thus at the forefront of the Plaintiff's own LB, the Plaintiff must already come to Court proving that his own affairs are in order within the confines of the law and legality. The Plaintiff must first prove that his claim is LEGAL. This rule should be immutable.

[58] The only variable should ~~only~~ be the degree or threshold of legality of the claim that the Plaintiff owed a LB to prove. In typical cases where the primary form was legitimate (while the Defendant contends a secondary ulterior design of an illegality), then the threshold of LB owed should only be to prove the legality of the primary form. Then the EVB shall shift onto the Defendant to prove the secondary ulterior illegality. But for instances alike in the case before us (where the primary form itself already contravened the law), then the threshold of the Plaintiff's LB should also extend to not only proving the debt owed, but also that the debt itself was legal and enforceable by law.

[59] Debt can be owed in both realms of legality and illegality. For the Plaintiff to succeed in a claim, he must **not only prove the debt, but the debt is one that CAN BE LEGALLY CLAIMED IN COURT**. Failure of which will denote that the Plaintiff had not come to the court with clean hands. A debt owed by a brothel to a human trafficking syndicate can be admitted. A debt owed arising from an

illegal money laundering/lending scheme also can be admitted. But those debts were owed out of an illegal consideration. Such debt should not stain the door of the court. The same rings true against the obviously dubious, illegal, and inexplicable impugned Loan Agreement before this Court; it should have never been attempted to be enforced by abusing the Court process.

[60] Thus, although generally the EVB to prove defence of illegality lies on the party asserting illegality, the Court cannot ignore (and the Plaintiff ought not simply abuse the process of the Court to conceal) the glaring illegalities gleaning from the Plaintiff's claim. Thus, alike in the case before us (where the primary form of the claim was already illegal) the Plaintiff's own LB should also extend to the Plaintiff proving the legality of its claim.

[61] It is also illogical to solely place EVB upon the Defendant to prove illegality. The illegality existed in this case is on the **absence of due and proper consent, notification, and justification under prevailing statutes and bye-laws. HOW CAN THE DEFENDANT (ON ITS OWN EVIDENCE) PROVE 'ABSENCE' (OR SOMETHING THAT DOES NOT EXIST)?** The logical answer is that the Defendant can only do so by putting the Plaintiff through the wringer (for the Plaintiff to discharge its LB and disprove illegality by furnishing evidence that the Plaintiff indeed had complied with all the prevailing laws). Thus, **it remains inescapable that the burden (be it LB or even EVB) shall still lie on the Plaintiff to prove its claim by proving that the impugned Loan Agreement was legal and enforceable by law.**

[62] We can draw some guidance from the **Court of Appeal** case of ***Tai Thong Flower Nursery Sdn Bhd v Master Pyrodor Sdn Bhd [2014] 6 MLJ 341*.** In Tai Thong, the Plaintiff commenced an action for vacant possession of land. The Plaintiff claims that it was the rightful registered proprietor of the land. Nonetheless, the Defendant **raised illegality of the Plaintiff's proprietorship as the transfer to the Plaintiff's had not received prior approval under section 214A of the National Land Code 1965.**

[63] The Court of Appeal held that since the Plaintiff seeks to claim registered ownership rights over the land, **THE PLAINTIFF OWED THE BURDEN OF PROOF TO PROVE THE LEGALITY OF ITS PROPRIETORSHIP.** Thus, independent of any shifting of EVB to the Defendant, the COA held that it was already incumbent of the Plaintiff to prove the legality of its claim:

"[48] *In our considered view,* ***the burden was on the plaintiff to prove that it was the lawful registered owner*** *of the subject land.*

[49] *When the illegality of the plaintiff's registration as proprietor of the subject land for contravention of s 214A of the NLC was raised,* ***THE BURDEN, IN OUR VIEW, WAS STILL ON THE PLAINTIFF TO PROVE THAT THERE WAS NO SUCH ILLEGALITY and that the necessary approval under that section had been obtained."*** *(Emphasis added.)*

[64] In any case, I find that it would set an undesirable precedent if I do not insist upon the Plaintiff to prove the legality of its claim from the outset (as the Plaintiff's LB to prove its case). I should set a precedent that the Court ought to be vigilant to weed out illegal claims and to discourage unscrupulous parties to try their luck to breathe life into an illegal claim through the Court's process (in hopes that the Defendant does not (or could not afford to) defend himself appropriately).

[65] Considering all of the aforementioned deliberation and findings under this Heading, I hereby answer **the 2nd issue in the POSITIVE.** The Learned JC was certainly correct to find that the Plaintiff ultimately failed to prove the validity and enforceability of the impugned Loan Agreement (and consequently the validity and enforceability of the two inexplicable Undertakings) despite the Defendant submitting a no case to answer.

F. THE RESTITUTION AND UNJUST ENRICHMENT 'EXCEPTION' (IN PATEL V MIRZA) TO THE MAXIM *EX TURPI CAUSA NON ORITUR ACTIO* DOES NOT APPLY IN THE PRESENT CASE

[66] In recent times, the Courts across many jurisdictions (particularly within the Commonwealth) had been called to re-assess the rigidity of the maxim *ex turpi causa non oritur actio* especially against persons in *pari delicto* (who were complicit) in the illegality who stood to wield illegality as a shield to escape unscathed and to an extent, even attain unjust enrichment. In fact, the **Court of Appeal** in the case of **Chan Kok Sung & Anor v Accupro Sdn Bhd & Anor [2024] MLJU 942** very recently had digested this particular movement in the legal landscape especially in light of the landmark English Case of **Patel v Mirza [2016] UKSC 42.** It is opportune that I reproduce the salient portions of the decision here:

[50] *SECONDLY**,** in very recent times, our apex Court had also followed the English position in the UK Supreme Court's landmark decision in Patel v Mirza [2016] UKSC 42. In Patel's case, the UK Supreme Court dealt with a similar circumstance where a delinquent contracting party had sought to excuse himself out of a breach by brandishing illegality as means to invalidate the entire contract he was initially bound to.*

[51] *In Patel's case, the UK Supreme Court had to reconsider and rethink the rigidity of the trite rule against illegality (the latin maxim of ex turpi causa non oritur actio) that might unfortunately cause a co-conspirator to an illegality to be unjustly enriched, at the expense of the other co-conspirator grave loss. The legal dilemma was this:*

a. *On one hand, it would be good precedent for the Court to not breathe life into any illegal contract so as to deter any person from considering to be embroiled in an illegal agreement. Good public policy would have it that no party should be allowed to seek any remedy from the Court arising from illegal contracts. Otherwise, subjects of the law would not be deterred from entering into illegal contracts knowing that they can obtain some form of reparation vide the Court; and*

b. *On the other hand, it would also be undesirable that the Court would leave any 'victim' or co-conspirator to an illegal contract to be without remedy when his monies were unjustly kept in the possession and control of the other co-conspirator. This would unjustly enrich the other co-conspirator and thus, would encourage people to engage in nefarious schemes to defraud other co-conspirators knowing that they're unjust enrichment would not be curtailed by the Court.*

[52] *In view of the above dilemma, the UK Supreme Court decided that the Court may order compensation arising from an illegal contract on the two conditions that:*

a. *The order for compensation was not contrary to any public policy; and*

b. *The order for compensation would not lead to a disproportionate reparation compared to the nature of the illegality involved.*

…

[54] *We must* ***APPROPRIATELY CAVEAT*** *that our application of the principle in Patel v Mirza (and our inclination to assist the Appellants in the Appeal before us) was incentivized by the specific and niche facts (which entailed the Respondents' unconscionable conducts which would unjustly deprive a legitimate judgment creditor for monies which were legitimately due to be paid to the Appellants). We remain in full and unmitigated agreement that as far and as much as possible, the Courts shall not lend any hand to assist any persons to obtain any remedy whatsoever arising from an illegal contract.*

[55] *Even if the Settlement Agreement might offend the rule against undue preference (which we already found that it had not), public policy dictates that the Respondents ought not to be left unscathed especially considering the fact that the Respondents had taken the parties and even the Courts for a ride for years. The Respondents' unsavoury conducts by and large had undermined the integrity of the Court and abused the process of the Court.*

> ***[56]*** *Thus, it would be vastly unjust and a total "overkill" for us to simply invalidate the Settlement Agreement and deprive the Appellants of just deserts. (Emphasis added.)*

[67] Applying the above principle in the present case, it is glaring that the Plaintiff's claim would have not satisfied the first criteria of the exception in Patel v Mirza (in that the nature of illegality, and an order for compensation for said illegality was clearly against public policy).

[68] It must be kept in mind that our nation in recent times have faced grave scandals, controversies, and criminalities at an unprecedented scale and prevalence. Public sensitivity and scrutiny so as to accountability as to monies, movement of monies, payment and receipt of monies, corruption and scandals is at an all-time high (as it should necessarily be).

[69] Our own Malaysian Legal Framework has prescribed meticulous laws, bye-laws, rules, and regulations to govern and police both domestic and international transactions especially those involving foreign exchanges and currencies. This framework was painstakingly drafted in hopes to curb criminality and corruption which by its very nature, often attempted to be concealed and shielded from the law.

[70] The above considered, I am of the considered view that the Plaintiff cannot simply sweep the illegal and dubious features of the impugned Loan Agreement under the rug and use the Court process as a platform to 'roll the dice' in hopes that the Court would somehow just focus on the supposed 'admission' of indebtedness via the two inexplicable Undertakings. As the Court of Appeal previously had pointed out, the term agreed under the impugned Loan Agreement was sorely bizarre and most likely may either be an illegal moneylending scheme or a money laundering scheme instead. This is especially so considering the Plaintiff's questionable readiness to abandon a half billion-ringgit loan under the impugned Loan Agreement in favour of a 'refund' of a mere 1 million Euros as per the two inexplicable Undertakings.

[71] And since the Plaintiff had failed to adduce any evidence to prove the contrary, the Learned JC was correct to find that the impugned Loan Agreement and the Undertakings were illegal and unenforceable.

[72] To allow any form of restitution or compensation to arise from the impugned Loan Agreement or the inexplicable undertakings would only breathe a semblance of legitimacy to the same illegalities. It would squarely be against public policy for us to set a precedent in which would only serve to open the floodgate to incentivise many unscrupulous personas to continue devising new and creative ways to delude the Court and thereupon, abuse the Court process to become the means to achieve their illegal ends.

G. DECISION

[73] Based on the aforementioned deliberations, the Appellant's appeal here is totally devoid of merit and must be dismissed with costs. Thus, the High Court order and decision are hereby affirmed.

[74] The Appellant is ordered to pay costs of RM40,000.00 to the Respondent subject to allocator.

[75] My learned brother Justice Azhahari Kamal bin Ramli has read this judgment in draft and has expressed his concurrence whereas Justice Che Mohd Ruzima bin Ghazali has a dissenting view and has written a separate judgment.

Dated 12th August 2024

SGD

(AZIMAH BINTI OMAR)

JUDGE

COURT OF APPEAL

For the Appellant - Messrs. CK Lim Law Chambers

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2. Chin Yan Leng
3. David Yii Hee Kiet

For the Respondent - Messrs. Kamarudin & Partners

1. Walter Pereira
2. Annie Gomez