



**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR  
IN THE FEDERAL TERRITORY OF KUALA LUMPUR,  
MALAYSIA  
(CIVIL DIVISION)  
[WRIT OF SUMMONS NO: WA-22NCvC-509-09/2017]**

**BETWEEN**

- 1. KARPAYAH @ KARUPPIAH RAMASAMY**  
(NRIC No.: 470525-06-5007)
- 2. RAJA KUMARY PANJACHARAM**  
(NRIC No.: 530427-10-5812)                      **... PLAINTIFFS**

**AND**

- 1. MY HOME BUDGET HOTEL SDN BHD**  
(Company No.: 1002675-D)
- 2. ALAGARSAMY**  
(NRIC No.: 720729-43-5005)
- 3. SELVI RANI A/P KANDIAH**  
(NRIC No.: 750723-07-5034)
- 4. ANANTHAN A/L VIJAYAKUMAR**  
(NRIC No.: 860730-56-5485)
- 5. BASKARAN MANIKAM**  
(NRIC No.: 730507-10-5739)
- 6. MESSRS. BAS VIN ASSOCIATES**  
(sued as a firm)                                      **... DEFENDANTS**

## GROUNDS OF JUDGMENT

### Plaintiffs' action against defendants

- [1] On 25.09.2017, the plaintiffs filed this action against the defendants, jointly and severally, vide a Writ of Summons dated 25.09.2017 (“the Writ”), enclosure (1) (1), together with a Statement of Claim dated 25.07.2017 (“the SOC”), enclosure (2).
- [2] The plaintiffs claimed for special damages of RM 1,043,000.00 for losses suffered by the plaintiffs based on 3 (three) causes of action, viz cheating/fraud, misrepresentation and conspiracy, arising from a Consent Judgment entered into on 03.07.2015 between the plaintiffs and the 1st defendant (“the said CJ”) in the Kuala Lumpur (“KL”) Sessions Court Writ of Summons No.: B52NCvC-7-01/2015 case (“the plaintiffs’ 2015 KL Sessions Court Writ case”) and a Lease Agreement (“LA”) executed by the 1st defendant, as lessee, and executed by a Senior Assistant Registrar (“SAR”) of the High Court of Malaya, attached to the Kuala Lumpur High Court, on behalf of the plaintiffs, as lessors, on 18.01.2016, and, subsequently, dated 27.01.2016 and stamped on 27.01.2016 (“the said LA”).
- [3] The plaintiffs also claimed for a declaration that the said LA is null and void for no consideration.
- [4] The said LA is for a 4 storeyed building, bearing addresses No. 264 (“the Ground Floor”), No. 264A (“the First Floor”), No. 264B (“the Second Floor”) and No. 264C (“the Third Floor”), at Jalan Tun Sambanthan, Brickfields, 50470 Kuala Lumpur (“the building”) for an initial term of 8 (eight) years with an automatic renewal for a subsequent term of 4 (four) years.

[5] The plaintiffs also claimed for interest at the rate of four percent (4%) per annum on the arrears of rent of RM 253,500.00 for the Ground Floor of the building, an order of vacant possession of the Ground Floor of the building against the 1<sup>st</sup> defendant, general and aggravated damages, interest on the judgment sum at the rate of five percent (5%) per annum and costs against the defendants.

### **Parties in plaintiffs' action against defendants**

[6] The 1<sup>st</sup> plaintiff, Karpayah @ Karuppiah A/L Ramasamy, is the husband of the 2<sup>nd</sup> plaintiff, Raja Kumary A/P Panjacharam.

[7] The plaintiffs averred in paragraph 1 of the SOC that they are Malaysian citizens.

[8] The plaintiffs filed this action through the law firm of Messrs. Selvam Shanmugam & Partners (“the plaintiffs’ current solicitors”).

[9] The 1<sup>st</sup> defendant, My Home Budget Hotel Sdn. Bhd., is a company incorporated under the Companies Act 1965.

[10] The 1<sup>st</sup> defendant has a registered address at No. 40-B, 2<sup>nd</sup> Floor, Jalan Lumut, Damai kompleks, Kuala Lumpur.

[11] The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the shareholders of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant, Alargasamy, is the husband of the 3<sup>rd</sup> defendant, Selvi Rani A/P Kandiah.

[12] In this action, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants are represented by the law firm of Messrs. Sri Dev & Naila (“the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ solicitors”).



- [13] The 4<sup>th</sup> defendant, Ananthan A/L Vijakumar, is an advocate & solicitor practising in the 6<sup>th</sup> defendant.
- [14] The 5<sup>th</sup> defendant, Baskaran Manikam, is an advocate & solicitor practising in the 6<sup>th</sup> defendant. The 5<sup>th</sup> defendant is the Senior Partner in the 6<sup>th</sup> defendant and he is the person handling the 1<sup>st</sup> defendant's tenancy of the building and/or the matters related to the 1<sup>st</sup> defendant's tenancy of the building.
- [15] The 6<sup>th</sup> defendant, Messrs. Bas Vin Associates, is a law firm registered with the Bar Council Malaysia, with an address at No. 13-15, Menara K1, Lorong 3/137C, Off Jalan Kelang Lama, 58000 Kuala Lumpur. The 6<sup>th</sup> defendant was representing the 1<sup>st</sup> defendant at the time the said CJ was entered into between the plaintiffs and the 1<sup>st</sup> defendant in the Sessions Court case.
- [16] In this action, the 4<sup>th</sup> to the 6<sup>th</sup> defendants are represented by the law firm of Messrs. Hakem Arabi & Associates ("the 4<sup>th</sup> to the 6<sup>th</sup> defendants' solicitors").

### **Background facts**

- [17] Below are the background facts.
- [18] In 2013, the plaintiffs entered into a tenancy agreement with the 1<sup>st</sup> defendant ("the 2013 tenancy agreement") (see the testimony of Mr. Santhiran Mogan A/L Rengasamy(DW1)).
- [19] Due to disputes arising from the 2013 tenancy agreement, the plaintiffs filed an action in the Shah Alam Sessions Court which was subsequently transferred to the KL Sessions Court, *viz* Civil Suit No.: B52NCvC-59-03/2014 ("the plaintiffs' 2014 KL Sessions Court Civil case").

- [20] In the plaintiffs' 2014 KL Sessions Court Civil case, the plaintiffs claimed for arrears of rent, vacant possession and other orders from the court against the 1<sup>st</sup> defendant (see paragraph 6.3.1. of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' Statement of Defence ("SOD")).
- [21] Subsequently, the plaintiffs withdrew the plaintiffs' 2014 KL Sessions Court Civil case with liberty to file afresh and with no order as to costs (see paragraph 6.3.2 of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD).
- [22] On 07.01.2015, the plaintiffs commenced the plaintiffs' 2015 KL Sessions Court Writ case *vide* a writ of summons dated 07.01.2015 and a statement of claim dated 06.01.2015, against the 1<sup>st</sup> defendant and 4 (four) other defendants to claim for several declarations and orders (see paragraph 6.3.3 of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD).
- [23] The 5 (five) defendants in the plaintiffs' 2015 KL Sessions Court Writ case are My Home Budget Hotel Sdn Bhd, (Company No.: 1002675-D), the 1<sup>st</sup> defendant (who is also the 1<sup>st</sup> defendant in the instant case), Kamala Jewellers Sdn Bhd (Company No.: 1049810-M) ("Kamala Jewellers"), the 2<sup>nd</sup> defendant, Arokianathan A/L A. Joseph (NRIC No.: 590602-01-5997) ("Arokianathan"), the 3<sup>rd</sup> defendant, Margaret Mary A/P A. Joseph (IC No.: 5572178) ("Margaret"), the 4<sup>th</sup> defendant, and Francis Sandanasamy A/L Anandam Joseph (IC No.: 6081412) ("Francis"), the 5<sup>th</sup> defendant.
- [24] The full trial of the plaintiffs' 2015 KL Sessions Court Writ case was scheduled to begin on 03.07.2015 and the parties appeared before the learned Sessions Court Judge, Puan Roszianayati Binti Ahmad ("Puan Roszianayati").

- [25] However, on the day of the trial, on 03.07.2015, the full trial of the plaintiffs' 2015 KL Sessions Court Writ case did not proceed.
- [26] This was because after the 1<sup>st</sup> defendant's solicitors approached the plaintiffs' first set of solicitors with a proposal to settle the dispute between the parties, the plaintiffs and the 1<sup>st</sup> defendant reached a settlement.
- [27] Hence, on 03.07.2015, Puan Roszianayati recorded the said CJ, which has 6 (six) paragraphs, between the plaintiffs and the 1<sup>st</sup> defendant in the plaintiffs' 2015 KL Sessions Court Writ case.
- [28] On the date the said CJ was recorded, the 1<sup>st</sup> defendant was occupying the Ground Floor of the building pursuant to the 2013 tenancy agreement.
- [29] In paragraph 1 of the said CJ, the parties agreed that the 1<sup>st</sup> defendant shall pay to the plaintiffs the arrears of rent from 01.04.2013 of RM 10,500.00 a month (totaling RM 283,000.00) in 5 (five) monthly instalments of RM 56,700.00 each with the first monthly instalment to commence on 15.08.2015 and the balance 4 (four) instalments to be paid on the same day of each of the subsequent months.
- [30] In paragraph 2 of the said CJ, the parties agreed that the sum of RM 30,000.00 previously paid by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> plaintiff's account shall be set-off from the first monthly instalment of the arrears of rent.
- [31] In paragraph 3 of the said CJ, the parties agreed that the parties shall execute a new "*Perjanjian Penyewaan*" which shall take effect on 01.08.2015 and vacant possession of the First, Second

and Third Floors of the building shall be delivered by the plaintiffs to the 1<sup>st</sup> defendant on 01.08.2015.

[32] In paragraph 4 of the said CJ, the parties agreed that the terms of the new “*Perjanjian Penyewaan*” are as follows:

- (1) The rent for the Ground Floor, the First Floor, the Second Floor and the Third Floor of the building is RM 20,000.00 monthly and shall be paid with effect from 01.11.2015 with 3 (three) months rent free for renovation purposes (subparagraph a));
- (2) The new “*Perjanjian Penyewaan*” shall require a deposit of 3 months rent and a utility deposit of RM 10,000.00 (subparagraph b));
- (3) The commencement term of the “*Perjanjian Penyewaan*” is 8 years with an automatic option for a term of 4 years (subparagraph c)); and
- (4) The monthly rent is fixed at RM 20,000.00 for the first term of 8 (eight) years and the parties agreed that for the subsequent term of 4 (four) years, the increase in the rent imposed by the plaintiffs on the 1<sup>st</sup> defendant shall not exceed 10% of the monthly rent.

[33] In paragraph 5 of the said CJ, the parties agreed that the plaintiffs will withdraw the 2015 KL Sessions Court Writ case and the 1<sup>st</sup> defendant’s counterclaim will be withdrawn.

[34] In paragraph 6 of the said CJ, the parties agreed that both parties will bear their respective costs.

[35] Subsequently, the plaintiffs filed Civil Suit No.: B52NCVC-428-11/2015 *vide* a Writ of Summons dated 04.11.2015 and an



unsigned and undated SOC to set aside the said CJ dated 03.07.2015 (“the plaintiffs’ 2015 Writ case to set aside the said CJ”).

[36] However, the Sessions Court ordered the plaintiffs’ 2015 Writ case to set aside the said CJ to be struck out due to the failure of the plaintiffs’ second set of solicitors to attend court for the case management.

[37] The plaintiffs then filed an application through the plaintiffs’ second set of solicitors to reinstate the plaintiffs’ 2015 Writ case to set aside the said CJ (“the plaintiffs’ reinstatement application”) but the plaintiffs’ reinstatement application was dismissed.

[38] The plaintiffs did not file an appeal to the High Court against the dismissal of the plaintiffs’ reinstatement application.

[39] The 1<sup>st</sup> defendant, as plaintiff, then filed KL Sessions Court (Civil Division) Originating Summons No.: B54-45-10/2015 against the plaintiffs in the instant case, as the defendants, for execution of the said CJ (“the 1<sup>st</sup> defendant’s 2015 KL Sessions Court OS case to enforce the said CJ”).

[40] The defendants alleged that the plaintiffs breached paragraph 3 of the said CJ by refusing to execute the final draft of the LA to take effect on 01.08.2015 and by refusing to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant on 01.08.2015.

[41] The 1<sup>st</sup> defendant succeeded in obtaining a Specific Performance Judgment dated 08.12.2015 against the plaintiffs with costs of RM 8,000.00 to the 1<sup>st</sup> defendant (“the SP Judgment”) (see paragraph 7 of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ SOD).



[42] Paragraph 3 of the SP Judgment ordered the defendants, who are the plaintiffs in the instant case, to execute a “*Perjanjian Penyewaan*” with the plaintiff, who is the 1<sup>st</sup> defendant in the instant case, forthwith. The paragraph states as follows in Malay:

*“Bahawa perintah Perlaksanaan Spesifik dan tandatangan Perjanjian Penyewaan antara Defendan-Defendan dan Plaintiff diadakan dengan serta merta;”*

(“the SP Order”).

[43] Paragraph 4 of the SP Judgment provided that in the alternative, the Court Registrar and/or Court representative shall sign all papers, document and/or agreement to ensure that the plaintiff, who is the 1<sup>st</sup> defendant in the instant case, can rent all the 4 floors of the building from the defendants, who are the plaintiffs in the instant case. The paragraph states as follows in Malay:

*“Secara alternative, Pendaftar Mahkamah dan/atau wakil Mahkamah akan menandatangani segala surat cara, dokumen and/or perjanjian untuk memastikan Plaintiff dapat menyewa Unit 264,264A, 264B dan 264C Jalan Tun Sambanthan, 50470 Brickfields, Kuala Lumpur daripada Defendan-Defendan;”*

[44] The 6<sup>th</sup> defendant, acting under the 1<sup>st</sup> defendant’s instructions, then wrote a letter dated 23.12.2015 to the plaintiffs’ second set of solicitors attaching the SP Judgment advising the plaintiffs that they must sign the LA and that if they did not do so, the LA would be signed and executed through a court officer (see subparagraph 9.4 of the 4<sup>th</sup> to the 6<sup>th</sup> defendants’ SOD).



- [45] On 30.12.2015, the 6<sup>th</sup> defendant received a facsimile from the plaintiffs' second set of solicitors asking for a copy of the LA for their perusal and execution and also for the cheques for the payment of the arrears of rent even though the plaintiffs had not yet executed the LA (see subparagraph 9.5 of the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD).
- [46] On 30.12.2015, the 6<sup>th</sup> defendant replied to the plaintiffs' second set of solicitors' letter dated 30.12.2015, attaching a copy of the LA for the renting of the building by the 1<sup>st</sup> defendant for an initial term of 8 (eight) years with an automatic renewal for a term of 4 (four) years ("the final draft of a LA for the building") and stating that the LA has to be signed first before payment of the arrears of rent (by the 1<sup>st</sup> defendant) and the 6<sup>th</sup> defendant also explained clearly the respective obligations of the parties in the 6<sup>th</sup> defendant's reply (see subparagraph 9.6 of the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD).
- [47] The plaintiffs applied to stay the SP Judgment before the Sessions Court Judge but the plaintiffs' application was dismissed by the learned Sessions Court Judge.
- [48] Due to the failure of the plaintiffs' second set of solicitors to reply to the 6<sup>th</sup> defendant's letter dated 30.12.2015 and the plaintiffs' refusal to execute the final draft of a LA for the building, the 5<sup>th</sup> defendant instructed the 4<sup>th</sup> defendant to make an appointment with Puan Zura Syazween Binti Hamizan ("Puan Zura"), a SAR of the High Court of Malaya at the KL High Court to execute the final draft of the LA on behalf of the plaintiffs under paragraph 4 of the SP Judgment see subparagraph 9.7 of the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD).
- [49] On 18.01.2016, the 4<sup>th</sup> defendant met Puan Zura, at the KL High Court, with some documents and cheques and Puan Zura



executed the LA on behalf of the plaintiffs for the granting of a lease of the building to the 1<sup>st</sup> defendant for an initial term of 8 (eight) years with effect from 18.01.2016 and expiring on 17.01.2024 with an automatic renewal of the lease for a term of 4 (four) years with effect from 18.01.2024 and expiring on 17.01.2028.

[50] After Puan Zura executed the LA on behalf of the plaintiffs, the 4<sup>th</sup> defendant dated the LA on 27.01.2016 and stamped the LA on 27.01.2016.

[51] As directed by Puan Zura, the 4<sup>th</sup> defendant e-filed a copy of the said LA with the Kuala Lumpur High Court.

[52] On 28.01.2016, the 6<sup>th</sup> defendant, being the 1<sup>st</sup> defendant's solicitors, then sent a copy of the said LA to Messrs. D. Prasad & Partners, the plaintiffs' second set of solicitors, with a request to Messrs. D. Prasad & Partners to advise the plaintiffs to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant (see subparagraph 9.9 of the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD).

[53] Subsequently, the plaintiffs applied to stay the proceeding and to set aside the said LA on the grounds, *inter alia*, that the plaintiffs were not paid the arrears of rent and that the plaintiffs were not paid the said deposits but the 1<sup>st</sup> defendant raised a preliminary objection.

[54] On 08.03.2016, the plaintiffs filed, through Messrs. Selvam Shanmugam & Partners, the plaintiffs' current solicitors, an application *vide* OS No.: WA-24NCvC-382-03/2016 in the KL High Court for extension of time to file a notice of appeal against the SP Judgment ("the plaintiffs' 2016 OS case for



extension of time to file a notice of appeal against the SP Judgment”).

[55] The plaintiffs also filed an application to stay the SP Judgment (“the plaintiffs’ application to stay the SP Judgment and to set aside the said LA”) but the 1<sup>st</sup> defendant raised a preliminary objection.

[56] On 25.03.2016, the Sessions Court allowed the 1<sup>st</sup> defendant’s preliminary objection and struck out the plaintiff’s application to stay the SP Judgment and to set aside the said LA with costs of RM1,500.00 on the grounds, *inter alia*, as follows:

- (1) The action of the SAR in signing the LA was in accordance with the SP Judgment;
- (2) The 1<sup>st</sup> defendant had prepared the monies and the cheques for payment in compliance with the said CJ and the cheques are still valid for payment;
- (3) The plaintiffs merely stated in their affidavit-in-reply that they did not know that the 1<sup>st</sup> defendant had prepared the cheques for payment in compliance with the said CJ and that the cheques are still valid for payment; and
- (4) The plaintiffs have not filed a notice of appeal against the SP Judgment but only an application for extension of time to file a notice of appeal against the SP Judgment.

[57] On 15.04.2016, Yeoh Wee Siam J (as she then was) dismissed with costs of RM3,000.00 the plaintiffs’ 2016 OS case for extension of time to file a notice of appeal against the SP Judgment.



- [58] The plaintiffs appealed to the Court of Appeal against the decision of Yeoh Wee Siam J (as she then was) dated 15.04.2016.
- [59] Subsequently, the plaintiffs served a Section 218 notice dated 29.04.2016 on the 1<sup>st</sup> defendant under the Companies Act 1965 (“the Section 218 notice”).
- [60] The 1<sup>st</sup> defendant applied *vide* OS No.: WA-24NCC-222-05/2016 for a declaration that the Section 218 notice is invalid (“the 1<sup>st</sup> defendant’s 2016 OS to declare the plaintiffs’ Section 218 notice invalid”).
- [61] On 27.06.2016, Noorin Binti Badaruddin JC (as she then was) allowed the 1<sup>st</sup> defendant’s application and granted the declaration sought by the 1<sup>st</sup> defendant against the Section 218 notice.
- [62] On 15.07.2016, the Court of Appeal dismissed, with costs of RM 10,000.00, the plaintiffs’ appeal against the decision of Yeoh Wee Siam J (as she then was) dated 15.04.2016 dismissing with costs of RM3,000.00 the plaintiffs’ 2016 OS case for extension of time to file a notice of appeal against the SP Judgment.
- [63] The plaintiffs did not file a notice of appeal to the Federal Court against the decision of the Court of Appeal dated 15.07.2016.
- [64] On 19.09.2016, the 1<sup>st</sup> defendant filed a Notice of Appointment for Assessment of Damages against the plaintiffs in the 1<sup>st</sup> defendant’s 2015 KL Sessions Court OS case to enforce the said CJ.
- [65] On 31.03.2017, the Sessions Court allowed the Assessment of Damages against the plaintiffs in the 1<sup>st</sup> defendant’s 2015 KL

Sessions Court OS case to enforce the said CJ under Order 7, Rule 1 of the Rules of Court 2012, and ordered as follows:

- (1) Damages of RM 425,000.00 to the 1<sup>st</sup> defendant less a sum of RM 178,500.00 being the rent for the Ground Floor and a sum of RM283,000.00 being the debt owed by the 1<sup>st</sup> defendant to the plaintiffs as per the said CJ to be set-off from the damages of RM 425,000.00;
- (2) Leaving a balance of RM 37,000.00 to be paid to the plaintiffs; and
- (3) Costs of RM 5,000.00 to be paid to the 1<sup>st</sup> defendant by the plaintiffs.

(“the Assessment of Damages Order of the Sessions Court dated 31.03.2017”).

[66] The plaintiffs appealed to the High Court against the Assessment of Damages Order of the Sessions Court dated 31.03.2017.

[67] In the meantime, the 1<sup>st</sup> defendant continued to occupy the Ground Floor of the building but the plaintiffs still refused, failed and/or neglected to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[68] The 1<sup>st</sup> defendant then filed OS No.: WA-A74-2954-08/2017 dated 01.08.2017 against the plaintiffs to obtain a writ of possession of the building (“the 1<sup>st</sup> defendant’s 2017 OS to obtain a writ of possession of the building”).

[69] Hence, on 25.09.2017, the plaintiffs filed this action against the defendants to claim for, *inter alia*, a declaration that the said LA is null and void for no consideration, an order that the 1<sup>st</sup>

defendant gives vacant possession of the Ground Floor of the building to the plaintiffs, and losses and damages for cheating/fraud/misrepresentation and conspiracy.

### **Plaintiffs' pleaded case in the SOC**

[70] In the SOC, the plaintiffs alleged that they had refused to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant based on the following reasons:

- (1) The 1<sup>st</sup> defendant breached paragraphs 1 and 2 of the said CJ when the 1<sup>st</sup> defendant failed to make payment to the plaintiffs of a sum of RM 253,500.00 being the arrears of the monthly rent of RM 10,500.00 for the Ground Floor of the building from 01.04.2013 totalling a sum of RM283,500.00 in 5 (five) instalments of RM 56,700.00 each with effect from 15 Aug 2015 and on the same day of each subsequent month less a set-off of a sum of RM 30,000.00 being a deposit paid by the 1<sup>st</sup> defendant from the 1<sup>st</sup> instalment (“the arrears of rent of RM 253,500.00”) (paragraphs 9 and 10 of the SOC);
- (2) Up until 18.01.2016, the 1<sup>st</sup> defendant had still not complied with the said CJ to pay to the plaintiffs the arrears of rent of RM 253,500.00 despite the 1<sup>st</sup> defendant having obtained the SP Judgment on 08.12.2015 against the plaintiffs in the 2015 KL Sessions Court OS case (paragraph 12 of the SOC);
- (3) On 18.01.2016, the 4<sup>th</sup> defendant met with Puan Zura and procured her signature for the plaintiffs in the LA dated 27.01.2016 (“the said LA”) (paragraph 13 of the SOC);



- (4) Among the terms of the said LA are Section 1.01(i) and Section 1.01(vi) and both are reproduced therein (paragraph 14 of the SOC);
- (5) Among the terms contained in the First Schedule of the Tenancy Agreement (“TA”) are Section 6 and Section 7, and both are reproduced therein (paragraph 15 of the SOC);
- (6) The plaintiffs will refer to the terms and the Schedules of the LA to prove the terms and the conditions of the tenancy and the effects, during the trial (paragraph 16 of the SOC);
- (7) Among the important terms of the said LA are the payment of the Security Deposit (of RM 60,000.00) and the Utility Deposit (of RM 10,000.00) (“the said deposits”) by the 1<sup>st</sup> defendant (paragraph 17 of the SOC);
- (8) Nevertheless, the 1<sup>st</sup> defendant failed to pay the said deposits as stipulated in Sections 6 and 7, respectively, of the LA (paragraph 18 of the SOC);
- (9) Even though it is clear that the 1<sup>st</sup> defendant had to pay the said deposits beforehand, the 1<sup>st</sup> defendant failed, refused and/or abandoned to fulfil its responsibility to do so (paragraph 19 of the SOC);
- (10) Hence, the said LA is invalid and void for no consideration (paragraph 20 of the SOC);
- (11) In the assessment of damages proceeding pursuant to the 2015 Sessions Court OS case, filed by the 1<sup>st</sup> defendant against the plaintiffs, the 2<sup>nd</sup> defendant, in his capacity as the 1<sup>st</sup> defendant’s director, gave evidence that the 1<sup>st</sup>



defendant had not yet paid the plaintiffs the arrears of rent of RM 253,500.00 and that the 1<sup>st</sup> to the 3<sup>rd</sup> defendants have refused to pay the arrears of rent of RM 253,500.00 (paragraph 21 of the SOC);

(12) The settlement of the outstanding (*viz* arrears of rent of RM 253,500.00) under the said CJ and the payment of the said deposits are fundamental terms for the plaintiffs to enter into the said LA (paragraph 22 of the SOC);

(13) The 1<sup>st</sup> to the 3<sup>rd</sup> defendants committed fraud/misrepresentation as follows:

(a) The 1<sup>st</sup> defendant had entered into the said CJ with the purpose of procuring the land together with the building (“the said property”) by way of fraud/misrepresentation to the extent of prejudicing the plaintiffs (paragraph 23 of the SOC);

(b) The 1<sup>st</sup> defendant had breached the said CJ by failing to pay the arrears of rent of RM253,500.00 and the deposits under the LA (paragraph 24 of the SOC);

(c) Until to date, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants failed to make any payment despite reminders given to them by the plaintiffs (paragraph 25 of the SOC); and

(d) At all material times, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have knowledge of the outstanding arrears of rent and the breaches of the said CJ and had, through the 4<sup>th</sup> to the 6<sup>th</sup> defendants, as the solicitors committed fraud and/or misrepresentation and/or conspired to induce the SAR to execute the LA to the extent prejudicial



to the plaintiffs even though the defendants knew payments were not made (paragraph 26 of the SOC);

(14) The 4<sup>th</sup> to the 6<sup>th</sup> defendants committed cheating/fraud, misrepresentation and/or conspiracy as follows:

- (a) The 5<sup>th</sup> and 6<sup>th</sup> defendants with the intention to cheat/defraud the plaintiffs and/or conspired with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants to cheat/defraud the plaintiffs, prepared a LA even though the said CJ only stated a TA (paragraph 27 of the SOC);
- (b) The 5<sup>th</sup> and 6<sup>th</sup> defendants with the intention to cheat/defraud the plaintiffs prepared the said LA even though the 5<sup>th</sup> and 6<sup>th</sup> defendants at the time of preparing the said LA clearly knew and/or had the knowledge that the 1<sup>st</sup> to the 3<sup>rd</sup> defendants did not pay the outstanding (arrears of rent of) RM253,500.00 and/or the deposits payable under the said LA and/or would not pay the outstanding (*viz* the arrears of rent of) RM253,500.00 (paragraph 28 of the SOC);
- (c) The 5<sup>th</sup> and 6<sup>th</sup> defendants with the intention to cheat had directed the 4<sup>th</sup> defendant on 08.01.2016 to give the said LA to the SAR to execute (paragraph 29 of the SOC);
- (d) The 5<sup>th</sup> and 6<sup>th</sup> defendants knowingly authorized and permitted the 4<sup>th</sup> defendant to procure the signature of the SAR on the premise that the 1<sup>st</sup> defendant had complied with the terms of the said CJ even though in reality the sum of RM253,500.00 was not paid



- and/or would not be paid by the 1<sup>st</sup> defendant (paragraph 30 of the SOC);
- (e) The 4<sup>th</sup> defendant made the said representation and/or cheating/fraud against the SAR that the outstanding (*viz* the arrears of rent of RM253,500.00) had been paid by the 1<sup>st</sup> defendant through cheques issued by the 1<sup>st</sup> defendant and had induced the SAR to sign the said LA on behalf of the plaintiffs by claiming that the 6<sup>th</sup> defendant was the stakeholder of those cheques (paragraph 31 of the SOC); and
  - (f) The 4<sup>th</sup> defendant when making the said representation at all material times knew very well that the representation was false and not true and was made to induce the SAR by fraud and/or misrepresentation to the extent of prejudicing the plaintiffs (paragraph 32 of the SOC).
- (15) The particulars of cheating/fraud, misrepresentation and/or conspiracy by the 4<sup>th</sup> to the 6<sup>th</sup> defendants are set out in paragraph 32 of the SOC as follows:
- “a) The 4<sup>th</sup> Defendant had caused misrepresentation on the facts especially on the unpaid outstanding (*sic*) by confusing the Senior Assistant Registrar to the detriment of (*sic*) Plaintiffs;
  - b) The 4<sup>th</sup> Defendant had caused false representations that the outstanding (*sic*) had been paid and / or will be paid even though it was not true and false;
  - c) The 4<sup>th</sup> Defendant made the representations as though (*sic*) the deposits had been paid and / or



would be paid, were true even though in reality were not true and the 4<sup>th</sup> Defendant did not believe it (sic) to be true and / or had the knowledge that it (sic) were not true.

- d) The 4<sup>th</sup> Defendant made false representation or mistake in facts that were fundamental to the said Lease Agreement ie, settlement of all outstanding (sic) and payment of deposits;
- e) The 5<sup>th</sup> and the 6<sup>th</sup> Defendants allowed the 4<sup>th</sup> Defendant to in (sic) induce the Court on the premises that the Plaintiffs refused the (Sic) sign the said lease agreement even though (sic) knew it were (sic) not true and procured the signature of the Senior Assistant Registrar by cheating / fraud dan (sic) / or by misrepresentation to the detriment of the Plaintiffs.
- f) The 5<sup>th</sup> and the 6<sup>th</sup> Defendants allowed the 4<sup>th</sup> Defendant to make statements and / or promises that the 1<sup>st</sup> Defendant had paid all outstaying (sic) especially the sum of RM 253,500.00 even though he (sic) knew that it were (sic) not true;
- g) The 5<sup>th</sup> and the 6<sup>th</sup> Defendants held those cheques issued by the 1<sup>st</sup> Defendant with intention not to pay the Plaintiffs;
- h) The 5<sup>th</sup> and the 6<sup>th</sup> Defendant advised, directed and permitted the 4<sup>th</sup> Defendant to secure the signature of the Senior Assistant Registrar with intention to cheat the Plaintiffs to enter into the said Lease Agreement;



- i) the (sic) 5<sup>th</sup> and the 6<sup>th</sup> Defendant (sic) used the process of Court to cause fraud and misrepresentation on the Plaintiffs;
- j) the (sic) 5<sup>th</sup> and the 6<sup>th</sup> Defendants allowed the 4<sup>th</sup> Defendants (sic) to cause (sic) cheat (sic) / fraud and/or misrepresentation to the Senior Assistant Registrar;
- k) The 5<sup>th</sup> and the 6<sup>th</sup> Defendant conspired with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to secure the agreement by cheating / defrauding and / or misrepresentation even though knew in reality that the outstanding and the deposits were not paid and / or would not be paid.”

[71] In paragraph 33 of the SOC, the plaintiffs averred that due to the defendants’ cheating/fraud, misrepresentation and conspiracy, either jointly or severally, the plaintiffs have suffered losses particularized as follows:

“PARTICULARS

- (a) Outstanding under the said CJ  
RM 253,500.00
- (b) Outstanding rental of RM 20,000.00  
RM 360,000.00  
*(from 01/02/2016 to 31/07/2017 and still continuing)*  
*(RM 20,000.00 x 18 months)*
- (c) Double rental RM 360,000.00



*(from 01/02/2016 to 31/07/2017 and still continuing)*

*(RM 20,000.00 x 18 months)*

(d) Security Deposit RM 60,000.00

(e) Utility Deposit RM 10,000.00

Outstanding as at 31/07/2017 RM 1,043,500.00”

[72] Therefore, the plaintiffs prayed for the following reliefs from the Court against the defendants in the last paragraph, *viz* paragraph 34, of the SOC:

- “(i) A declaration that the said Lease Agreement is null and void and vacant possession of the ground floor of No.264 is to be given to the Plaintiffs;
- (ii) A declaration that all Defendants whether jointly and/or severally liable to the Plaintiffs;
- (iii) All Defendants whether jointly and/or severally liable to pay to the Plaintiffs immediately damages amounting to RM 1,043,500.00;
- (iv) Interest on the judgment sum at the rate of five percent (5%) per annum from the date of this Writ until full realization;
- (v) Interest on RM 253,500.00 at the rate of four percent (4%) per annum from the date 03.07.2015 until the date of the judgment of this Writ;
- (vi) All Defendants are jointly and/or severally liable to pay to the Plaintiffs general damages that (sic) to be assessed;

- (vii) Appropriate aggravated damages;
- (viii) Costs on solicitors (sic) client basis; and
- (ix) Additional reliefs or any other reliefs which are deemed suitable and just by this Honourable Court;”

### **1<sup>st</sup> to 3<sup>rd</sup> defendants’ pleaded case in SOD**

[73] The 1<sup>st</sup> to the 3<sup>rd</sup> defendants filed their joint Statement of Defence (“SOD”) dated 16.10.2017 (“the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ SOD”) through the law firm of Messrs. Sri Dev & Naila. It has 15 paragraphs.

[74] At the outset in paragraph 1, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants averred that they joined issues with each other.

[75] In paragraph 2 (i) a., they averred that the plaintiffs ought to be prevented or estopped from proceeding with this Writ due to the plaintiffs’ failure to pay the costs awarded by the Court to the 1<sup>st</sup> defendant in other proceedings which involve the same subject matter as the plaintiffs have never respected the judgments of the Court.

[76] In paragraph 2 (i) b., they have set out in a table 7 (seven) court proceedings in which a total sum of RM 31,120.00 of costs was awarded to the 1<sup>st</sup> defendant, and 2 (two) court proceedings in which a total sum of costs of RM 15,000.00 was awarded to the plaintiffs thereby leaving a balance sum of costs of RM 16,120.00 still unpaid by the plaintiffs. The respective amounts of the costs awarded for each of the 9 proceedings are also tabulated and set out in the same paragraph.

- [77] In paragraph 2 (ii) a., they averred that the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants are not the proper parties to be sued as they are only the directors of the 1<sup>st</sup> defendant.
- [78] In paragraph 3, they averred that they have no knowledge of paragraph 1 of the SOC, *viz* that the plaintiffs are Malaysian citizens, as they have not seen any documents to that effect.
- [79] In paragraph 4, they admitted that the plaintiffs are the owners of the property and that the plaintiffs have been handling the tenancy dispute with the 1<sup>st</sup> defendant at all material times.
- [80] In paragraph 6, they admitted the said CJ.
- [81] In paragraph 7 and subparagraph 7.1, they averred that the 1<sup>st</sup> defendant complied with the said CJ by giving cheques in the name of the 1<sup>st</sup> plaintiff for all the deposits and other sums of money which were required to be paid by the 1<sup>st</sup> defendant, to the 1<sup>st</sup> defendant's solicitors (the 6<sup>th</sup> defendant) as stakeholder, as agreed upon in the said CJ.
- [82] In subparagraph 7.2, they averred that the 1<sup>st</sup> defendant through the 1<sup>st</sup> defendant's solicitors (the 6<sup>th</sup> defendant) had prepared a TA which was subsequently handed over to the plaintiffs' previous solicitors, *viz* Messrs. S Mogan & Co, for approval, that the plaintiffs' solicitors made some amendments to some Paragraphs in the TA and recaptioned it as a LA and that they would prove at the trial that it was the plaintiffs' solicitors who had changed the title of the agreement from TA to LA.
- [83] In subparagraph 7.4, they averred that despite having received (a copy of the final draft of) the LA, the plaintiffs failed, refused and/or neglected to sign the LA thereby breaching the said CJ.





- [84] In subparagraph 7.5, they averred that despite reminders sent by letters and/or notices to the plaintiffs, the plaintiffs failed, refused and/or neglected to sign the LA resulting in the 6<sup>th</sup> defendant filing the Sessions Court OS case upon the direction of the 1<sup>st</sup> defendant.
- [85] In paragraph 8, they denied the whole of paragraph 12 of the SOC and they averred that this is because the plaintiffs failed to comply with the said CJ.
- [86] In the same paragraph 8, they averred that the payment of the arrears of rent of RM 253,500.00 on 15.08.2015 is a contingency debt as the plaintiffs have to sign and execute the LA first, *viz* on 01.08.2015, before the payment of the arrears of rent of RM 253,500.00 needs to be made. In the same paragraph 8, they averred that the defendants will refer to the said CJ at the trial.
- [87] In paragraph 9, they admitted paragraph 13 of the SOC (that on 18.01.2016, the 4<sup>th</sup> defendant met Puan Zura, the SAR, and obtained her signature on the LA dated 27.01.2016 on behalf of the plaintiffs) and their averments are set out in subparagraphs 9.1 to 9.9.
- [88] In subparagraph 9.1, they averred that the plaintiffs appointed new solicitors, *viz* Messrs. D. Prasad & Partners, to handle the 2015 OS case.
- [89] In subparagraph 9.2, they averred that the plaintiffs filed an affidavit-in-reply (in the 2015 OS case) in which they exhibited a Writ of Summons for Civil Suit No.: B52NCVC-428-11/2015 dated 04.11.2015 and an unsigned and undated SOC to set aside the said CJ dated 03.07.2015.



- [90] In subparagraph 9.3, they averred that on 08.12.2015, the Sessions Court Judge allowed the 1<sup>st</sup> defendant's application (to enforce the said CJ) in the 2015 OS case and the Sessions Court Judge ordered the plaintiffs to pay costs of RM 8,000.00 to the 1<sup>st</sup> defendant but the Sessions Court Judge did not allow the 1<sup>st</sup> defendant's claim for damages/compensation of RM 20,000.00 a month.
- [91] In subparagraph 9.4, they averred that the 6<sup>th</sup> defendant, acting under the 1<sup>st</sup> defendant's instructions, wrote a letter dated 23.12.2015 to the plaintiffs' solicitors attaching the SP Judgment advising the plaintiffs that they must sign the LA and that if they did not do so, the LA would be signed and executed through a court officer.
- [92] In subparagraph 9.5, they averred that on 30.12.2015, the 6<sup>th</sup> defendant received a facsimile from the plaintiffs' solicitors asking for a copy of the LA for their perusal and execution and also for the cheques for the payment of the arrears of rent even though the plaintiffs had not yet executed the LA.
- [93] In subparagraph 9.6, they averred that on 30.12.2015, the 6<sup>th</sup> defendant replied to the plaintiffs' solicitors' letter dated 30.12.2015, attaching a copy of the LA and stating that the LA has to be signed first before payment of the arrears of rent (by the 1<sup>st</sup> defendant) and the 6<sup>th</sup> defendant also explained clearly the respective obligations of the parties in the 6<sup>th</sup> defendant's reply.
- [94] In subparagraph 9.7, they averred that due to the failure of the plaintiffs' solicitors to reply to the plaintiffs' solicitors' letter dated 30.12.2015, which I believe is a typographical error as I believe that they were in fact referring to the 1<sup>st</sup> defendant's solicitors' letter also dated 30.12.2015, the 6<sup>th</sup> defendant,

contacted Puan Zura to execute the TA as stated in paragraph (d) of the SP Judgment.

[95] In subparagraph 9.8, they averred that Puan Zura signed the LA on behalf of the plaintiffs after having considered the request of the 4<sup>th</sup> defendant and after having perused the necessary documents.

[96] In subparagraph 9.9, they averred that after the SAR and the 1<sup>st</sup> defendant executed the LA, the 6<sup>th</sup> defendant, acting under the instruction of the 1<sup>st</sup> defendant, had the LA stamped and a copy of the (stamped) LA was sent to the plaintiffs' (new) solicitors on 28.01.2016.

[97] In paragraph 10, they strongly denied paragraphs 14 to 22 of the SOC and they averred as follows:

- i. There are paragraphs in the LA which provide for the payment of deposits but the deposits were paid by the 1<sup>st</sup> defendant upon the execution of the LA in accordance with para 7.1 of the said CJ. It is clear from the paragraphs in the LA that the deposits have to be paid **“on the date of execution and vacant possession provided”**. It follows, therefore, that the plaintiffs' claim for the deposits is illogical and does not make sense because the plaintiffs failed and/or neglected to execute the LA and give vacant possession of the property to the 1<sup>st</sup> defendant.
- ii. They will refer to the terms and schedules of the LA and the judgments of the judges in the previous proceedings to prove that the payment of the deposits is contingent on the giving of vacant possession of the property to the 1<sup>st</sup> defendant.



- iii. Since the plaintiffs were the cause of the non compliance of the said CJ, the LA is valid based on the the SP Judgment dated 08.12.2017 and they (the 1<sup>st</sup> to the 3<sup>rd</sup> defendants) will refer to the SP Judgment to prove that a declaration was obtained to confirm the LA.
- iv. They referred to paragraph 8 of the SP Judgment concerning the payment of the arrears of rent.

(Emphasis added by the 1<sup>st</sup> to the 3<sup>rd</sup> defendants).

[98] In paragraph 11, they strongly denied paragraphs 23 to 32 of the SOC and they put the plaintiffs on strict proof and they averred as follows:

- i. All the above paragraphs in the SOD are repeated.
- ii. This case concerns the dispute between the plaintiffs and the 1<sup>st</sup> defendant in which the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are directors. Hence, the 4<sup>th</sup> to the 6<sup>th</sup> defendants, who are the solicitors of the 1<sup>st</sup> defendant have no direct or indirect interest in the subject matter of the dispute. Therefore, all the allegations that the 4<sup>th</sup> to the 6<sup>th</sup> defendants are involved in any form of cheating/fraud, misrepresentation and conspiracy with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants have no merits, are illogical and do not make sense. The 4<sup>th</sup> to the 6<sup>th</sup> defendants were merely performing their legal duties based on the instructions of the 1<sup>st</sup> defendant and the Orders made by this Court.
- iii. The plaintiffs' rash action (in filing this case against the 4<sup>th</sup> to the 6<sup>th</sup> defendants) have hindered the 4<sup>th</sup> to the 6<sup>th</sup> defendants from performing their legal duties to their clients without fear and undue influence.



- iv. The plaintiffs are attempting to obtain “unfair enrichment” from parties who are not at fault especially the 2<sup>nd</sup> to the 6<sup>th</sup> defendants. The tenancy dispute is only between the plaintiffs and the 1<sup>st</sup> defendant and the plaintiffs have abused the process of the court by acting blindly in bringing in the other defendants.
- v. Allegations of cheating/fraud, misrepresentation of fact and conspiracy against the defendants are lacking in detail, frivolous and vexatious. The plaintiffs should have provided details and proof of the allegations in the SOC but the plaintiffs failed to do so. The plaintiffs merely made baseless, illogical and nonsensical allegations, which are insufficient. Hence, the plaintiffs’ allegations of cheating/fraud, misrepresentation and conspiracy are defective and incomplete.
- vi. The 4<sup>th</sup> defendant did not at any time deceive or cheat the SAR who is an accredited officer having the requisite experience. It is surprising how the plaintiffs can allege that a judicial officer can be deceived or cheated by the 4<sup>th</sup> defendant. In other words, the plaintiffs have disputed the authority, honesty and capability of the SAR.
- vii. The defendants also take issue that the plaintiffs were represented by their previous solicitors, Messrs. S. Mogan & Co and (new solicitors) Messrs. D Prasad & Partners at the time the events occurred and they have never disputed the validity of the LA or the conduct of all the defendants, in particular the 4<sup>th</sup> to the 6<sup>th</sup> defendants. It is very surprising how the plaintiffs’ third set of solicitors, Messrs. Selvam Shanmugam, can advise the plaintiffs that the 4<sup>th</sup> to the 6<sup>th</sup> defendants were involved in

cheating/fraud, misrepresentation and conspiracy together with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants even though about 2 (two) years have elapsed since the LA was prepared by the 6<sup>th</sup> defendant with the consent of the plaintiffs' previous solicitors, Messrs. S. Mogan & Co, and was signed by the SAR at the time when the plaintiffs were represented by their (new solicitors) Messrs. D Prasad & Partners.

- viii. Furthermore, during the hearing of the plaintiffs' application to stay the SP Judgment before the Sessions Court Judge, the plaintiffs' solicitor, Mr. S. Selvam alleged that the 4<sup>th</sup> to the 6<sup>th</sup> defendants have cheated this Court and he threatened that he will take legal action against the 4<sup>th</sup> to the 6<sup>th</sup> defendants so that we will regret and our insurance will be prejudiced. The Sessions Court Judge disregarded the submission of the plaintiffs' counsel and the Notes of Proceedings of the hearing will be supplied at a later date by the defendants to prove the bad intention or mala fide of the plaintiffs' counsel, Mr. S. Selvam. It is believed that this threat was made by Mr. S. Selvam in his personal capacity.
- ix. In this case, the plaintiffs alleged that the 4<sup>th</sup> to the 6<sup>th</sup> defendants together with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants were involved in cheating/fraud, misrepresentation and conspiracy when the 5<sup>th</sup> defendant has about 20 years of experience in the legal field in UK and Malaysia, collectively, without any record of wrongdoing and the 4<sup>th</sup> defendant has about 7 (seven) years of experience in the legal field in Malaysia without any record of wrongdoing. Apart from that the 6<sup>th</sup> defendant has a highly regarded reputation amongst the law firms in Malaysia.



- x. Following from what is stated in subparagraph 11 (ix) the defendants will prove clearly and in detail through documents in the trial that all the transactions that occurred in this case are in accordance with the provisions of the law, the Court Orders and the guidelines under the Legal Profession Act 1976.
- xi. The plaintiffs' conduct in accepting the existence of the said CJ dated 03.07.2015, the SP Judgment and the LA and in applying those provisions in them which are favourable to them is a final admission by them and they cannot resile from it. It also shows that the allegations of cheating/fraud, misrepresentation and conspiracy made by the plaintiffs against the defendants are bare allegations without any concrete particulars and are contradictory to their own averments. Hence, the plaintiffs must be estopped from disputing the validity of the LA and the surrounding events. The defendants will prove the acceptance by the plaintiffs of the existence of the said CJ dated 03.07.2015, the SP Judgment and the LA during the trial.
- xii. It is important that the issues raised in this Writ are subject to the principle of "*res judicata*" by virtue of the reason that the issues and facts stated in the Writ have been litigated in full in the following (eight) proceedings. Since the plaintiffs are raising the same issues repeatedly, the plaintiffs must be estopped from continuing with this Writ. All the cause papers for the following (eight) proceedings including the judgments of the judges who had handled this case will be produced in the trial:

[the (eight) proceedings are set out in a table therein].



- xiii. The previous Judges who heard this case which revolved around the same issues as those in this Writ have decided clearly that the LA is valid and the defendants were not involved in any cheating/fraud, misrepresentation of fact and conspiracy and they did not dispute and/or question the creditability of any of the defendants. This is contrary to the creditability of the plaintiffs where as a whole all the judges have disputed the creditability of the plaintiffs. The observations of the Judges on the creditability of the plaintiffs made in their judgments will be produced at the trial.
- xiv. The 1<sup>st</sup> to the 3<sup>rd</sup> defendants also joined issue that the plaintiffs filed this Writ merely to set aside and/or delay the hearing of the OS No.: WA-A74-2954-08/2017 dated 01.08.2017 filed by the 1<sup>st</sup> defendant to obtain the leave of the Court for vacant possession of the said property. The bad intention and/or mala fide of the plaintiffs will be proved in the trial.
- xv. The 1<sup>st</sup> to the 3<sup>rd</sup> defendants also joined issue and averred that the plaintiffs are “vexatious litigants” who have refused, failed and/or neglected to accept the fact that all the problems concerning the said tenancy were caused by themselves and they have abused the process of the court by filing case after case to achieve a situation that would favour them even though the previous Judges have clearly in their judgments stated that the plaintiffs were wrong and were not credible.

[99] In paragraph 12, they denied paragraph 33 of the SOC (on the losses suffered by the plaintiffs) and they put the plaintiffs to strict proof. In the same paragraph 12, they averred that the





particulars of the plaintiffs' losses as set out in that paragraph 33 of the SOC are confusing and defective because all the prior proceedings were only between the plaintiffs and the 1<sup>st</sup> defendant.

[100] Hence, they averred in the same paragraph 12 that it is illogical that after about 2 (two) years have elapsed since the said CJ dated 03.07.2017, the plaintiffs are attempting to claim not only from the 1<sup>st</sup> defendant but from parties who are not concerned with the prior proceedings between the plaintiffs and the 1<sup>st</sup> defendant.

[101] In paragraph 13, they further averred that the plaintiffs' claim in paragraph 33 of the SOC is very confusing, baseless and hence, illogical because (in prayer 1) the plaintiffs have prayed for a declaration that the LA is invalid and void and at the same time they have claimed for losses under the LA.

[102] In paragraph 14, they averred that other and except those allegations of the plaintiffs which have been admitted by them, they deny each and every allegation in the SOC as if the same has been traversed seriatim and they put the plaintiffs to strict proof.

[103] Therefore, in paragraph 15, they prayed that the plaintiffs' claim be dismissed with costs.

[104] Below is my understanding of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' pleaded case in their SOD.

[105] Subsequent to the said CJ and in breach of paragraph 3 of the said CJ, the plaintiffs refused to execute a new TA to take effect from 01.08.2015 and give vacant possession of the First, Second



and Third Floors of the building to the 1<sup>st</sup> defendant on 01.08.2015.

[106] The plaintiffs must first execute a TA to take effect from 01.08.2015 and also give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant on 01.08.2015 as stipulated in paragraph 1 of the said CJ before the 1<sup>st</sup> defendant is obliged to pay the plaintiffs the arrears of rent for the Ground Floor in accordance with paragraphs 1 and 2 of the said CJ as the payment of the arrears of rent of RM253,500.00 is contingent on the plaintiffs first giving vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[107] Due to the refusal of the plaintiffs to execute a TA which was converted into a LA by the plaintiffs' own previous solicitors, Messrs. S. Mogan, with the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant commenced execution proceedings *vide* the 2015 Sessions Court OS case against the plaintiffs and the 1<sup>st</sup> defendant was successful in obtaining the SP Judgment.

[108] It is clearly stated in the terms of the LA executed by the SAR on behalf of the plaintiffs that the payment of the deposits under the LA is to be made by the 1<sup>st</sup> defendant "on the date of execution and vacant possession provided".

[109] But the plaintiffs have failed, refused and/or neglected to give vacant possession of the First, Second and Third Floors of the premises to the 1<sup>st</sup> defendant even though the 1<sup>st</sup> defendant has made payment of the deposits under the LA by giving cheques for the requisite amounts to the 1<sup>st</sup> defendant's solicitors as stakeholder on the date the 1<sup>st</sup> defendant executed the LA and a copy of the stamped LA was sent to the plaintiffs' solicitors on 28.01.2016.

[110] The plaintiffs must be estopped from challenging the validity of the said CJ, the said LA and the SP Judgment (“the 3 (three) matters”) in the instant case, as the plaintiffs have by their own actions accepted the validity of the said CJ, the said LA and the SP Judgment, where the terms favour the plaintiffs, and the 1<sup>st</sup> to the 3<sup>rd</sup> defendants will prove (in the trial) the plaintiffs’ acceptance of the 3 (three) matters (see subparagraph 11 (xi) of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ SOD).

[111] Hence, the plaintiffs’ allegations of cheating/fraud, misrepresentation of fact and conspiracy against the 1<sup>st</sup> to the 3<sup>rd</sup> defendants are bare allegations without any concrete particulars as the plaintiffs’ allegations contradict the plaintiffs’ own averments in the SOC (see subparagraph 11 (xi) of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ SOD).

[112] Based on the doctrine of *res judicata*, the validity of the said CJ and the said LA cannot be challenged by the plaintiffs in this action as these 2 matters have already been finally decided by the courts in proceedings subsequent to the said CJ dated 03.07.2015 and the execution of the LA by the SAR (on 18.01.2016) on behalf of the plaintiffs and the plaintiffs must be estopped from proceeding with the Writ (see subparagraphs 11 (xii) and (xiii) of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ SOD).

[113] Hence, due to the repeated and persistent refusals of plaintiffs to comply with paragraphs 1 and 2 of the said CJ, the 1<sup>st</sup> defendant had to resort to applying for execution of the said CJ in order to obtain a specific performance order against the plaintiffs based on the plaintiffs’ breaches of the said CJ.

[114] Therefore, the 1<sup>st</sup> defendant in the instant case, filed an application as the sole plaintiff, against the plaintiffs in the instant case, as the 2 (two) defendants, *vide* an Originating

Summons in the Kuala Lumpur Sessions Court, *viz* KL Sessions Court (Civil Division) Originating Summons No.: B54-45-10/2015 (“the 1<sup>st</sup> defendant’s 2015 Sessions Court OS case to enforce the said CJ”) based on the breaches by the defendants, who are the plaintiffs in the instant case, of the said CJ.

[115] The 1<sup>st</sup> defendant was successful in obtaining a Specific Performance Judgment dated 08.12.2015 against the plaintiffs (“the SP Judgment”) (P2).

[116] Paragraph 3 of the SP Judgment ordered the 2 (two) defendants, who are the 2 (two) plaintiffs in the instant case, to execute a “*Perjanjian Penyewaan*” with the sole plaintiff, who is the 1<sup>st</sup> defendant in the instant case, *viz* “*Bahawa perintah Perlaksanaan Spesifik dan tandatangan Perjanjian Penyewaan antara Defendan-Defendan dan Plaintiff diadakan dengan serta merta.*”

[117] However, paragraph 4 of the SP Judgment, also provided for an alternative to the plaintiffs executing the “*Perjanjian Penyewaan*”, *viz* for the signing by the Court Registrar and/or Court representative of all papers, document and/or agreement to ensure that the plaintiff, who is the 1<sup>st</sup> defendant in the instant case, can rent all the 4 floors of the building from the defendants, who are the plaintiffs in the instant case.

[118] However, despite the 1<sup>st</sup> defendant obtaining the SP Judgment, the plaintiffs still refused to execute the final draft of a LA for the building.

[119] The final draft of a LA was prepared by the 1<sup>st</sup> defendant’s solicitors, *viz* the 6<sup>th</sup> defendant, on the request of the plaintiffs’ solicitors at that time and sent to the plaintiffs’ solicitors for the execution by the plaintiffs.



[120] But the plaintiffs still refused to execute the final draft of a LA and to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[121] Hence, the 5<sup>th</sup> defendant instructed the 4<sup>th</sup> defendant to make an appointment with a SAR at the KL High Court to execute the LA.

[122] Therefore, on 18.01.2016, the 4<sup>th</sup> defendant met Puan Zura, the SAR, at the KL High Court, with some documents and cheques and after Puan Zura perused the necessary documents Puan Zura executed the said LA on behalf of the plaintiffs.

[123] Based on my understanding of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD, the crux of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' pleaded defence is four-pronged.

[124] The first prong is that the payment of the arrears of rent of RM 253,500.00 on 15.08.2015 is a contingency debt whereby it is necessary for the plaintiffs to first sign and execute the said LA on 01.08.2015 before the payment of the arrears of rent of RM 253,500.00 is due and payable by the 1<sup>st</sup> defendant to the plaintiffs (see subparagraph 10.ii).

[125] The second prong is that the payment of the deposits under the said LA is a contingency payment (see subparagraph 10.2) as it is clearly stated in the paragraphs in the said LA that the deposits payable under the said LA have to be paid "on the date of execution of this agreement and vacant possession provided" and that, hence, the plaintiffs' claim for the deposits is illogical and nonsensical as they failed and/or neglected to execute the said LA and give vacant possession of the said property to the 1<sup>st</sup> defendant (see subparagraph 10.i) and since the plaintiffs are the cause of the non-compliance of the said CJ, therefore, the

said LA that was executed in accordance with the SP Judgment dated 08.12.2017 is valid and the defendants would refer to the SP Judgment to prove that a declaration was obtained to confirm the validity of the said LA (see subparagraph 10.iii).

[126] The third prong is that the plaintiffs cannot approbate and reprobate and the plaintiffs must be estopped from challenging the validity of the 3 (three matters) as the plaintiffs have accepted the validity of the 3 (three) matters.

[127] The fourth prong is that based on the doctrine of *res judicata*, the validity of the said CJ and the said LA cannot be challenged by the plaintiffs in this action as these 2 (two) matters have already been finally decided by the courts in subsequent proceedings.

[128] I noted that although the 1<sup>st</sup> defendant has averred in subparagraph 7.1 that he has complied with the said CJ by giving cheques for the deposits and the other payments which the 1<sup>st</sup> defendant is required to make as agreed in the said CJ, to the 6<sup>th</sup> defendant, who are the 1<sup>st</sup> defendant's solicitors, as stakeholder, in accordance with the said CJ, it is not stated in that subparagraph or in any other paragraph in the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD, the date that this event took place.

[129] I noted that it is also not stated in that subparagraph or in any other paragraphs in the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD that the cheques were postdated cheques and/or the reason why the 1<sup>st</sup> defendant made the decision to give postdated cheques in making the payment of the arrears of rent of RM253,500.00 under the said CJ and the payment of the deposits under the said LA when there is no mention of the giving of postdated cheques by the 1<sup>st</sup> defendant in the said CJ, the said LA and in the



correspondences between the solicitors of the plaintiffs and the solicitors of the 1<sup>st</sup> defendant.

[130] I noted that the date of the execution of the said LA by the SAR on behalf of the plaintiffs, *viz* on 18.01.2016, is also not stated in subparagraph 9.7 or in any other subparagraph or paragraph of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD.

#### **4<sup>th</sup> to 6<sup>th</sup> defendants' pleaded case in SOD**

[131] The 4<sup>th</sup> to the 6<sup>th</sup> defendants filed their joint Statement of Defence ("SOD") dated 16.10.2017, through the law firm of Messrs. Hakem Arabi & Associates.

[132] In their SOD, the 4<sup>th</sup> to the 6<sup>th</sup> defendants joined issues in the preparation of their SOD (see paragraph 1 of the SOD).

[133] The averments of the 4<sup>th</sup> to the 6<sup>th</sup> defendants in their SOD, are similar to the averments of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants in their SOD.

[134] Hence, the 4<sup>th</sup> to the 6<sup>th</sup> defendants' pleaded defence is also similarly four-pronged as stated above under the caption "1<sup>st</sup> to 3<sup>rd</sup> defendants' pleaded case in SOD".

#### **Plaintiffs' Reply to 1<sup>st</sup> to 3<sup>rd</sup> defendants' SOD**

[135] The plaintiffs filed their Reply dated 27.10.2017 to the 1<sup>st</sup> to 3<sup>rd</sup> defendants' SOD, through the plaintiffs' current solicitors.

[136] In paragraph 2, the plaintiffs averred that since the plaintiffs have alleged cheating/fraud, misrepresentation and conspiracy against the 1<sup>st</sup> defendant, the principle of the 1<sup>st</sup> defendant as a different entity does not apply to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as



they were the directors of the 1<sup>st</sup> defendant, and the 2<sup>nd</sup> defendant executed the LA witnessed by the 4<sup>th</sup> defendant with the approval of the 3<sup>rd</sup> defendant.

[137] In paragraph 3, the plaintiffs joined issue with the defendants pertaining to paragraphs 1 to 6, paragraphs 3.1, 3.2, 3.3, 3.4 of the SOD.

[138] In paragraph 4, in reply to paragraphs 7, 7.1 to 7.4 of the SOD, the plaintiffs admitted the filing of the suit No. B54-45-10/2015 by the 1<sup>st</sup> defendant but denied the rest of the contents and they put the defendants to strict proof.

[139] In paragraph 5, in reply to paragraph 8, the plaintiffs strenuously denied the contents and stated that the outstanding RM 253,500.00 was not a pre-conditional owing. In the same paragraph 5, the plaintiffs averred that during the hearing before the Court of Appeal at Putrajaya under Civil Appeal No. WA-02(NCC)(A)-1391-08/2016, the Court of Appeal firmly reprimanded the 5<sup>th</sup> defendant as solicitors not to twist the terms of the Order dated 03.07.2015, *viz* the said CJ in order to suit the wishes of the 1<sup>st</sup> defendant by misleading the Court.

[140] In paragraph 6, in reply to paragraphs 9.1 to 9.9, the plaintiffs admitted the facts, where the facts are similar to the SOC, but the plaintiffs could not admit the other contents due to the details that could not be confirmed.

[141] In the same paragraph 6, the plaintiffs further stated that the 6<sup>th</sup> defendant as a stakeholder of the valueless cheques knew that the 1<sup>st</sup> defendant will not pay the plaintiffs and will fail to pay the plaintiffs with the intention to cheat/defraud and/or conspire with the 1<sup>st</sup> to the 6<sup>th</sup> defendants when the LA was sent even though the 4<sup>th</sup> to the 6<sup>th</sup> defendants knew that the 1<sup>st</sup> defendant





did not have the money to cash the cheques. I had difficulty trying to understand this averment.

[142] In paragraph 7, the plaintiffs averred that the contents of subparagraphs 10 (i) until 10 (iii) are baseless and are denied.

[143] In paragraph 8, as an additional reply to subparagraphs 10 (vii) and 10 (viii), the plaintiffs denied the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' allegation against the SAR and the plaintiffs further repeated paragraphs 32, subparagraphs 32 (a) until 32 (d) of the SOC and the defendants' attempts (in the SOD) at twisting the facts with baseless allegations.

[144] In paragraph 9, in addition to the reply to subparagraph 10 (iv), the plaintiffs denied any allegation of wrongdoing on the part of the SAR and further repeated paragraphs 32, and subparagraphs 32 (a) to 32 (d) of the SOC and the defendants' attempt (in the SOD) to misquote the facts and level baseless allegations against the plaintiffs.

[145] In paragraph 10, in response to subparagraphs 11 (i) to 11 (xv), the plaintiffs repeated paragraphs 27 to subparagraph 32 (k) of the SOC and further stated as follows:

“a. The 6<sup>th</sup> Defendant failed in carrying out its duty to hand over to the Plaintiffs the cheques when the LA was executed and stamped and the 4<sup>th</sup> and 5<sup>th</sup> Defendants committed fraud, misrepresentation, conspiracy to secure the signature of the Senior Assistant Registrar therefore the issues no interest, fear, undue influence, abuse of the process of court are baseless because the 6<sup>th</sup> Defendant as solicitors should have known, would be implicated in its undertakings in caring out his legal duties.”



[146] In paragraph 11, in reply to paragraph 12, the plaintiffs stated that the failure of the 6<sup>th</sup> defendant as a stakeholder had directly and/or indirectly implicated all the defendants in conspiracy, fraud and misrepresentation on the grounds that the 6<sup>th</sup> defendant had acted upon the instructions of the defendants.

[147] In paragraph 12, in reply to paragraph 13, the plaintiffs stated that where allegations of fraud/misrepresentation and conspiracy have been raised, the plaintiffs have rights to seek for rescission of contract and damages.

[148] In paragraph 13, the plaintiffs averred that save as hereinbefore specifically admitted, the plaintiffs denied each and every allegation contained in the SOD as if the same were set out in the Reply and traversed seriatim.

[149] Therefore, in paragraph 14, the last paragraph of the Reply, the plaintiffs averred that the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD is frivolous and vexatious and the plaintiffs prayed to the Court to strike out their SOD against the plaintiffs with costs.

### **Plaintiffs' Reply to 4<sup>th</sup> to 6<sup>th</sup> defendants' SOD**

[150] The plaintiffs also filed their Reply dated 27.10.2017 to the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD, through the plaintiffs' current solicitors.

[151] In paragraph 1, the plaintiffs raised objections against the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD on 3 (three) grounds as stated in subparagraphs a. to c. including the prospect of filing an application to expunge and/or strike out the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD.



[152] The 1<sup>st</sup> ground as averred in subparagraph 1 a. is that the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD is only a repetition of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD, is a bare denial and/or is not an available defence for the 4<sup>th</sup> to the 6<sup>th</sup> defendants.

[153] The 2<sup>nd</sup> ground as averred in subparagraph 1 b. is that the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD contains issues pertaining to law, evidence, suggestion and opinion, which were not material facts to the Writ and need to be expunged.

[154] The 3<sup>rd</sup> ground as averred in subparagraph 1 c. is that the defendants must be prohibited and/or estopped from raising preliminary objections pertaining to costs and principle of different entity between the 1<sup>st</sup> and the 3<sup>rd</sup> defendants as it is not justifiable as of right.

[155] In paragraph 2, the plaintiffs averred that in the event the plaintiffs' application (if available) is not allowed by this Court in (the exercise of its discretion), the plaintiffs relied on the averments in paragraphs 3 to 13.

[156] In paragraph 3, the plaintiffs joined issue with the defendants pertaining to paragraphs 1 to 6 to subparagraph 6.4 except for admissions.

[157] I noted that the plaintiffs' averments in paragraphs 4 to 6 are similar to the plaintiffs' averments in paragraphs 4 to 6 of the plaintiffs' Reply to the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD except for the additional averments in subparagraph a. and subsubparagraphs (i) to (vi) which stated as follows:

“a. that the 6<sup>th</sup> Defendant as stakeholder to those cheques:-



- i. committed fraud/cheating/misrepresentation against the Senior Assistant Registrar of the High Court of Malaya through 4<sup>th</sup> Defendant on the advice of the 5<sup>th</sup> Defendant who conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants;
- ii. induced Senior Assistant Registrar of the High Court of Malaya through 4<sup>th</sup> Defendant on the advice of the 5<sup>th</sup> Defendant who conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that the 6<sup>th</sup> defendant held those cheques and will be cashed out;
- iii. induced Senior Assistant Registrar of the High Court of Malaya through 4<sup>th</sup> Defendant on the advice of the 5<sup>th</sup> Defendant who conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that the Plaintiffs would be paid through the 6<sup>th</sup> Defendant;
- iv. committed fraud/cheating/misrepresentation against the Senior Assistant Registrar of the High Court of Malaya through 4<sup>th</sup> Defendant on the advice of the 5<sup>th</sup> Defendant who conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, who as a stakeholder should have paid to the Court in order to protect the SAR instead the SAR was used to achieve the 1<sup>st</sup> Defendant (sic) desire;
- v. induced Senior Assistant Registrar of the High Court of Malaya through 4<sup>th</sup> Defendant on the advice of the 5<sup>th</sup> Defendant who conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that those cheques had been paid and/or would be paid by the 6<sup>th</sup> Defendant to the Plaintiffs; and



- vi. knew and/or had the knowledge those cheques could not be cashed out and of no value;”

[158] In paragraph 7, as an additional reply to subparagraph 9.8 specifically, the plaintiffs averred that the 4<sup>th</sup> defendant on the advice of the 5<sup>th</sup> defendant who conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, when met with the SAR to make empty promises with no intention to fulfil.

[159] In paragraph 8, as an additional reply to subparagraph 9.9 specifically, the plaintiffs averred that the 6<sup>th</sup> defendant, when sending the LA to the plaintiffs, failed to pay the outstanding rentals as promised to the SAR that it would be paid to the plaintiffs, (the promise made), for the purposes of procuring the signature of the SAR by way of fraud/cheating/misrepresentation through the 4<sup>th</sup> defendant on the advice of the 5<sup>th</sup> defendant who conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

[160] In paragraph 9, the plaintiffs denied subparagraphs 10.1 to 10.4 and the plaintiffs stated that the contents are baseless and that the 6<sup>th</sup> defendant as stakeholder should have paid the plaintiffs before applying for vacant possession and costs if necessary.

[161] In paragraph 10, in reply to paragraph 11, and subparagraphs 11(1) to 11(15), the plaintiffs repeated paragraphs 17 to subparagraph 32(k) and the plaintiffs further stated as follows:

“a. All Defendants are practicing solicitors and knew the responsibility and liability of a stakeholder;”

[162] I noted that the plaintiffs’ averments in paragraphs 11 to 13 are similar to the plaintiffs’ averments in paragraphs 11 to 13 of the plaintiffs’ Reply to the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ SOD.

[163] Therefore, in paragraph 14, the last paragraph of the Reply, the plaintiffs (similarly) averred that the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD is frivolous and vexatious and the plaintiffs prayed to the Court to strike out their SOD against the plaintiffs with costs.

### **Transfer of case to High Court NCvC 11 Kuala Lumpur**

[164] Subsequently, this case was transferred to High Court NCvC 11 Kuala Lumpur under the direction of the Managing Judge of the Civil Division of the Kuala Lumpur High Court.

### **1 (one) Pre-Trial Case Management (“PTCM”) before Tuan Saravan A/L Meyappan**

[165] On 10.04.2018, Tuan Saravan A/L Meyappan (“Tuan Saravanan”), the learned SAR, of High Court NCvC 11, Kuala Lumpur, conducted a PTCM in which he gave directions to the parties to file the cause papers for the full trial in accordance with my standing instructions for all full trial cases.

### **1st PTCM before trial judge on 03.09.2018**

[166] On 03.09.2018, I conducted the 1<sup>st</sup> PTCM before the trial judge in accordance with the Practice Direction of the Rt. Hon. Chief Judge of Malaya (“the CJM’s Practice Direction”).

[167] Mr. G. Alexander appeared for the plaintiffs (“Mr. Alexander”). Mr. Nair, Sri Dev (“Mr. Nair”) appeared for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants. Mr. Nekoo, Ravi (“Mr. Nekoo”), appeared for the 4<sup>th</sup> to the 6<sup>th</sup> defendants.



[168] Mr. Alexander, for the plaintiffs, informed me that the PTCM directions given on 10.04.2018 by Tuan Saravanan have been complied with. He also stated as follows:

- (1) Only an additional Bundle of Documents has yet to be filed to contain a copy of each of the two Orders of Court, *viz* the draft Order of the Sessions Court for case B52NCvC-428-11/2015 is at pg. 226 and the draft Judgment of the Court of Appeal for Civil Appeal No: W-02(IM)NCvC-782-04/2016 is at pg. 422;
- (2) These 2 documents are in Part B of the Common Bundle of Documents, Enclosure (49) (subsequently, given the alphabetical marking Bundle 'C' by the Court on the first day of the full trial);
- (3) Pp. 1-3, Common Bundle of Documents, Enclosure (48) (subsequently, given the alphabetical marking Bundle 'B' by the Court on the first day of the full trial), Part A – the said CJ;
- (4) Pp. 99-112, Common Bundle of Documents, Enclosure (49), Part B – the said LA;
- (5) 1<sup>st</sup> defendant gave notice by letter dated 30.12.2015 to the plaintiffs to execute the LA, at pg. 397, Part B, Common Bundle of Documents, Enclosure (49);
- (6) No reply from plaintiffs' second set of solicitors to the 1<sup>st</sup> defendant's solicitors' letter;
- (7) Letter dated 30.12.2015 from plaintiffs' second set of solicitors, to the 1<sup>st</sup> defendant's solicitors, informing the 1<sup>st</sup> defendant's solicitors to forward the TA and the cheques for payment of outstanding rentals from April

2013 as per the said CJ, at pg. 396, Common Bundle of Documents, Enclosure (49); and

- (8) Plaintiffs' case is that under paragraph 1 of the said CJ, at pg. 2, Enclosure (48) – outstanding rentals of RM283,500.00 must be paid first on 15.08.2015.

[169] Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, stated as follows:

- (1) The 1<sup>st</sup> defendant's stand is that the 1<sup>st</sup> defendant will only pay the arrears of rent for the Ground Floor if vacant possession of the 3 other floors, viz the First to the 3<sup>rd</sup> Floors, is given to the 1<sup>st</sup> defendant by the plaintiffs as per the said CJ.

[170] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, stated as follows:

- (1) The 4<sup>th</sup> to 6<sup>th</sup> defendants' case is that the change from Tenancy Agreement to Lease Agreement was from Mr. Mogan, the plaintiffs' 1<sup>st</sup> set of solicitors;
- (2) He referred to emails exchanged between Baskaran, the 5<sup>th</sup> defendant, and Mr. Mogan – pg. 430;
- (3) He also referred to pg. 385 of Enclosure (49), letter dated 25.08.2015, letter from 6<sup>th</sup> defendant – paragraph 3 - about handing over postdated cheques to 1<sup>st</sup> defendant's solicitors by the 1<sup>st</sup> defendant;
- (4) He also referred to pg. 387, Enclosure (49) - Mogan's letter mentioned LA; and
- (5) The 4<sup>th</sup> - 6<sup>th</sup> defendants' case is that there was no conspiracy on their part.





[171] Mr. Alexander, for the plaintiffs, responded by stating as follows:

- (1) Non-compliance with paragraph 1 of the said CJ because the postdated cheques for arrears of rent of RM283,500.00 are to be given by the 1<sup>st</sup> defendant to the plaintiffs.

[172] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, responded by stating as follows:

- (1) The defendants' appeal against the decision of Justice Hue dismissing the striking out application is fixed for (Hearing) in the Court of Appeal on 08.11.2018.

[173] I then fixed the 2<sup>nd</sup> and final PTCM before the trial Judge on Tuesday, 25.09.2018, at 9.00 am. I also directed the parties to refile the Statement of Agreed Facts, Statement of Issues to be Tried, and List of Witnesses, on or before Tuesday, 18.09.2018.

### **2<sup>nd</sup> PTCM before trial judge on 25.09.2018**

[174] On 25.09.2018, I conducted the 2<sup>nd</sup> PTCM before the trial judge in accordance with the CJM's Practice Direction.

[175] Mr. S. Selvam ("Mr. Selvam"), the plaintiffs' lead counsel, appeared for the plaintiffs. Mr. Nair, appeared for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants. Mr. Nekoo, appeared for the 4<sup>th</sup> to the 6<sup>th</sup> defendants.

[176] Mr. Selvam, for the plaintiffs, stated that all the PTCM directions have been complied with.

[177] However, I found that the Revised List of Witnesses for the plaintiffs, Enclosure (78), efiled on 14.09.2018, was not in compliance with the PTCM direction given by me on 03.09.2018



as it did not state that the 1<sup>st</sup> and 2<sup>nd</sup> witnesses, *viz* the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, will give a witness statement each. I then directed for a Re-Revised List of Witnesses for the plaintiffs to be filed.

[178] I found that the Opening Statement of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants complied with the PTCM direction given by the court. I also found that the 5<sup>th</sup> defendant's amended witness statement, Enclosure (80), complied with the PTCM direction given by me on 03.09.2018.

[179] Mr. Nekoo, who appeared for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, then stated as follows:

- (1) The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants rely on the doctrine of *res judicata*. Decision of Yeoh Wee Siam J upheld by the Court of Appeal. Draft Order is at No. 36 in Index of Common Bundle of Documents, Part B, Enclosure (49);
- (2) The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants rely on ordinary estoppel ie that the plaintiffs' solicitors agreed for the TA to be converted into a LA; and
- (3) The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants held on to the postdated cheques for payment of arrears of rent on the instructions of the 1<sup>st</sup> defendant.

[180] I then directed for the Re-Revised Statement of Issues to be Tried to be filed. I found that the plaintiff's Revised Opening Statement, Enclosure (84), did not comply with the PTCM direction given by me on 03.09.2018. The reason is because it did not state which of the 2 plaintiffs, who will be called as witnesses, will testify on which issue in the Statement of Issues to be Tried.



[181] Mr. Selvam, for the plaintiffs, informed the Court that only the 1<sup>st</sup> plaintiff will testify and that the 2<sup>nd</sup> plaintiff will not be testifying in the full trial.

[182] I directed that this must be stated in the Re-Revised List of Witnesses and in the Re-Revised Opening Statement.

[183] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, then informed the Court that an additional Common Bundle of Documents to include a copy of the Tenancy Agreement, enclosure (91), has been filed and a Re-Revised Witness Statement of the 5<sup>th</sup> defendant, enclosure (92), to correct typographical errors has been filed.

[184] However, Mr. Nekoo did not hand over a copy of the 5<sup>th</sup> defendant's Re-Revised Witness Statement, enclosure (92), to the Court.

[185] Nevertheless, I allowed enclosure (91) and enclosure (92) to be used by the 4<sup>th</sup> to the 6<sup>th</sup> defendants in the full trial. The reason is because Mr. Nekoo had informed the Court that enclosure (92) was efiled to correct typographical errors in the 5<sup>th</sup> defendant's Revised Witness Statement.

[186] I then asked the respective counsels how long they would take for the examination-in-chief, cross-examination and re-examination of the parties' respective witnesses.

[187] Mr. Selvam, for the plaintiffs, stated that the plaintiffs would take one day for the plaintiffs' case with 1 witness giving a Witness Statement and 3 subpoenaed witnesses.

[188] Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, stated that he would take 1 ½ hours for the cross-examination (of the plaintiffs' 1 witness giving a Witness Statement).



[189] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, stated that he would take 1 hour (for the cross-examination of the plaintiffs' 1 witness giving a Witness Statement).

[190] Mr. Selvam, for the plaintiffs, stated that he would take 1 hour for the re-examination (of the plaintiffs' 1 witness giving a Witness Statement).

[191] Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, stated that he would take half an hour for the cross-examination of each of the plaintiffs' 3 subpoenaed witnesses.

[192] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, stated that he would take 45 minutes or less for the cross-examination of each of the plaintiffs' 3 subpoenaed witnesses.

[193] Mr. Selvam, for the plaintiffs, stated that he would take 15 minutes for the re-examination of each of the plaintiffs' 3 subpoenaed witnesses.

[194] Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, stated that it would take 2 hours to translate the contents of the Witness Statement to the 2<sup>nd</sup> defendant.

[195] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, stated that he would take half an hour to cross-examine the 2<sup>nd</sup> defendant.

[196] Mr. Selvam, for the plaintiffs, stated that he would take 1 hour to 1 ½ hours to cross-examine the 2<sup>nd</sup> defendant.

[197] Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, stated that he would take 15 minutes for the re-examination of the 2<sup>nd</sup> defendant.

[198] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, then stated that all the 4<sup>th</sup> to the 6<sup>th</sup> defendants' witnesses would speak English and they have given their Witness Statements.



[199] Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, stated that he would take 15 minutes to cross-examine the 4<sup>th</sup> defendant.

[200] Mr. Selvam, for the plaintiffs, stated that he would take 2 hours to cross-examine the 4<sup>th</sup> defendant.

[201] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, stated that he would take about 10 minutes for re-examination of the 4<sup>th</sup> defendant.

[202] Mr. Selvam, for the plaintiffs, stated that he would take about 1½ hours to cross-examine the 5<sup>th</sup> defendant.

[203] Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, stated that he would take 15 minutes to cross-examine him.

[204] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, stated that he would take about 30 minutes for re-examination of the 5<sup>th</sup> defendant.

[205] Mr. Selvam, for the plaintiffs, stated that he would take about 1 hour to cross-examine Mr. Mogan, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants' witness.

[206] Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, stated that he would take 15 minutes to cross-examine him.

[207] Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, stated that he would take 20 minutes for the re-examination of Mr. Mogan.

[208] I then directed the parties to comply with the PTCM directions given on that day, viz Monday, 01.10.2018. I maintained the Full Trial dates that were fixed on Tuesday - Friday, 02-05.10.2018 for enclosure (1).

[209] I also informed the parties that the (Full Trial) fixed on Tuesday, 02.10.2018, would start at 10.30 am. and for the

subsequent days, the court would inform the parties on the day before.

### Parties' agreed facts

[210] The agreed facts as set out in the parties' Statement of Agreed Facts are very scanty and are reproduced as follows in Malay:

- “(1) Plaintiff-plaintif adalah pemilik bangunan 4 tingkat yang terletak di No. 264, 264A, 264B dan 264C, Jalan Tun Sambanthan, Brickfield defendants, 50470 Kuala Lumpur ('Hartanah tersebut');*
- (2) Plaintiff-plaintif dan Defendan Pertama telah mencapai suatu persetujuan dan suatu Penghakiman Persetujuan telah direkodkan pada 03.07.2015 ('Penghakiman Persetujuan tersebut');*
- (3) Defendan Pertama masih menduduki tingkat bawah Hartanah tersebut;*
- (4) Pada 18.01.2016 Puan Zura Syazwen Hamizan, Penolong Kanan Pendaftar, telah menandatangani Perjanjian Pajakan bertarikh 27.01.2016 bagi pihak Plaintiff-plaintif; dan*
- (5) Plaintiff-plaintif masih tidak memberikan milikan kosong tingkat 1, 2 dan 3 Hartanah tersebut kepada Defendan Pertama.”*

[211] However, despite what is stated in paragraph (1) of the parties' Agreed Facts, I noted that the plaintiffs averred in paragraph 2 of the SOC that the land on which the building stands was originally registered in the names of the plaintiffs and 3 other

persons, namely, Arokianathan A/L A. Joseph (NRIC No.: 590602-01-5997) (“Arokianathan”), Margaret Mary A/P A. Joseph (IC No.: 5572178) (“Margaret”), and Francis Sandanasamy A/L Anandam Joseph (IC No.: 6081412) (“Francis”).

[212] I also noted that the plaintiffs averred in para 3 of the SOC, that by a CJ dated 03.07.2015, the plaintiffs acquired a 1/12 undivided share in the land from Francis (“the CJ dated 03.07.2015 between the plaintiffs and Francis”).

[213] I also noted that in paragraph 4 of the LA, it is stated that on 23.03.2015, the lessors, *viz* the plaintiffs, obtained Judgment-in-Default of Appearance against Arokianathan and Margaret being the co-owners of the land holding a 1/12 share each and that accordingly, all transactions pertaining to the deised premises including the LA will be transacted by the lessors, on behalf of Arokianathan and Margaret.

### **Issues for determination by Court**

[214] The parties framed the following 10 (ten) issues and 8 (eight) Subissues for determination by the Court in the Re-Revised Statement of Issues to be Tried, enclosure (96), efiled on 01.10.2018, and given the alphabetical marking ‘K’ by the Court on the first day of the full trial:

1. Whether the terms as provided in paragraphs 3, 4, 4(b) and 4(d) of the said CJ were to prepare a TA or LA?
  - 1(a) Whether the 1<sup>st</sup> defendant was in breach of paragraph 3 of the said CJ when a LA was signed instead of a TA?



1(b) Whether the plaintiffs' previous solicitors, Messrs. Mogan & Co., wanted the name of the TA to be changed to a LA?

2. Whether the 1<sup>st</sup> defendant who is occupying the ground floor of the premises without any payment of the outstanding rentals of RM 253,500.00 payable under paragraph 1 of the said CJ is continuously cheating the plaintiffs?

2(a) Does paragraph 1 of the said CJ allow the 1<sup>st</sup> defendant to pay outstanding rentals prospectively when the due dates have retrospective effect?

2(b) Does paragraph 1 of the said CJ allow the 1<sup>st</sup> defendant to off-set the outstanding rentals with the future rental?

2(c) Whether the 1<sup>st</sup> defendant's refusal to pay the Rental Deposit of RM 60,000.00 and Utility Deposit of RM 10,000.00 payable pursuant to paragraph 4 (b) of the said CJ, is continuously cheating the plaintiffs?

2(d) Whether the conduct of the 1<sup>st</sup> defendant who entered into the said LA in order to acquire the said premises is deemed as cheating the plaintiffs when no consideration was given under the said LA?

2(e) Whether the plaintiffs had consented to the occupation of the ground floor by the 1<sup>st</sup> defendant?





3. Whether the execution of the said LA by the SAR was pursuant to the SP Judgment dated 08.12.2018?
4. Whether the plaintiffs' solicitors were informed that the plaintiffs' failure to execute the said LA would result in the SAR signing the said LA?
5. Whether the conduct of the 4<sup>th</sup> defendant who obtained the signature of the SAR on the said LA can be deemed as cheating?
6. Whether the 4<sup>th</sup> defendant acting on the instructions of the 5<sup>th</sup> defendant had perpetrated fraud/cheating/misrepresentation on the SAR in order to induce the SAR to sign the said LA?
7. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as directors of the 1<sup>st</sup> defendant conspired with the 4<sup>th</sup> and 5<sup>th</sup> defendants to cheat the plaintiffs?
8. Whether the 6<sup>th</sup> defendant through the 4<sup>th</sup> defendant acting on the instructions of the 5<sup>th</sup> defendant conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to cheat and / or induce the SAR to obtain the signature on the plaintiffs' behalf in order to acquire the said premises without any consideration given under the said LA?
9. Whether the 6<sup>th</sup> defendant as stakeholder to the cheques conspired through the 4<sup>th</sup> defendant acting on the 5<sup>th</sup> defendant's instructions with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for not paying the outstanding rentals to the plaintiffs?

10. Whether the validity of the said LA had been decided in proceedings before the Subordinate Court, the High Court and the Court of Appeal and therefore caught by the principle of *res judicata*?

10(a) Whether all the outstanding rentals payable by the 1<sup>st</sup> defendants had been set-off by the Sessions Court Order dated 31.03.2017, the High Court Order dated 16.10.2017 and the Court of Appeal Order dated 14.02.2018?

**Alphabetical markings given to Bundle of Pleadings, Common Bundles of Documents and other cause papers filed for use in full trial**

[215] On 02.10.2018, the first day of the full trial, Mr. S. Selvam appeared for the plaintiffs together with Mr. Alexander. Mr. Nair, appeared for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants together with Mr. K. Ponnusamy. Mr. Nekoo, appeared for the 4<sup>th</sup> to the 6<sup>th</sup> defendants together with Ms. Parvinder Kaur.

[216] Mr. S. Selvam informed the Court that the plaintiffs have efiled on Monday, 28.09.2018, the plaintiffs' Opening Statement (Revised 2), enclosure (94), and the Re-revised plaintiffs' List of Witnesses, Enclosure (95), and efiled on 01.10.2016, the parties' Re-revised Statement of Issues to be Tried, enclosure (96).

[217] Mr. Nair, informed the Court that enclosure (93), *Ikatan Dokumen Tambahan D1-D3*, was efiled on 27.09.2018, containing the Judgment of Justice Hue and the Notes of Proceedings and 2 Orders of the Court.

[218] The Court then gave alphabetical markings to the Bundle of Pleadings, Common Bundles of Documents and other cause papers filed by the parties for use in the full trial in compliance with the PTCM directions given by Tuan Saravanan on 10.04.2018 and by me, on 03.09.2019 and 25.09.2018, respectively.

[219] The Bundle of Pleadings, Common Bundles of Documents and other cause papers filed by the parties for use in the full trial in compliance with the PTCM directions given by the Court and the alphabetical markings given by the Court are as follows:

No.	Documents for Trial	Marked
1	<i>Ikatan Pliding</i> , Enclosure (45), efiled on 14.08.2018	‘A’
2	<i>Ikatan Dokumen Bersama (Bahagian A), Jilid I</i> , Enclosure (48), efiled on 16.08.2018	‘B’
3	<i>Ikatan Dokumen Bersama (Bahagian B), Jilid II</i> , Enclosure (48), efiled on 16.08.2018	‘C’
4	<i>Ikatan Dokumen Bersama (Bahagian C), Jilid III</i> , Enclosure (48), efiled on 16.08.2018	‘D’
5	<i>Ikatan Dokumen D4-D6</i> , Enclosure (62), efiled on 20.08.2018	‘E’
6	<i>Ikatan Dokumen D1-D3</i> , Enclosure (74), efiled on 28.08.2018	‘F’
7	<i>Ikatan Dokumen Tambahan</i> , (Parts A & B), Enclosure (83), efiled on 18.09.2018	‘G’
8	<i>Ikatan Dokumen Ke-2 D4-D6</i> , Enclosure (91), efiled on 24.09.2018	‘H’
9	<i>Ikatan Dokumen Tambahan D1-D3</i> ,	‘I’

	Enclosure (93), efiled on 27.09.2018	
10	<i>Fakta-fakta yang Dipersetujui Terpinda</i> , Enclosure (81), efiled on 18.09.2018	‘J’
11	<i>Revised (2) Isu-isu untuk Dibicarakan</i> , Enclosure (96), efiled on 01.10.2018	‘K’
12	<i>Ringkasan Kes Plaintiff-plaintif</i> , Enclosure (59), efiled on 17.08.2018	‘L’
13	<i>Ringkasan Kes D1-D3</i> , Enclosure (70), efiled on 28.08.2018	‘M’
14	<i>Ringkasan Kes D4-D6</i> , Enclosure (65), efiled on 20.08.2018	‘N’
15	<i>Re-revised Senarai Saksi Plaintiff-plaintif</i> , Enclosure (95), efiled on 28.09.2018	‘O’
16	<i>Senarai Saksi D1-D3 Terpinda</i> , Enclosure (98), efiled on 02.10.2018	‘P’
17	<i>Senarai Saksi D4-D6 Terpinda</i> , Enclosure (75), efiled on 30.08.2018	‘Q’
18	<i>Re-revised Penyataan Pembukaan Plaintiff-plaintif</i> , Enclosure (94), efiled on 28.09.2018	‘R’
19	<i>Penyataan Pembukaan D1-D3</i> , Enclosure (85), efiled on 21.09.2018	‘S’
20	<i>Penyataan Pembukaan D4-D6</i> , Enclosure (79), efiled on 18.09.2018	‘T’
21	<i>Senarai Soalan Saksi Sapina Plaintiff-plaintif, Pn. Zura Syazween binti Hamizan</i> , Enclosure (57), efiled on 17.08.2018	‘U’
22	<i>Senarai Soalan Saksi Sapina Plaintiff-plaintif, Sithananda Prasad A/L Deva Prasad</i> , Enclosure (58), efiled on 17.08.2018	‘V’

23	<i>Senarai Soalan Saksi Sapina Plaintiff-plaintif, CIMB Bank Officer, Enclosure (56), efiled on 17.08.2018</i>	‘W’
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[220] After the commencement of the full trial, upon the requests of the parties concerned, the Court granted leave to the parties to file 6 (six) additional Bundles of Documents for use in the continuation of the full trial.

[221] On 11.03.2019, the Court allowed the plaintiffs’ application, enclosure (146), for the issue of a subpoena to recall En. Zafri bin Hassan (PW3), the plaintiffs’ 3<sup>rd</sup> subpoenaed witness, to adduce documents in the continuation of the full trial.

[222] Subsequently, the Court gave the following alphabetical markings to the 6 (six) additional Bundles of Documents filed by the parties and the subpoena that was issued to recall En. Zafri bin Hassan, which was efiled by the plaintiffs:

24	<i>katan Dokumen Bersama (Tambahan-III), Bahagian A, Enclosure</i>	
	(115), efiled on 19.11.2018	‘X’
25	<i>Ikatan Dokumen Bersama (Tambahan-IV), Enclosure</i>	
	(118), efiled on	
	14.11.2018	‘Aa’
26	<i>Ikatan Dokumen Ke-3, (D4-D6), Enclosure (102), efiled on 12.10.2018</i>	
		‘Bb’
27	<i>Ikatan Dokumen Bersama (Tambahan V), Enclosure (143), efiled on</i>	

16.02.2019 ‘Cc’

28 *Ikatan Dokumen Bersama (Tambahan VI)*, Enclosure (153), efiled on

13.03.2019

‘Dd’

29 *Ikatan Dokumen Tambahan ke-2 Defendan-Defendan Pertama, K2-2*

*dan Ke-3*, Enclosure (144), efiled on 28.02.2019 ‘Ee’

30 *Sepina Untuk Memberi Keterangan Dan Mengemukakan Dokumen*

*Encik Zafri bin Hassan*, Enclosure (178), efiled on 12.06.2019 ‘Ff’

**10 (ten) witnesses called by plaintiffs and the 2 (two) groups of defendants in 13 (thirteen) days of full trial**

[223] The parties called 10 (ten) witnesses altogether in the 13 (thirteen) days of full trial.

[224] The plaintiffs filed a List of Witnesses with 4 (four) witnesses and called all of them in the trial.

[225] The 1<sup>st</sup> to the 3<sup>rd</sup> defendants called 2 (two) witnesses.

[226] The 4<sup>th</sup> to the 6<sup>th</sup> defendants called 4 (four) witnesses.

[227] The Court allowed the 4<sup>th</sup> to the 6<sup>th</sup> defendants to open their case first by calling 3 of their 4 witnesses followed by the 1<sup>st</sup> to the 3<sup>rd</sup> defendants calling their 1<sup>st</sup> witness, followed by the 4<sup>th</sup> to the



6<sup>th</sup> defendants calling their 4<sup>th</sup> witness and followed by the 1<sup>st</sup> to the 3<sup>rd</sup> witnesses calling their 2<sup>nd</sup> and last witness.

[228] The reason is because Mr. Nair, the learned counsel for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, had a fall and injured his leg and was on medical leave.

[229] The 13 (thirteen) days of full trial commenced on 02.10.2018, and it continued on 03.10.2018 – 05.10.2018, 26.10.2018, 22.11.2018, 03.12.2018, 11.03.2019 – 15.03.2019, 02.05.2019 & 03.05.2019, 07.05.2019, 28.06.2019, 12.06.2019, 16.07.2019 & 17.07.2019.

[230] On 17.07.2019, the full trial concluded after the 10<sup>th</sup> witness, Selvi (DW6), completed giving her evidence and she was released by the Court.

[231] The Court then gave directions to the parties for the handing over of a copy of the Transcribed Notes of Proceedings and the filing of written submissions by the 2 (two) groups of defendants, the plaintiffs and the written submissions-in-reply by the 2 (two) groups of defendants.

[232] The Court also fixed 23.07.2019 as the date for oral submissions / clarification / decision.

**Decision of Court dated 23.07.2019 dismissing plaintiffs' action against defendants with costs after full trial**

[233] On 23.07.2019, I heard oral submissions from the parties' learned counsels and after considering the written and oral submissions of the parties' learned counsels, I ordered the action commenced by the plaintiffs against the defendants *vide* the

writ, enclosure (1), dismissed with costs as the plaintiffs have failed to prove their claim on the balance of probabilities.

[234] Mr. Suaran Singh prayed for costs of RM 80,000.00 based on the following reasons:

- (1) 13 days of full trial;
- (2) 9 witnesses called altogether; and
- (3) Expedited preparation of submissions.

[235] Mr. Nekoo prayed for costs of RM 100,000.00 based on the following reasons:

- (1) The trial was protracted as a lot of time was taken on the issue that under the said CJ the 1<sup>st</sup> defendant should have signed a new TA with the plaintiffs instead of a LA;
- (2) We had to call witnesses for the full trial; and
- (3) But today, *viz* on 23.07.2019, Mr. S. Selvam concedes that the TA mentioned in the said CJ ought to be a LA.

[236] Mr. Selvam prayed that no costs be ordered against the plaintiffs as the plaintiffs have never been paid the rent since 2013 for the Ground Floor occupied by the 1<sup>st</sup> defendant.

[237] However, after having considered the submissions of the parties' learned counsels, the Court was of the view that a sum of RM 40,000.00 was a reasonable amount of costs to order against the plaintiffs for each of the 2 (two) groups of defendants.

[238] Hence, the Court ordered the plaintiffs to pay a sum of RM 40,000.00 as costs to the 1<sup>st</sup> to the 3<sup>rd</sup> defendants and a sum of RM 40,000.00 as costs to the 4<sup>th</sup> to the 6<sup>th</sup> defendants.



[239] Being dissatisfied with the decision of the Court dated 23.07.2019, on 31.07.2019, the plaintiffs filed a notice of appeal dated 31.07.2019 to the Court of Appeal against the decision of the Court dated 23.07.2019, enclosure (192).

**Reasons for decision of Court dated 23.07.2019 dismissing plaintiffs' action against defendants with costs**

[240] Below are the reasons why the Court dismissed the plaintiffs' action against the defendants with costs.

[241] I noted that the plaintiffs' grievance is that up-to-date, the 1<sup>st</sup> defendant has not paid to the plaintiffs the arrears of rent of RM253,500.00 under the said CJ and the deposits under the said LA but the 1<sup>st</sup> defendant is still in occupation of the Ground Floor of the premises.

[242] I also noted that the plaintiffs have yet to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[243] I noted that the crux of the plaintiffs' pleaded case is that they refused to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant due to the failure of the 1<sup>st</sup> defendant to pay to the plaintiffs the arrears of rent for the Ground Floor of the building on 01.08.2015 as per paragraphs 1 and 2 of the said CJ and the failure of the 1<sup>st</sup> defendant to pay to the plaintiffs the said deposits payable under the said LA on 18.01.2016 upon the execution of the said LA by the SAR on behalf of the plaintiffs.

[244] I noted that the plaintiffs have pleaded that the payment of the arrears of rent for the Ground Floor of the building and the



payment of the said deposits under the said LA are fundamental terms.

[245] I noted that the plaintiffs have pleaded that the defendants committed fraud/misrepresentation and/or conspiracy against the plaintiffs because the 1<sup>st</sup> defendant has never paid the plaintiffs the arrears of rent for the Ground Floor of the building and the said deposits under the said LA.

[246] I also noted that the plaintiffs have pleaded that the said LA is null and void due to no consideration as the 1<sup>st</sup> defendant did not pay to the plaintiffs the arrears of rent for the Ground Floor of the building and the said deposits under the said LA.

[247] I also noted that the plaintiffs have pleaded in paragraph 27 of the SOC that the 5<sup>th</sup> and 6<sup>th</sup> defendants with the intention to cheat/defraud the plaintiffs and/or conspired with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to cheat/defraud the plaintiffs prepared a LA even though the said CJ only stated TA.

[248] I also noted that the plaintiffs have pleaded that the defendants committed cheating/fraud/misrepresentation and/or conspiracy against the plaintiffs in inducing the SAR to execute the said LA on 18.01.2016 even though the 1<sup>st</sup> defendant did not pay to the plaintiffs the arrears of rent for the Ground Floor of the building and the said deposits under the said LA.

### **Plaintiffs' proven case**

[249] The 4 (four) witnesses called by the plaintiffs in the full trial are as follows:

- (1) Puan Zura, the SAR, who executed the LA on behalf of the plaintiffs on 18.01.2016, as PW1;

- (2) Sithananda Prasad A/L Deva Prasad (“Mr. Prasad”), the plaintiffs’ solicitor at the time the said LA was executed by Puan Zura (PW1), as PW2;
- (3) Encik Zafri bin Hassan Basri (“Zafri”), the officer of the CIMB Bank Berhad in which the 1<sup>st</sup> defendant has an account, as PW3; and
- (4) Karpayah @ Karuppiah A/L Ramasamy (“Karpayah”), the 1<sup>st</sup> plaintiff who gave evidence for himself and for the 2<sup>nd</sup> plaintiff, as PW4.

[250] The plaintiffs’ first witness, Puan Zura (PW1), who testified under a subpoena, answered only 3 questions for the examination-in-chief. The 3 questions are set out in the List of Questions, efiled by the plaintiffs in accordance with the PTCM directions given by the Court and marked with the alphabet ‘U’ by the Court on the first day of the full trial.

[251] The 1<sup>st</sup> question was on the SP Judgment, the 2<sup>nd</sup> question was on Puan Zura’s authority to sign the said LA on behalf of the plaintiffs and the 3<sup>rd</sup> question was to ask Puan Zura to identify the said LA signed by her on behalf of the plaintiffs and her two (2) signatures in the said LA.

[252] The 3 questions framed and efiled by the plaintiffs and the answers given on oath during the trial by Puan Zura (PW1) are as follows:

“(1) *Sila rujuk Bundle ‘C’, muka surat 99-112, adakah nama Puan tertera dengan tandatangan Puan?*

*Jawapan: Ada.*

(2) *Apakah authority atau kuasa yang Puan ada untuk menurunkan tandatangan di sini? Saya percaya berpandu kepada perintah, setuju?*

*Jawapan: Setuju.*

(3) *Rujuk muka surat 4, 5 dan 6, Bundle 'B'. Ada tak di muka surat 6 nama Puan dan tandatangan Puan tertera?*

*Jawapan: Ada."*

[253] The Court marked the said LA signed by Puan Zura (PW1), on behalf of the plaintiffs, as Exhibit P1, and her 2 (two) signatures on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, as P1A and P1B, respectively.

[254] Upon the request of Mr. Selvam, the Court marked the SP Judgment as Exhibit P2. Mr. Selvam then asked PW1 whether she had signed the said LA in accordance with Exhibit P2 and PW1 answered "Betul" in Malay or "Correct" in English.

[255] Mr. Selvam then asked PW1 what was her understanding of the SP Judgment, Exhibit P2. PW1 answered that the judgment gave power to her to sign the document for one of the parties if they fail to sign the document.

[256] Mr. Selvam then asked PW1 what was that document according to Exhibit P2. PW1 answered by referring to paragraph 4 of the SP Judgment and she said that "*Dokumen tersebut adalah segala surat cara, dokumen atau perjanjian untuk memastikan Plaintiff dapat menyewa ...*".

[257] Mr. Selvam then referred PW1 to paragraph 3 and asked her what was her understanding of that paragraph. PW1 said that



*“Kedua-dua ... pihak-pihak adalah diarahkan untuk melaksanakan satu perjanjian penyewaan”.*

[258] Mr. Selvam then asked PW1 to pay attention to Exhibit P1. Mr. Selvam then referred PW1 to pg. 99 of Bundle ‘C’. Mr. Selvam then asked PW1 what was her understanding of Exhibit P1 based on its title. PW1 said *“Ini adalah Lease Agreement”*.

[259] Mr. Selvam then asked PW1 whether she understood the meaning of “Lease Agreement”. However, before PW1 could answer his question, Mr. Selvam asked her whether she could state in Bahasa Malaysia what is a “Lease Agreement”.

[260] PW1 answered *“Perjanjian Pajakan”*. Mr. Selvam then asked PW1 to explain why did the matter occur in that way. Before PW1 could answer the question, Mr. Selvam immediately said PW1 should have signed in a *“Perjanjian Sewa”* but she signed in a *“Perjanjian Pajakan”*. Before PW1 could say anything, Mr. S. Selvam asked her whether she could explain why the matter has occurred (in that manner). PW1 said she was not sure.

[261] Mr. Selvam then asked PW1 to explain what had occurred on that day, *viz* when she signed (the said LA).

[262] PW1 said that she could not recall specifically what occurred on the date she signed (the said LA).

[263] Mr. Selvam then asked PW1 whether she read (the SP Judgment) Exhibit P2, *viz* the essence of Exhibit P2, before she signed (the said LA) Exhibit P1.

[264] PW1 said that she read specifically paragraph 4 of Exhibit P2 which authorized her to sign on behalf of the party, *viz* the plaintiffs in the instant case.

[265] Mr. Selvam then suggested to PW1 that she did not read paragraphs 1, 2 and 3. But PW1 said maybe she did read them by glancing through them. PW1 then said she referred to paragraph 4.

[266] In answer to further questions by Mr. Selvam after he had referred PW1 to the signature part of the LA, at pg. 112, Bundle ‘C’, PW1 said that she signed the LA in front of and as witnessed by Ananthan (DW2), the 4<sup>th</sup> defendant, after DW2 had obtained an appointment from her by telephone to sign the said LA, Exhibit P1.

[267] Mr. Selvam then asked PW1 whether she had made sure that the party representing the plaintiffs were present. PW1 then said that usually, the party who appears to obtain her signature to execute a document that is ordered by the Court will appear without the other party and they will bring along for e.g. proof of service that shows that service has been effected but there is no feedback from the other party. PW1 then explained that that was the reason why she had signed the said LA at that time.

[268] At this juncture, I had commented in Malay as follows:

“Ya, kalau pihak itu sudah tandatangan, tak perlulah Puan Zura tandatangan, kan.” (See Notes of Evidence, Jilid 1, pg. 30, line 8).

[269] In response to Mr. Selvam’s next question to PW1 to compare the SP Judgment, Exhibit P2, and the said LA, Exhibit P1, and to state whether the words “Lease Agreement” or “*Sewaan*” or “*Pajakan*” were present in the SP Judgment, Exhibit P2, and / or in the said LA, Exhibit P1, PW1 said that “Most probably *saya terus sign sahaja di bahagian 112*”, viz most probably she just signed in the signature part of the LA, at pg. 112, Bundle ‘C’,

and that she did not notice (the title of the said LA on) the front page.

[270] Mr. Selvam then asked PW1 whether based on her explanation, PW1 did not read the said LA from pp. 99 to 111, Bundle ‘C’, and that she just signed (the said LA, Exhibit P1). PW1 answered “*Betul*” in Malay or “Correct” in English.

[271] Mr. Selvam then posed his last question to PW1. He asked PW1 whether the lawyer, viz the 4<sup>th</sup> defendant (DW2), who appeared before her had given her any explanation for the execution of the said LA by her. PW1 answered that she could not recall the conversation that had transpired (between DW2 and her) at that time.

[272] During cross-examination by Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, PW1 was referred to the letter from the 6<sup>th</sup> defendant addressed to her at pg. 1, Bundle ‘F’ and she identified it as the letter that she received after her telephone conversation with Ananthan (DW2), the 4<sup>th</sup> defendant.

[273] PW1 was also referred to the SP Judgment, Exhibit P2, and she agreed with Mr. Nair’s suggestion that she merely followed the Order that was given (by the Court) at pp. 4 to 6, Bundle ‘B’, in particular, paragraph 4 at pg. 6.

[274] PW1 was also referred to paragraph 4 of the SP Judgment, Exhibit P2, at pg. 6, Bundle ‘B’, and she agreed with Mr. Nair’s suggestion that “*Puan Zura dikehendaki untuk menandatangani segala surat, dokumen dan apa ... dan/atau perjanjian? Itu sahaja untuk memastikan Plaintiff dapat menyewa.*”

[275] It was suggested to PW1 by Mr. Nair that in paragraph 4, at pg. 6, Bundle ‘B’, *“tidak di sebutkan sama ada perjanjian tersebut sepatutnya adalah satu penyewaan atau satu pajakan.”*

[276] PW1 answered that *“Dalam perenggan 4 ini hanya menyatakan segala surat cara, dokumen dan/atau perjanjian untuk memastikan Plaintiff dapat menyewa.”*

[277] In response to Mr. Nair’s suggestion that *“Menyewa”* was stated in paragraph 4 and there was no mention of *“perjanjian pajakan atau penyewaan”*, PW1 answered that *“Untuk di perenggan 4 ini secara spesifiknya tiada menyebut perjanjian penyewaan”* in Malay or *“For paragraph 4, specifically, there is no mention of a tenancy agreement”* in English.”

[278] In answer to Mr. Nair’s last question, which was a suggestion, PW1 agreed with his suggestion that before and at the time when she signed in the said LA, at pg. 112, Bundle ‘C’, she had made sure that all the necessary documents were given to her by the solicitor, Ananthan (DW2).

[279] During cross-examination by Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, PW1 agreed with his suggestion that she signed the document, at pg. 112, Bundle ‘C’ after she obtained the confirmation from the 4<sup>th</sup> defendant, that the plaintiffs refused to sign the agreement.

[280] In re-examination by Mr. Selvam, PW1 said that paragraph 4 (of the SP Judgment) did not refer specifically to the word *“perjanjian”* and that in signing the agreement, *viz* the said LA, Exhibit P1, she did not look at the other pages (of the SP Judgment, Exhibit P2) and she only looked at paragraph 4 (of the SP Judgment, Exhibit P2).





[281] The plaintiffs' second witness, Mr. Prasad (PW2), also testified under a subpoena. In his examination-in-chief, he said that he acted only for the 2<sup>nd</sup> plaintiff, *viz* Raja Kumary A/P Panacharam, that his law firm was the 2<sup>nd</sup> plaintiff's second set of solicitors and that he had taken over the 2<sup>nd</sup> plaintiff's tenancy matter from Messrs. S. Mogan & Co., the plaintiffs' first set of solicitors, after the said CJ was recorded.

[282] PW2 said that he wrote a letter dated 30.12.2015 to the 6<sup>th</sup> defendant as instructed by the 2<sup>nd</sup> plaintiff pursuant to the said CJ to ask the 6<sup>th</sup> defendant to forward the TA to him for his client's perusal and execution and to request for the cheques which represent the outstanding rentals commencing from April 2013 as per the CJ (see Exhibit P6, pg. 396 of Bundle 'C').

[283] I noted that only the 2<sup>nd</sup> plaintiff's name is stated in the reference number of PW2's letter, Exhibit P6, addressed to the 6<sup>th</sup> defendant. I noted that this piece of evidence corroborated PW2's evidence that he only acted for the 2<sup>nd</sup> plaintiff.

[284] I also noted that for reasons best known to the plaintiffs, the 2<sup>nd</sup> plaintiff did not give evidence in the trial in this case and that only the 1<sup>st</sup> plaintiff gave evidence in the trial for himself and for the 2<sup>nd</sup> plaintiff in this case.

[285] PW2 said that after sending his letter dated 30.12.2015, Exhibit P6, to the 6<sup>th</sup> defendant, the 1<sup>st</sup> defendant's solicitors, the 1<sup>st</sup> defendant filed the 2015 Kuala Lumpur Sessions Court OS suit, as plaintiff, against the plaintiffs in this case, as defendants, for SP to enforce the said CJ against the plaintiffs, in this case, as defendants.



[286] PW2 said that he was involved in the suit. PW2 also said that his name appeared at pg. 5 of the SP Judgment (see Exhibit P2, pp. 4, 5 and 6 of Bundle ‘B’).

[287] PW2 was referred by Mr. Selvam to an earlier letter dated 02.09.2015 written by Messrs. S. Mogan & Co. to the 6<sup>th</sup> defendant (“Messrs. S. Mogan & Co.’s letter dated 02.09.2015 to the 6<sup>th</sup> defendant”).

[288] PW2 read out the letter. In the letter, Messrs. S. Mogan & Co. stated, *inter alia*, as follows:

- (1) that they were instructed by their clients that “currently the 1, 2 & 3 floors of the said premise have been occupied by the tenants who have a valid tenancy till 31.12.2015”;
- (2) that their clients “have duly given notice to the existing tenant to vacate and give vacant possession on/before 31.12.2015”;
- (3) that “due to the manner in which the CJ was entered without taking into consideration of the existing valid tenancy, our clients unable to give vacant possession of the premise as per the Consent Order”;
- (4) that the new tenancy will commence “from 01.01.2016”;
- (5) that they “will forward the proposed tenancy agreement to your goodself for your final approval before signing the same”; and
- (6) “Meanwhile kindly revert to us with your clients (*sic*) confirmation”.

[289] PW2 then said that he had taken over the 2<sup>nd</sup> plaintiff’s tenancy matter from Messrs. S. Mogan & Co. after the said CJ was



recorded between the plaintiffs and the 1<sup>st</sup> defendant for the 2015 KL Sessions Court writ case.

[290] PW2 was then referred by Mr. Selvam to a letter dated 30.12.2015 from the 6<sup>th</sup> defendant addressed to PW2's law firm ("the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners") (see Exhibit P7, at pp.397-399, Bundle 'C') in reply to PW2's letter dated 30.12.2015 to the 6<sup>th</sup> defendant ("Messrs. D. Prasad & Partners's letter dated 30.12.2015 to the 6<sup>th</sup> defendant") (see Exhibit P6, pg. 396 of Bundle 'C').

[291] PW2 was questioned by Mr. Selvam on the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners (Exhibit P7) and PW2 said that he was not aware of Exhibit P7 as his law firm did not receive it.

[292] Mr. Selvam's questions and Mr. Prasad's (PW2's) answers on this point are as follows:

“SVS : Tenancy. Can you refer to page 387 in Bundle C, the thick bundle? 397, sorry. Page 397.

SITHA: Yes.

SVS : Are you aware of this letter? Do you know anything about it?

SITHA: No.

SVS : No. Did your name mentioned (sic) in this letter – your firm's name?

SITA : Yes.



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- SVS : Then, can you explain why you said you don't know about this letter?
- SITHA : I mean we did not receive it.
- SVS : You did not receive it. That's all, My Lady."

(SVS is Mr. Selvam and Sitha is Mr. Prasad).

[293] During cross-examination by Mr. Nair for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, PW2 testified, *inter alia*, as follows:

- (1) PW2 agreed with the suggestion that he had, in fact, filed a claim, a writ action, *viz* the Suit No.: B52NCVC-48-11/2015, on behalf of Karpayah and Raja Kumary to set aside the said CJ;
- (2) PW2 agreed with the suggestion that the writ action was struck off due to his failure to appear in Court for the case management of the writ action;
- (3) PW2 agreed with the suggestion that he had filed an application to reinstate the writ action but the application was dismissed;
- (4) PW2 agreed with the suggestion that in Messrs. S. Mogan & Co.'s letter dated 02.09.2015 to the 6<sup>th</sup> defendant, Messrs. S. Mogan & Co. stated that they would forward the proposed tenancy agreement to Bas Vin Associates, *viz* the 6<sup>th</sup> defendant;
- (5) However, PW2's client did not tell him whether the proposed tenancy agreement was forwarded to Bas Vin Associates; and



- (6) After PW2 took over the tenancy matter from Messrs. S. Mogan & Co., PW2 did not prepare a tenancy agreement to be forwarded to Bas Vin Associates.

[294] During cross-examination by Mr. Nekoo for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, PW2 testified, *inter alia*, as follows:

- (1) PW2 was referred to a copy of a letter, at pg. 254, Bundle 'C', which was a copy of the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pp. 397-399, Bundle 'C', Exhibit P7;
- (2) PW2 disagreed with the suggestion that he had received the copy of the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pg. 254, Bundle 'C', that was sent to him by the 6<sup>th</sup> defendant;
- (3) PW2 agreed with the suggestion that if he had not received the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pg. 254, Bundle 'C', as a prudent solicitor, he would have written a further letter to the 6<sup>th</sup> defendant to ask him for the tenancy agreement and the outstanding rentals as a reminder;
- (4) PW2 also disagreed with the suggestion that he had, in fact, received the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pp. 397-399, Bundle 'C', Exhibit P7, because if he had not received it he would have sent a reminder to the 6<sup>th</sup> defendant to ask for the cheques for the outstanding rentals and the proposed tenancy agreement;
- (5) PW2 agreed with the suggestion that the email address, dsp@dprasad.com, that was stated in the 6<sup>th</sup> defendant's



letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pg. 397, Bundle 'C', is his email address but he again disagreed with the suggestion that he had, in fact, received the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pp. 397-399, Bundle 'C', Exhibit P7; and

- (6) It was put to PW2 that a copy of the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pp. 397-399, Bundle 'C', Exhibit P7, was also sent to PW2 by the 6<sup>th</sup> defendant using PW2's email address but PW2 did not respond to the put question.

[295] I noted that the copy of a letter, at pg. 254, Bundle 'C', which was similar to the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pp. 397-399, Bundle 'C', Exhibit P7, was just a (copy of a) document which was exhibited in an affidavit.

[296] During re-examination, PW2 explained that he disagreed with the suggestion of Mr. Nekoo that he had received a copy of the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pg. 254, Bundle 'C', because he did not receive it by courier or email.

[297] After he was re-examined by Mr. Selvam, the Court posed 2 (two) questions to PW2 to obtain some clarification from him as he was the solicitor, who had taken over the conduct of the tenancy matter between plaintiffs and the 1<sup>st</sup> defendant, from Messrs. S. Mogan & Co. after the said CJ was recorded.

[298] The first question posed to PW2 was why there was no mention in the SP Judgment about payment of outstanding rentals.

[299] In his answer to the first question from the Court, PW2 referred the Court to paragraph 2 of the SP Judgment which stated as follows in Malay:

“Deklarasi perintah Mahkamah bertarikh 03.07.2015 tersebut adalah asas Perjanjian Sewa yang sah di mana Plaintiff dan Defendan-Defendan adalah terikat sepenuhnya kepada terma-terma perjanjian persetujuan tersebut”.

[300] PW2 explained that this paragraph talked about the outstanding rentals.

[301] The second question posed to PW2 was why the plaintiffs, who were the defendants in that case, did not insist that there ought to be a term in the SP Judgment to state that the outstanding rentals must be paid before the 1<sup>st</sup> defendant, who was the plaintiff in that case, can execute the said CJ against the defendants, who are the plaintiffs in this case, since in this case, the plaintiffs have sued the defendants for, *inter alia*, conspiracy to cheat the plaintiffs on the ground that the outstanding rentals were not paid to the plaintiffs.

[302] In his answer to the second question from the Court, PW2 explained that it is already qualified by virtue of paragraph 2 of the SP Judgment that the other Order, *viz* the Consent Order, also has to be enforced.

[303] PW2 also explained that the key ingredient in the SP Judgment is the declaratory Order of the Court in that case.

[304] On 05.10.2018, PW2 was recalled for further cross-examination by Mr. Nekoo after the Court allowed the 4<sup>th</sup> to the 6<sup>th</sup> defendants' application made pursuant to Section 138 (4) of the Evidence Act 1950, enclosure (100), a sealed copy of which was



served on PW2, to recall PW2 on the ground that on 04.10.2018, his firm has looked at the records and has found that the email confirming that a copy of the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 was sent to PW2 by email is in their possession and the email online tracking by the courier company confirming that it had delivered the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to the plaintiffs' solicitors, viz Messrs. D. Prasad & Partners, is also in his firm's possession.

[305] I noted that Mr. Nekoo was able to produce copies of exchanges of emails between the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant, and PW2 in relation to the draft LA prepared by the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant, and documentary evidence which showed that PW2 did, in fact, receive a copy of the 6<sup>th</sup> defendant's letter of reply dated 30.12.2015 to Messrs. D. Prasad & Partners, at pp. 397-399, Bundle 'C', Exhibit P7, which was sent by the 6<sup>th</sup> defendant to Messrs. D. Prasad & Partners by courier and also sent to PW2 by the 6<sup>th</sup> defendant using PW2's email address.

[306] In the further cross-examination, PW2 testified, *inter alia*, as follows:

- (1) When PW2 was referred to an email dated 30.12.2015, at pg. 6, in the yet to be filed 4<sup>th</sup> to the 6<sup>th</sup> defendants' Additional Bundle of Documents, sent to 2 (two) email addresses, dsp@dprasad.com and info@dprasad.com and he was asked to confirm whether those were his email addresses, he said "Yes";
- (2) He agreed with the suggestion that he had received the email from the 6<sup>th</sup> defendant and he said that he received the email at info@dprasad.com;





- (3) He agreed with the suggestion that having received the email on 30.12.2015, ID(D4-D6)6, he responded to the email on 14.01.2016 by sending an email dated 14.01.2016 to the 6<sup>th</sup> defendant;
- (4) When PW2 was referred to the next email, he agreed with the suggestion that he had made some comments to the LA;
- (5) When PW2 was referred to pg. 9, in the yet to be filed 4<sup>th</sup> to the 6<sup>th</sup> defendants' Additional Bundle of Documents, he identified it as the letter dated 30.12.2015, ID(D4-D6)7, which was attached to the email sent by Bas Vin Associates, the 6<sup>th</sup> defendant, to Messrs. D. Prasad & Partners;
- (6) When PW2 was referred to paragraph A, of the letter dated 30.12.2015, ID(D4-D6)7, at pg. 9, which stated "To execute the Lease Agreement together with the addendum", he agreed with the suggestion that he was aware at all times that a LA is to be executed as per the letter;
- (7) When PW2 was referred to pp. 18-32, of the letter, in the yet to be filed 4<sup>th</sup> to the 6<sup>th</sup> defendants' Additional Bundle of Documents, he agreed with the suggestion that the document is the LA, ID(D4-D6)8, that was sent to him by email by the 6<sup>th</sup> defendant, by way of the email attachment;
- (8) When PW2 was referred to paragraph A, line 5 of the letter dated 30.12.2015, at pg. 9, which starts with the words "Failure to execute this Lease Agreement by the given date, would entitle our client to execute the same with the Court officials", and his email dated 14.01.2016, at pg. 6,



in the yet to be filed Bundle of D4-D6 Documents, he disagreed with the suggestion that the reason in his response where he did not specifically state that it must be a Tenancy Agreement that must be executed is because he was at all times aware that it is a Lease Agreement that should be executed;

- (9) However, PW2 agreed with the suggestion that when the application was filed by the 1<sup>st</sup> defendant to enforce the CJ, the LA was attached to the affidavit filed for the application;
- (10) PW2 also agreed with the suggestion that at all material times, the Court was made known of the LA;
- (11) However, when it was suggested to PW2 “And that is the reason, in your response on January 14<sup>th</sup>, you did not say that it should be a Tenancy Agreement. Yes, that is the reason why you did not say specifically that it should be a Tenancy Agreement that should be executed. Do you agree with me?”, PW2 answered “I don’t know. Disagree.”;
- (12) PW2 agreed with the suggestion that when he received the 6<sup>th</sup> defendant’s email with the 6<sup>th</sup> defendant’s letter dated 30.12.2015 as an attachment, he also received a copy of the LA that was attached to the 6<sup>th</sup> defendant’s email, at pp. 18-32, of the letter, in the yet to be filed Bundle of D4-D6 Documents; and
- (13) When PW2 was asked whether the evidence given by him earlier in cross-examination that he did not receive the 6<sup>th</sup> defendant’s letter dated 30.12.2015, Exhibit 7, at pg 397, Bundle ‘C’, which stated his email address as dsp@dprasad.com was true or the evidence given by him



in his further cross-examination that he received a copy of the 6<sup>th</sup> defendant's letter dated 30.12.2015, ID (D4-D6)7, at pg 397, Bundle 'C', which was attached to the email of the 6<sup>th</sup> defendant sent to his email address info@dprasad.com, was true, PW2 insisted that both statements were true.

[307] During the further re-examination by Mr. S. Selvam, PW2 explained that the SP Judgment referred to "*perjanjian penyewaan*" and that there was no mention anywhere in the SP Judgment of a LA.

[308] I noted that PW2 did not testify that the 6<sup>th</sup> defendant did not carbon copy to him the 6<sup>th</sup> defendant's letter to the SAR to execute the said LA on behalf of the plaintiffs and that hence, he was unaware that there was such a letter.

[309] I noted that PW2 did not testify that the plaintiffs refused to execute the said LA due to the non payment of the arrears of rent by the 1<sup>st</sup> defendant and that, hence, he wrote the letter dated 30.12.2015 to the 6<sup>th</sup> defendant, who were the 1<sup>st</sup> defendant's solicitors, to demand for the payment of the arrears of rent by the 1<sup>st</sup> defendant.

[310] I noted that PW2 did not testify that the words "and vacant possession provided" as pleaded in subparagraph 10.i of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD and in subparagraph 10.i of the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD, were absent in the said CJ.

[311] The plaintiffs had subpoenaed the Manager of the CIMB Bank Berhad ("the Bank Manager") to answer only one question in The List of Question efiled by the plaintiffs for the subpoenaed witness, marked with the alphabet 'V' by the Court.



[312] The Bank Manager sent Zafri (PW3) to the Court as his representative to answer that one question, *viz* whether there were sufficient moneys in the 1<sup>st</sup> defendant's bank account to honour the cheques on the dates of the cheques. In other words, whether on the dates the 6 (six) cheques were issued by the 1<sup>st</sup> defendant, there were sufficient moneys in the 1<sup>st</sup> defendant's bank account to meet the amounts stated in the cheques.

[313] Mr. Nair objected to PW3 answering the question on the ground that it would contravene Section 133 of the Financial Services Act 2013, Section 130 (3) of the Evidence Act 1950 and Section 6 of the Bankers Books Evidence Act 1949.

[314] Mr. Nair also informed the Court that he had attached Section 6 of the Bankers Books Evidence Act 1949 to the copy of Section 130 (3) of the Evidence Act 1950 which he had handed over to the Court that morning.

[315] Basically, Mr. Nair's objection to Zafri answering the sole question posed is that no bank shall be compelled to produce its books in any legal proceedings unless ordered to do so by the Court.

[316] In response, Mr. S. Selvam informed the Court that the plaintiffs have not compelled the Bank Manager and/or Zafri to testify on the sole question posed and that Zafri had voluntarily come to Court to give evidence for the plaintiffs and that the Bank has taken the risk that the Bank may be sued for giving evidence in the trial of this case.

[317] Mr. S. Selvam informed the Court that the cheques were never given to the plaintiffs and he referred the Court to the plaintiffs' averments in paragraph 6 a. vi of the plaintiffs' Reply to the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD where the plaintiffs stated that the 6<sup>th</sup>



defendant, who is holding the cheques, as stakeholder, have the knowledge that those cheques could not be cashed out and have no value.

[318] Mr. S. Selvam then submitted that the plaintiffs have alleged fraud and a conspiracy between the 1<sup>st</sup> defendant and the 6<sup>th</sup> defendant.

[319] After I considered Mr. Nair's objection, the reasons given by him for his objection and the reasons given by Mr. S. Selvam why the plaintiffs have subpoenaed the Bank Manager to ask the sole question, I overruled Mr. Nair's objection on the ground that the plaintiffs have posed the sole question to the Bank Officer to establish whether on the dates the cheques were issued there were funds in the 1<sup>st</sup> defendant's bank account to meet those cheques.

[320] I then allowed the witness to answer the sole question and Zafri (PW3) answered "No", *viz* on the dates the 6 (six) respective cheques were issued from the 1<sup>st</sup> defendant's bank account there were insufficient moneys to meet the amounts as stated in the respective cheques.

[321] In cross-examination by Mr. Nair, the learned counsel for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, PW3 said, *inter alia*, that on 28.07.2015, the balance in the account was RM 155,091.87 and as at 04.08.2015, the balance in the account was RM 54,390.81.

[322] PW3 also said that for loans payment, it is a common practice for a customer to issue postdated cheques.

[323] PW3 also said that apart from loans payment, it is not a common practice for a customer to issue postdated cheques. He also said that there were bounced cheques from the account in 2015 for

some technical reason, *viz* 1 cheque in Aug 2015 dated 03.08.2015 and 1 cheque in Sept 2015 dated 10.09.2015. He explained that the technical reason is stated as “Drawer’s confirmation required.” He also said that the 2 cheques did not bounce due to insufficient funds in the account.

[324] He agreed with Mr. Nair’s suggestion that there were funds in the account during the statement period.

[325] There was no cross-examination of PW3 by Mr. Nekoo, the learned counsel for the 4<sup>th</sup> to the 6<sup>th</sup> defendants.

[326] In re-examination by Mr. S. Selvam, PW3 said that the bank balance as at 31.08.2015 is RM 34,831.43 and the bank balance as at 30.09.2015 is RM 34,688.35. He also stated the account no. and the name of the account holder, *viz* My Home Budget Hotel Sdn Bhd.

[327] The plaintiffs’ fourth witness, Karpayah (PW4), aged 71 years old, is a Veterinary Surgeon with a Bachelor’s of Science degree (BSc) in Veterinary Science from the University of Madras now renamed Tamil Naidu Agriculture University. PW4 is the plaintiffs’ key witness. He gave evidence in his examination-in-chief *vide* a Witness Statement, Exhibit P3, enclosure (55), efiled on 17.08.2018.

[328] In his examination-in-chief, he said that the plaintiffs had refused to execute the final draft of a LA and give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant on 01.08.2015 as stipulated in paragraph 3 of the said CJ or on any other date because of the following reasons:

- (1) The said CJ stipulated the signing of a TA;



- (2) The plaintiffs never gave instructions to Mr. Mogan (DW1), their previous lawyer, to prepare a LA;
- (3) The plaintiffs' instruction to Mr. Mogan (DW1) was to sign a TA based on the said CJ which DW1 acknowledged in paragraph 11 of his affidavit affirmed on 25.03.2016 that "we (*viz*, the plaintiffs' first set of solicitors) were working with the First Defendant (*sic*) lawyer (*viz*, Baskaran (DW3), to draft a tenancy agreement";
- (4) But the 5<sup>th</sup> defendant had fraudulently changed the TA to a LA because according to Baskaran's (DW3's), the 5<sup>th</sup> defendant's, email to Mr. Mogan (DW1), my previous lawyer, at pg. 432, Bundle 'C', the 5<sup>th</sup> defendant had admitted that he had converted the TA to a LA;
- (5) The plaintiffs were not given a chance to explain to the SAR their refusal to sign the said LA based on the following reasons:
  - i. The plaintiffs only agreed based on the said CJ to sign a TA;
  - ii. But the 6<sup>th</sup> defendant, through the 4<sup>th</sup> and 5<sup>th</sup> defendants, had fraudulently made changes to the said LA by adding the term "and vacant possession provided" in Sections 6 and 7 of the First Schedule, at pp. 111 and 112, Bundle 'C';
  - iii. A comparison of the said LA and copies of the earlier draft exhibited in the affidavit filed by Mr. Mogan (DW1) and in the affidavit filed by the 5<sup>th</sup> defendant, at pp. 168 and 169, Bundle 'C', confirmed that the words "and vacant possession provided" were



fraudulently, added later, at the last minute, in the said LA, at at pp. 111 and 112, Bundle ‘C’; and

- iv. The plaintiffs never agreed on payment of the outstanding rentals under the said CJ and the said deposits under the said LA to be made by the 1<sup>st</sup> defendant upon vacant possession provided of the First, Second and Third Floors of the building;
- (6) The plaintiffs were prejudiced by the act of the SAR in signing the said LA on their behalf based on the following reasons:
1. The execution of the LA by Puan Zura (PW1), the SAR, was fraudulently procured on behalf of the 1<sup>st</sup> defendant by the 6<sup>th</sup> defendant, acting through the 4<sup>th</sup> and 5<sup>th</sup> defendants;
  2. This is because the 6<sup>th</sup> defendant, acting through the 4<sup>th</sup> and 5<sup>th</sup> defendants, used postdated cheques issued by the 1<sup>st</sup> defendant when the said CJ did not stipulate for the payment of the arrears of rent of RM253,500.00 for the Ground Floor of the building by the 1<sup>st</sup> defendant by way of postdated cheques;
  3. The 4<sup>th</sup> defendant upon the instruction of the 5<sup>th</sup> defendant had taken the LA and the cheques at pp. 427 and 428, Bundle ‘D’, to the SAR and had fraudulently convinced her that they had complied with all the terms of the said CJ and got her to sign the LA on the pretext that the 1<sup>st</sup> defendant would pay the plaintiffs the arrears of rent of RM253,500.00 for the Ground Floor





of the building and the said deposits under the said LA; and

4. PW4 believed that the 1<sup>st</sup> defendant was also present at the time (the SAR signed the said LA);
- (7) The 1<sup>st</sup> defendant breached paragraphs 1 and 2 of the said CJ when the 1<sup>st</sup> defendant refused to pay the plaintiffs the arrears of rent of RM253,500.00 for the Ground Floor in accordance with the terms of paragraphs 1 and 2 of the said CJ;
- (8) The 1<sup>st</sup> defendant entered into the said CJ with the sole intention to cheat the plaintiffs in order to obtain vacant possession of the First, Second and Third Floors of the building without making payment of the arrears of rent of RM253,500.00 for the Ground Floor of the building;
- (9) This is because right until the trial of this case, the 1<sup>st</sup> defendant had refused, failed and / or neglected to make payment of the arrears of rent of RM253,500.00 for the Ground Floor of the building in accordance with the terms of paragraphs 1 and 2 of the said CJ;
- (10) The intention of the 1<sup>st</sup> to the 6<sup>th</sup> defendants to cheat the plaintiffs can be seen from the refusal, failure and / or neglect of the 1<sup>st</sup> defendant to pay the plaintiffs the arrears of rent of RM253,500.00 for the Ground Floor in accordance with the terms of paragraphs 1 and 2 of the said CJ;
- (11) The intention of the 1<sup>st</sup> to the 6<sup>th</sup> defendants to cheat the plaintiffs can also be seen from the use of postdated



cheques that were issued by the 1<sup>st</sup> defendant when there were insufficient moneys in the 1<sup>st</sup> defendant's bank account to meet the postdated cheques (see the evidence of Zafri (PW3), the bank officer);

- (12) The 6<sup>th</sup> defendant, as stakeholder, is duty bound to release the cheques to the plaintiffs after the SAR signed the said LA but the 6<sup>th</sup> defendant refused to do so on the pretext that no vacant possession of the First, Second and Third Floors of the building was given by the plaintiffs and that the plaintiffs must first give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant but this was a fraud perpetrated on the plaintiffs by the 6<sup>th</sup> defendant through the the 4<sup>th</sup> and 5<sup>th</sup> defendants;
- (13) Had the 4<sup>th</sup> defendant informed the SAR that the 6<sup>th</sup> defendant will not release the cheques until vacant possession is given, PW4 believed that the SAR would not have signed the said LA;
- (14) The plaintiffs have suffered losses of RM 1,573,500.00 calculated up to the date of the trial;
- (15) However, the plaintiffs are not claiming for the said deposits under the said LA and the plaintiffs are making an oral application to amend paragraph 34 of the SOC by deleting their claim for the said deposits under the said LA; and
- (16) Therefore, the plaintiffs' claim against the defendants ought to be allowed with costs.

[329] During cross-examination by Mr. Nair, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, PW4 said, *inter alia*, as follows:



- (1) PW4 agreed with the suggestion that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not parties in the 2015 KL Sessions Court Writ case, the 2016 Sessions Court OS case and the plaintiffs' appeal against the assessment of damages proceeding;
- (2) PW4 disagreed with the suggestion that when the said CJ was entered into, the 1<sup>st</sup> defendant was a tenant of the plaintiffs;
- (3) The plaintiffs were in Court at the time the said CJ was recorded;
- (4) PW4 disagreed with the suggestion that under paragraph 3 of the said CJ, a new TA will be signed between the plaintiffs and the 1<sup>st</sup> defendant and will take effect on 01.08.2015 and vacant possession of the First, Second and Third Floors will be delivered to the 1<sup>st</sup> defendant by PW4 and his wife, the plaintiffs, on 01.8.2015;
- (5) PW4 agreed with the suggestion that the plaintiffs did not deliver vacant possession of the First, Second and Third Floors to the 1<sup>st</sup> defendant;
- (6) PW4 disagreed with the suggestion that the 1<sup>st</sup> defendant's refusal to pay the arrears of rent of RM253,500.00 for the Ground Floor was not a pretext but it is an agreement between the parties as per the said CJ;
- (7) PW4 disagreed with the suggestion that the 1<sup>st</sup> defendant has been lawfully occupying the Ground Floor since 2013;
- (8) PW4 agreed with the suggestion that in the letter dated 02.09.2015, at pg. 387, Bundle 'C', his previous lawyer,



Mr. Mogan (DW1), was referring to the 6<sup>th</sup> defendant's letter dated 25.08.2015, at pg. 385, Bundle 'C';

- (9) PW4 agreed with the suggestion that he was suffering from high blood pressure because in the 6<sup>th</sup> defendant's letter dated 25.08.2015, at pg. 385, Bundle 'C', the 6<sup>th</sup> defendant stated that "Our client" that is the 1<sup>st</sup> defendant "has given a short grace period for your client to comply with the terms of the consent judgment. Upon learning from you that one of your clients, Mr Karpayah, was hospitalized due to high blood pressure but it has come to a stage that your clients are deliberately misusing our client's good will and kindness";
- (10) PW4 also agreed with the suggestion that the plaintiffs have given instructions to Mr. S. Mogan to send the letter at pp. 387 and 388, Bundle 'C', to the 6<sup>th</sup> defendant;
- (11) PW4 also agreed with the suggestion that it is true that according to his instructions to his lawyer as contained in his lawyer's letter found at pg. 387, Bundle 'C', to the 6<sup>th</sup> defendant, he was unable to give vacant possession as per the CJ because there were existing tenants in the First, Second and Third Floors, as clearly stated at at pg. 387, Bundle 'C';
- (12) PW4 also agreed with the suggestion that he has also told his lawyer that he has given notices to the existing tenants, to vacate and give vacant possession on or before 31.12.2015 as stated in the third paragraph of his lawyer's letter, at pg. 387, Bundle 'C';
- (13) PW4 also agreed with the suggestion that his instruction which is also found in the last paragraph of his lawyer's

letter, at pg. 388, Bundle ‘C’, is that the tenancy will commence on 01.01.2016;

- (14) When PW4 was asked whether the proposed tenancy agreement as stated in the last sentence of his lawyer’s letter, at pg. 388, Bundle ‘C’, would be forwarded to the 6<sup>th</sup> defendant for the 6<sup>th</sup> defendant’s final approval before signing the same, was forwarded to the 6<sup>th</sup> defendant, as stated there, PW4 said he did not see the agreement;
- (15) When PW4 was referred to the 6<sup>th</sup> defendant’s letter at pg. 389, Bundle ‘C’, and asked whether he had seen the letter dated 02.09.2015, which was in response to his lawyer’s letter at pg. 387, Bundle ‘C’, PW4 said “Yes, I’ve seen the letter.”;
- (16) However, PW4 was not sure whether his lawyer had responded to the 6<sup>th</sup> defendant’s letter;
- (17) PW4 disagreed with the suggestion that the obligation of the 1<sup>st</sup> defendant to give him the cheques is upon him giving vacant possession;
- (18) When PW4 was referred to the cheques, at pp. 427, 428 and 429, Bundle ‘D’, he said all the cheques were in his name but he did not see the cheques at all;
- (19) When PW4 was referred to the sealed Order of the said CJ at pp. 1 to 3, Bundle ‘B’, PW4 said his lawyer did not show him a copy of the draft order of the said CJ at pp. 1 to 3, Bundle ‘B’;
- (20) However, PW4 said he saw Clauses 1 and 3 on the day the said CJ was recorded in the Court;



- (21) When PW4 was referred to pp. 429, 430, 431 and, Bundle 'D', collectively, PW4 said they are emails and he has not seen them;
- (22) When it was suggested to PW4 that it was his lawyer who had agreed to change the TA to a LA, PW4 said he did not give any order;
- (23) When PW4 was asked by the Court whether his lawyer had done that, he said he does not know;
- (24) PW4 also said Mr. Mogan did not inform him about the change, *viz* from TA to LA;
- (25) At this juncture, Mr. Nair then referred PW4 to the exchanges of emails between Mr. Mogan and Bas Vin Associates and Mr. Nair also referred PW4 to the contents of each of the emails, which showed that Bas Vin Associates had initially prepared a TA but it was changed to a LA on the request of Mr. Mogan and that was why in the email dated July 30, at pg. 432, Bundle 'D', Bas Vin Associates had used the caption 'LA' instead of 'TA' and converted the TA to a LA with the terms and conditions unchanged;
- (26) Mr. Nair also drew PW4's attention to one of the emails in which Bas Vin Associates reminded Mr. Mogan that following the CJ, "vacant possession of the building need (*sic*) to be provided (*sic*) 01.08.2015 upon parties signing a tenancy agreement";
- (27) In reply to a question from the Court, PW4 said that he was informed by his current solicitors, Mr. Alexander and Mr. S. Selvam, a few months back when this case was



ongoing of the email showing that Bas Vin Associates had converted the TA to a LA upon the request of his previous lawyer, Mr. Mogan;

- (28) When Mr. Nair referred PW4 to the SP Judgment at pp. 4 to 6, Bundle 'D', and Mr. Nair read out to PW4 his answer to Question 23 of his Witness Statement in which PW4 had stated “This is the judgment dated 08.12.2015 ordering specific performance against the Plaintiff for the completion of the tenancy agreement based on the Consent Judgment dated 03.07.2015” and PW4 was asked by Mr. Nair whether PW4 knows what “specific performance” is, PW4 answered “It’s another subsequent agreement.”;
- (29) When Mr. Nair asked PW4 again whether he knows what “specific performance” is and what an order for “specific performance” is, PW4 answered “It’s another agreement.”;
- (30) Mr. Nair then referred PW4 to the affidavit-in-reply affirmed on 25.03.2016 by he and his wife, the 2<sup>nd</sup> plaintiff, at pg. 143, Bundle 'C', in response to the affidavit-in-reply of the 1<sup>st</sup> defendant to oppose their application for leave to file a notice of appeal out of time against the SP Judgment, and Mr. Nair explained to PW4 that an order for “specific performance” is an order under the law called Specific Relief Act that is obtained by a party “in a case where someone doesn’t perform certain obligations under an agreement, then the party who is aggrieved, that means the party who suffers will apply to the Court ... for specific performance for the defaulting party to perform the terms of the agreement.”;
- (31) Mr. Nair then asked PW4 “Do you understand?” and PW4 answered “Yes.”;



- (32) Mr. Nair then referred PW4 back to the affidavit-in-reply affirmed on 25.03.2016 by he and his wife, the 2<sup>nd</sup> plaintiff, first to pg. 140, Bundle ‘C’, and then to paragraph 8, at pg. 143, Bundle ‘C’, and Mr. Nair read out the contents of paragraph 8 to PW4;
- (33) Mr. Nair then suggested to PW4 that his complaint in paragraph 8, is that PW4 did not want to comply with the LA because he was not given any consideration but PW4 disagreed with Mr. Nair’s suggestion;
- (34) After Mr. Nair repeated his suggestion to PW4, PW4 agreed with Mr. Nair’s suggestion;
- (35) PW4 said “Yes. No consideration given to me.”;
- (36) PW4 also agreed that he did not sign the LA;
- (37) PW4 agreed with Mr. Nair’s suggestion that nowhere in the affidavit-in-reply affirmed on 25.03.2016 by he and his wife, the 2<sup>nd</sup> plaintiff, or even in the extension of time application, that he had raised the issue that he did not agree to sign a LA which is the issue that he has raised in this case;
- (38) I noted that PW4 had given 2 different reasons why he did not sign the LA, viz no consideration given to him as stated in paragraph 8 of he affidavit-in-reply affirmed on 25.03.2016 by he and his wife, the 2<sup>nd</sup> plaintiff, and the agreement was a LA not a TA as stated in his SOC in this case;
- (39) When PW4 was asked by Mr. Nair why he did not state in paragraph 8 of the affidavit-in-reply affirmed on 25.03.2016 by he and his wife, the 2<sup>nd</sup> plaintiff, that the



reason why he did not sign the LA was because the agreement should have been a TA and not a LA, and PW4 was asked by Mr. Nair which of the 2 reasons is the true reason, PW4 said he is not a lawyer and that he is only concerned about the agreement not being a TA;

- (40) Mr. Nair then asked him “Is that your case before this Court today?” and PW4 answered “There are other things also apart from this.”;
- (41) Mr. Nair then referred PW4 to the notes of proceedings for the assessment of damages before the learned Sessions Court Judge, at pg. 12, Bundle ‘I’, and PW4 agreed with Mr. Nair’s suggestions that he was present and that the plaintiffs were represented by Mr. S. Selvam and that his wife gave evidence on behalf of the plaintiffs;
- (42) PW4 disagreed with the suggestion that even his lawyer, *viz* Mr. S. Selvam, had based his arguments that it is a LA and there was no dispute that the agreement should have been a TA;
- (43) Mr. Nair then referred PW4 to the decision of the learned High Court Judge, at pg. 87, Bundle ‘I’, in which the learned High Court Judge dismissed the defendants’ application to strike out the Writ and SOC in this case and to the reasons of the learned High Court Judge, at pg. 90, Bundle ‘I’, where the learned High Court Judge had gone through the facts and made findings of facts, *inter alia*, that the 6<sup>th</sup> defendant, on the instructions of the 1<sup>st</sup> defendant, prepared a draft TA and forwarded to the former solicitors of the plaintiffs, Messrs. S. Mogan & Co. who made some amendments and also changed the title of the agreement from a TA to a LA and the 6<sup>th</sup> defendant,



subsequently, sent a letter to Messrs. S. Mogan & Co. demanding compliance of the terms of the said CJ (“the said findings of facts”) and Mr. Nair wished to rely on the said findings of facts to make a suggestion to PW4 but the Court interrupted him and stopped him from doing so on the basis that the said findings of facts were made in a judgment for an interlocutory application, *viz* a striking out application, instead of a judgment after a full trial, and that PW4 does not know appreciate the differences between an interlocutory proceeding and a full trial;

- (44) Mr. Nair then referred PW4 to his wife’s evidence in the notes of proceedings for the assessment of damages, in line 4, at pg. 56, Bundle ‘I’, that dealt with the letter the receipt of which was denied by the plaintiffs’ solicitor, D. Prasad, when he testified before this Court in the full trial of this case;
- (45) Mr. Nair stated that in PW4’s wife’s evidence, she stated that she was aware of the receipt by the plaintiffs’ solicitor, D. Prasad, of the 6<sup>th</sup> defendant’s letter dated 30.12.2015, at pg. 397, Bundle ‘C’, in reply to the letter from the plaintiffs’ solicitor, D. Prasad, to the 6<sup>th</sup> defendant’s letter also dated 30.12.2015, at pg. 396, Bundle ‘C’;
- (46) After Mr. Nair explained to the Court that this is an important matter since it is the plaintiffs’ case in the SOC that they did not receive the 6<sup>th</sup> defendant’s letter, through D. Prasad, and PW4 was also present in the Sessions Court when his wife gave this piece of evidence, the Court allowed him to continue with his cross-examination of PW4 on this point;

- (47) PW4 said that he was not aware of his wife's evidence that his wife was aware of the receipt by the plaintiffs' solicitor, D. Prasad, of the 6<sup>th</sup> defendant's letter dated 30.12.2015, at pg. 397, Bundle 'C', in reply to the letter from the plaintiffs' solicitor, D. Prasad, to the 6<sup>th</sup> defendant's letter also dated 30.12.2015, at pg. 396, Bundle 'C';
- (48) PW4 said that sometimes both he and his wife would give instructions to D. Prasad and sometimes either he or his wife would give the instructions to D. Prasad but in the case of affidavits, both of them would affirm the affidavits;
- (49) Mr. Nair explained to the Court that in the cross-examination of PW4 he had to take PW4 through the affidavit-in-reply affirmed by PW4 and PW4's wife for their application to file the notice of appeal out of time, the notes of proceeding of the assessment of damages in the Sessions Court before Puan Roszianayati and the 2 letters dated 30.12.2015 of D. Prasad and the 6<sup>th</sup> defendant, as they were contemporaneous documents;
- (50) Mr. Nair then referred PW4 to the Order of the Sessions Court which dismissed his application dated 16.03.2016, enclosure (9), to stay the SP Judgment as well as to revoke the LA, at pp. 81 and 82, Bundle 'B' and Mr. Nair asked PW4 whether he was aware of enclosure (9), and PW4 said that he was not sure;
- (51) Mr. Nair then referred PW4 to the Grounds of Judgment of Yeoh Wee Siam J for Her Ladyship's decision dismissing his application, enclosure (2), to file the Notice of Appeal against the SP Judgment of the learned Sessions Court

Judge dated 08.12.2015 and the subsequent action of the SAR in executing the said LA on behalf of the plaintiffs, out of time and for extension of time, at pp. 12 to 25, Bundle 'B', and Mr. Nair asked PW4 whether his lawyer, showed him the Grounds of Judgment and PW4 answered in the affirmative;

- (52) PW4 agreed with Mr. Nair's suggestion that in Her Ladyship's Grounds of Judgment there was a reference to his and his wife's contention in their application in enclosure (2), that the 4<sup>th</sup> to the 6<sup>th</sup> defendants had perpetrated an act of fraud on the Court by blinding the eyes of the SAR, viz "*membutakan mata*" in Malay of the SAR;
- (53) PW4 agreed with Mr. Nair's suggestion that Yeoh Wee Siam J dismissed his application and his appeal to the Court of Appeal against Her Ladyship's decision was unanimously dismissed by the Court of Appeal;
- (54) When PW4 was referred to Questions 30 and 12 of his Witness Statement and the contents of the Order of Puan Roszianayati dated 31.03.2017, after assessment of damages, at pp. 60 and 61, Bundle 'B', on the plaintiffs' claim for a sum of RM 37,000.00 still owing to the plaintiffs by the 1<sup>st</sup> defendant, PW4 disagreed with Mr. Nair's suggestion that the 1<sup>st</sup> defendant only owes the plaintiffs a sum of RM 7,000.00 since a sum of RM 30,000.00 being the deposit as stated in paragraph 2 of the said CJ has to be deducted from the sum of RM 37,000.00 mentioned in the Order of Puan Roszianayati dated 31.03.2017;

- (55) PW4 disagreed with the suggestion that in all the previous proceedings, the Court considered the LA because the said CJ only mentioned a TA and the plaintiffs did not sign a LA;
- (56) Mr. Nair then referred PW4 to the Judgment of Wan Ahmad Farid Bin Wan Salleh JC at pp. 62 to 76, Bundle ‘B’ affirming the decision on the assessment of damages by Puan Roszianayati, the learned Sessions Court Judge, and dismissing the plaintiffs’ appeal against the assessment of damages by Puan Roszianayati, the learned Sessions Court Judge, and the Grounds of Judgment of Puan Roszianayati for the assessment of damages, at pp. 83 to 95, Bundle ‘B’;
- (57) Mr. Nair then asked whether he knows of the two Grounds of Judgments and PW4 answered in the affirmative and he also said that they were shown to him by his solicitor, Mr. S. Selvam, some time back;
- (58) PW4 also said that his appeal to the Court of Appeal against the decision of the High Court was dismissed by the Court of Appeal;
- (59) PW4 agreed with the suggestion that insofar as the monies that are due to him in regard to the rentals under the said CJ, they have been set off by virtue of the assessment of damages by Puan Roszianayati;
- (60) PW4 said that only the Second Floor is currently being occupied by tenants and he agreed with the suggestion that he is collecting rentals for the Second Floor; and

(61) PW4 disagreed with the suggestion that he is not entitled to the claim before this Court.

[330] During cross-examination by Mr. Nekoo, for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, PW4 said, *inter alia*, as follows:

- (1) When he was referred to the exchanges of emails between Mr. Mogan and Bas Vin Associates, the 6<sup>th</sup> defendant, at pg. 432, Bundle ‘D’, PW4 disagreed with the suggestion that Mr. Mogan was aware that the agreement that was being prepared by the 6<sup>th</sup> defendant was a LA;
- (2) When he was referred to the email dated 31.07.2015, at pg. 432, Bundle ‘D’, ID(D4-D6)4, from Mr. Mogan to the 6<sup>th</sup> defendant in which Mr. Mogan stated he was appending the duly amended draft LA, PW4 disagreed with the suggestion that Mr. Mogan knew about the LA which was supposed to be signed by the plaintiffs and the 1<sup>st</sup> defendant;
- (3) When he was referred to his answer to Question 26 in his Witness Statement and also to the first three lines of paragraph 38, at pg. 22, Bundle ‘B’, in the Judgment of Yeoh Wee Siam J, where the learned High Court Judge said “The Defendants contend that the Plaintiff’s Solicitors, Ananthan Vijayakumar and Baskaran Manikam, had abused the process of the Court by blinding the eyes of the SAR.”, PW4 disagreed with the suggestion that the issue of fraud by the 4<sup>th</sup> to the 6<sup>th</sup> defendants was in fact raised by the plaintiffs in their application to the KL High Court in the 2016 KL HC OS case for extension of time to file their notice of appeal against the SP Judgment of Puan Roszianayati;

- (4) When he was referred to paragraph 45, at pg. 25, Bundle ‘B’, in the Judgment of Yeoh Wee Siam J, where the learned High Court Judge said, *inter alia*, in her conclusion “It also appears to me from the cause papers that there is little likelihood of the Defendants succeeding in their Appeal,” and to the copy of the letter (from the plaintiffs’ second set of solicitors) dated 30.12.2015, at pg. 396, Bundle ‘C’, PW4 agreed with the suggestion that in this letter Mr. Prasad, the plaintiffs’ solicitor, did not inform or indicate to the 6<sup>th</sup> defendant that he wants to appeal against the SP Judgment;
- (5) When PW4 was referred to paragraph 12, at pg. 16, Bundle ‘B’, in the Judgment of Yeoh Wee Siam J, where the learned High Court Judge said “On the same day i.e. 30.12.2015, the Plaintiff’s Solicitors replied the letter of the Defendants’ Solicitors and enclosed the Lease Agreement and stated clearly and in detail as to why the Lease Agreement could be executed and the obligations of both parties (exh. MBHB-13 of Plaintiff’s AIR).”, and it was suggested to him that the learned High Court Judge had referred to the letter from the 6<sup>th</sup> defendant dated 30.12.2015, at pg. 397, Bundle ‘C’, PW4 said he was not sure;
- (6) However, PW4 agreed with the suggestion that when the 6<sup>th</sup> defendant’s letter dated 30.12.2015, at pg. 397, Bundle ‘C’, was produced by the 1<sup>st</sup> defendant during the proceedings for the plaintiffs’ application for extension of time to file their notice of appeal out of time, PW4 did not say that he has never seen this letter before;



- (7) When PW4 was referred to the draft LA at pp. 417 to 420, Bundle 'C', firstly to Section 6, at the bottom of pg. 417, where the Rental Security Deposit is stated, then to the next pg. at 418, where the words "vacant possession" (in brackets) are stated, then to the First Schedule, at pg. 419, where the same words "vacant possession" (in brackets) are stated in Section 6 and then at pg. 420, where the same words "vacant possession" (in brackets) are stated in Section 7, PW4 agreed with the suggestion that the words "vacant possession" (in brackets) are stated in Sections 6 and 7 as pointed out to him by Mr. Nekoo;
- (8) I also noted that the commencement date of the draft LA, is stated as 01.08.2015 in Section 3 of the First Schedule, at pg. 111, Bundle 'C', in accordance with paragraph 3 of the said CJ;
- (9) However, PW4 said he was not aware whether his solicitor (at the material time), Mr. Prasad, knew of the additional words "vacant possession" in the LA;
- (10) PW4 also disagreed with the suggestion that by virtue of the 6<sup>th</sup> defendant's letter dated 30.12.2015, at pg. 397, Bundle 'C', the 4<sup>th</sup> to the 6<sup>th</sup> defendants did not commit any fraud on the plaintiffs;
- (11) When PW4 was referred to Question 36 and Question 38 of his Witness Statement, in which he had complained that he was not notified of the date for the signing of the LA by the Registrar, PW4 disagreed with the suggestion that there was no need to notify him to that effect since he had defaulted on the terms of the SP Judgment;



- (12) PW4 also disagreed with the suggestion that the LA and the presence of the additional words “vacant possession” in the LA were notified by the 6<sup>th</sup> defendant to both his previous solicitors, Mr. Mogan and Mr. Prasad;
- (13) PW4 also disagreed with the suggestion that the 4<sup>th</sup> to the 6<sup>th</sup> defendants did not conspire with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants and that they did not commit any fraud on the plaintiffs; and
- (14) Mr. Nekoo adopted the cross-examination by Mr. Nair on the rest of the Questions in PW4’s Witness Statement.

[331] In re-examination by Mr. Selvam for the plaintiffs, PW4 said, *inter alia*, as follows:

- (1) When PW4 was asked to clarify why he said that he was not aware, when he was cross-examined by Mr. Nair on the Grounds of Judgment of Puan Roszianayati dated 31.03.2017, at pp. 83 to 95, Bundle ‘B’, PW4 explained that the said CJ was based on a TA, not a LA;
- (2) When PW4 was asked to explain why he could not explain when he was cross-examined by Mr. Nair on line 17, at pg. 12, Bundle ‘I’, PW4 said that the LA was fabricated or created as it was supposed to be a TA;
- (3) When PW4 was asked to clarify why he disagreed with Mr. Nair’s suggestion that based on the said CJ at pp. 1 to 3, Bundle ‘B’, the plaintiffs have to hand over vacant possession of the First to the Third Floors to the 1<sup>st</sup> defendant on 01.08.2015 before the 1<sup>st</sup> defendant is required to pay the arrears of rent of RM 253,500.00 to the plaintiffs on 15.08.2015, PW4 explained that the payment



of the arrears of rent of RM 253,500.00 must be made first by the 1<sup>st</sup> defendant to the plaintiffs in January 2016 and only after that will the plaintiffs give vacant possession of the First to the Third Floors to the 1<sup>st</sup> defendant on 01.01.2016 as stated in Mr. Mogan's letter dated 02.09.2015 to the 6<sup>th</sup> defendant, at pp. 387 and 388, Bundle 'C';

- (4) PW4 read out the 5<sup>th</sup> paragraph of Mr. Mogan's letter dated 02.09.2015 to the 6<sup>th</sup> defendant, at pp. 387 and 388, Bundle 'C', *viz* "In the circumstances our client instructed us to inform your client that, all the terms and conditions of the Consent Judgment will be the same and be commenced from 01.01.2016. We will forward the proposed tenancy agreement to yourgoodself for your final approval before signing the same.", in response to the 6<sup>th</sup> defendant's letter dated 25.08.2015 to Mr. Mogan, at pp. 385 and 386, Bundle 'C';
- (5) However, I noted that it is not the pleaded case of the plaintiffs in the SOC that the outstanding rentals are to be paid by the 1<sup>st</sup> defendant in January 2016 although I noted that in the SOC, the plaintiffs have pleaded waiver by the 1<sup>st</sup> defendant of the date of the commencement of the new tenancy and the handing over of vacant possession by the plaintiffs on 01.08.2015 as stated in the said CJ;
- (6) In response to a specific question to this effect by the Court to Mr. Selvam, the plaintiffs' learned lead counsel, *viz* that it is not the pleaded case of the plaintiffs in the SOC that the outstanding rentals are to be paid by the 1<sup>st</sup> defendant in January 2016, the latter said that this



particular averment does not appear in the plaintiffs' pleadings;

- (7) Nevertheless, Mr. Selvam insisted that basically, it is pleaded in the SOC that the payment of the arrears of rent of RM 253,500.00 must be made first by the 1<sup>st</sup> defendant to the plaintiffs and only after that will the plaintiffs give vacant possession of the First to the Third Floors to the 1<sup>st</sup> defendant on 01.01.2016;
- (8) I also noted that the commencement date of the said LA, is 18.01.2016, as stated in Section 3 of the Addendum of the First Schedule – Due to Non-compliance of the Consent Judgment dated 03<sup>rd</sup> July 2015, at pg. 111, Bundle 'C', instead of 01.08.2015 as stated in the said CJ and in Section 3 of the First Schedule;
- (9) I also noted that the Addendum of the First Schedule – Due to Non-compliance of the Consent Judgment dated 03<sup>rd</sup> July 2015 was an additional part of the said LA and that the draft LA only had the First Schedule where it is stated in Section 3 that the commencement date is 01.08.2015 as per the said CJ;
- (10) I also noted that PW4 was moving back and forth on 2 (two) issues, *viz* the issue that under the said CJ, the new agreement must be a TA not a LA and the issue that the outstanding rentals must be paid by the 1<sup>st</sup> defendant to the plaintiffs before the handing over of vacant possession by the plaintiffs to the 1<sup>st</sup> defendant;
- (11) I further noted that when PW4 was cross-examined by Mr. Nair on the assessment of damages proceeding and the issue on the payment of the outstanding rentals, PW4 had



agreed that the assessment of damages proceeding had overtaken the issue on the payment of the outstanding rentals;

- (12) In his re-examination, PW4 explained that the set off of the outstanding rentals was based on the said LA and Mr. Selvam stated that in the Judgment of the learned Sessions Court Judge, the latter mentioned tenancy and the learned High Court Judge also affirmed it as a tenancy and none of them mentioned it as a lease;
- (13) So I asked Mr. Selvam to look at the parties' Statement of Issues to be Tried, marked with the alphabet 'K' by the Court, and state where is this issue that the outstanding rentals must be paid in January 2016 and the TA must also be executed on 01.01.2016;
- (14) I had done this because I was of the view that it is not about what the witness, *viz* PW4 is saying in his evidence, but if the re-examination is being done on matters which are outside the parties' Statement of Issues to be Tried, then it is a waste of the Court's time;
- (15) Mr. Selvam stated that it is not stated in the parties' Statement of Issues to be Tried, that the outstanding rentals must be paid in January 2016 and the TA must also be executed on 01.01.2016;
- (16) I also asked Mr. Selvam why was there no appeal right up to the Court of Appeal to challenge the validity of the LA since the plaintiffs' pleaded case in the SOC before this Court is that the agreement for the new tenancy must be a TA not a LA and the assessment of damages was done by the learned Sessions Court Judge on the basis that the new



tenancy was a LA instead of a TA and hence, there was a breach of the said CJ by the 1<sup>st</sup> defendant;

- (17) Mr. Selvam stated that he did not know what was the wisdom of the Court of Appeal in that matter;
- (18) I also asked Mr. S. Selvam whether there was a challenge raised before the Court of Appeal that the said LA is void because PW4 and his wife never agreed to the execution of a LA;
- (19) Mr. Selvam stated in the negative;
- (20) I also expressed my view that under the wider principle of *res judicata*, if some issue could have been raised at that point in time but was not raised, it can be an abuse of the process of the Court to, subsequently, raise it in a fresh proceeding;
- (21) I also noted that Issue 10 in the parties' Statement of Issues to be Tried is on whether the validity of the said LA has been decided in the proceedings before the Subordinate Court, High Court and Court of Appeal and, therefore, caught by the principle of *res judicata*;
- (22) I also noted that it is the plaintiffs' pleaded case in the SOC that Issue 10 ought to be decided in the negative because the issue whether under the said CJ the agreement to be executed by the plaintiffs to grant to the 1<sup>st</sup> defendant a new tenancy of the building must be a TA instead of a LA was never raised by the plaintiffs in the proceedings before the Subordinate Court, High Court and Court of Appeal;

(23) PW4 explained that he disagreed with Mr. Nekoo's suggestion that the 4<sup>th</sup> to the 6<sup>th</sup> defendants did not commit fraud on the plaintiffs because they have committed fraud on the plaintiffs by getting the SAR to sign the said LA on behalf of the plaintiffs; and

(24) In his answer to a question posed by the Court, PW4 said he and his wife, the 2<sup>nd</sup> plaintiff, had agreed to give a tenancy (of the building) to the 1<sup>st</sup> defendant for an initial term, *viz* a starting period of 8 (eight) years with an option to renew for a subsequent term of 4 (four) years.

**Plaintiffs' written submissions, Parts I and II, both dated 23.07.2019**

[332] After the conclusion of the full trial, the plaintiffs filed 2 (two) sets of submissions. They are the Plaintiffs' Outline Submissions ("the POS") and the Plaintiffs' Outline Submissions (Part II) ("the POS (Part II)"). Both the POS and the POS (Part II) are dated 23.07.2019.

**POS**

**Principles of *res judicata*, estoppel and waiver are inapplicable**

[333] In the POS, the plaintiffs submitted that the defendants are estopped, *viz* estoppel in pais or estoppel by conduct, from resurrecting the issue on the applicability of the principles of *res judicata*, estoppel and waiver to this case as pleaded by the 2 (two) groups of defendants in their respective Statements of Defence.

[334] The plaintiffs submitted that this is because the issue has already been decided twice in the negative in favour of the plaintiffs by Her Ladyship Hue Siew Kheng J (“the learned High Court Judge”) when the learned High Court Judge dismissed 2 (two) intervening interlocutory applications filed by the 2 (two) groups of defendants, *viz* enclosures (7) and (14), to strike out the plaintiffs’ Writ and SOC based on this issue (see the 2 (two) Orders of the learned High Court Judge dated 07.03.2018, enclosures (39) and (43), respectively).

[335] The plaintiffs further submitted that the 2 (two) groups of defendants have, subsequently, on 08.11.2018, withdrawn their appeals in the Court of Appeal against the learned High Court Judge’s decisions and their appeals have been struck off by the Court of Appeal with costs of RM 1000.00 for each of the 2 (two) groups of defendants (see Court of Appeal Civil Appeal No. W-02 (IM)-720-04/2018 for the 1<sup>st</sup> group of defendants and Court of Appeal Civil Appeal No. W-02 (IM)-(NCVC)-728-04/2018 for the 2<sup>nd</sup> group of defendants).

[336] The plaintiffs referred to the cases of *Tengku Azmi Bin Tengku Yusoff & Anor. v. Tengku Ahmad Bin Tengku Abduk Ghaffar & Ors* [1982] 1 MLJ 78 and *Newton Engineering & Manufacturing (Pte) Ltd v. Sam Aik Industries SDn Bhd* [1996] 1 MLJU 492 in support of their submissions on this issue.

**“Tenancy Agreement” in paragraph 3 of said CJ ought to be a LA in law based on duration of initial term of tenancy despite pleading otherwise in SOC**

[337] In the POS, the plaintiffs submitted that for Issue 1, the “Tenancy Agreement” in English or “*Perjanjian Penyewaan*” in Malay as stated in paragraph 3 of the said CJ ought to be a LA

in law instead of a TA due to the initial tenure of the tenancy for a term of 8 (eight) years plus a renewal of the tenancy for a term of 4 (four) years.

**2 (two) reasons given by Karpayah (PW4) for plaintiffs’ refusal to sign said LA**

[338] The plaintiffs submitted that in regard to the repeated testimonies of Baskaran (DW3) and Alagar (DW4) that the plaintiffs had refused to execute the LA, the Court ought to take into consideration the evidence of Karpayah (PW4) in his examination-in-chief that PW4 had explained that the refusal of the plaintiffs to sign the LA was because of 2 (two) reasons.

**1<sup>st</sup> reason is plaintiffs only agreed to sign a TA not a LA**

[339] The first reason is that in the said CJ, the plaintiffs only agreed to sign a TA not a LA.

**2<sup>nd</sup> reason is the words “and vacant possession provided” were fraudulently inserted into said LA by 6<sup>th</sup> defendant through 5<sup>th</sup> defendant**

[340] The second reason is that the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant (DW3), has, fraudulently, made changes to the LA by adding the term “and vacant possession provided” in Sections 6 and 7 of the First Schedule, at pp. 111 and 112, and (a comparison of) the draft (of the LA) approved by the plaintiffs’ first set of solicitors and sent to the 6<sup>th</sup> defendant and the draft of the LA prepared by the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant (DW3), confirmed (that) the words “and vacant



possession provided” were added, subsequently, by the 6<sup>th</sup> defendant.

**Waiver by 1<sup>st</sup> defendant of date of giving of vacant possession by plaintiffs in paragraph 3 of said CJ even though this issue is unpleaded in SOC**

[341] The plaintiffs submitted that the 1<sup>st</sup> defendant could no longer rely on paragraph 3 of the said CJ pursuant which required the plaintiffs to hand over vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant on 01.08.2015 as the 1<sup>st</sup> defendant had waived its right to rely on paragraph 3 of the said CJ.

[342] The plaintiffs relied on 2 (two) pieces of documentary evidence in support of this submission, *viz* the 2 (two) letters, both dated 30.12.2015 (see Exhibits P6 and P7), which were exchanged between the plaintiffs’ first set of solicitors and the 1<sup>st</sup> defendant’s solicitors at the material time, *viz* the 6<sup>th</sup> defendant.

[343] The plaintiffs contended that as at 30.12.2015, the parties were still negotiating for the completion of the tenancy of the building whereas paragraph 3 of the said CJ stated that the execution of the TA and the handing over of vacant possession of the First, Second and Third Floors are to take place on 01.08.2015, *viz* about 4 (four) months earlier.

[344] The plaintiffs also submitted that prior to 30.12.2015, there was also correspondence between Mr. Mogan (DW1) of the plaintiffs’ first set of solicitors and Baskaran (DW3) of the 6<sup>th</sup> defendant, on this matter (see P13).



**Particulars of fraud and / or misrepresentation and / or conspiracy committed by 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants pleaded in paragraph 26 of SOC**

[345] The plaintiffs submitted that in paragraph 26 of the SOC, at pg. 11 of Bundle A, the plaintiffs have pleaded the fraud and / or misrepresentation and / or conspiracy committed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants in relation to the execution of the said LA by the SAR as follows:

“At all material times, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have knowledge of the outstanding arrears of rent and the breaches of the said CJ and had, through the 4<sup>th</sup> to the 6<sup>th</sup> defendants, as the solicitors committed fraud and / or misrepresentation and / or conspired to induce the SAR to execute the LA to the extent prejudicial to the plaintiffs even though the defendants knew payments were not made.”

[346] However, I noted that the plaintiffs did not plead in paragraph 26 of the SOC, the particulars of the alleged inducement of the SAR in relation to the execution of the said LA by the SAR by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants despite alleging that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have committed fraud and / or misrepresentation and / or conspiracy in relation to the execution of the said LA by the SAR.

**Non-compliance by 1<sup>st</sup> defendant of said CJ due to failure, refusal and inability to pay arrears of rent and said deposits pleaded in paragraph 28 of SOC**

[347] The plaintiffs submitted that in paragraph 28 of the SOC, at pg. 11 of Bundle A, the plaintiffs have pleaded that the 1<sup>st</sup> defendant

did not comply with the said CJ, that the 1<sup>st</sup> defendant could not afford to pay the arrears of rent of RM 253,500.00 and also the said deposits which have been in arrears under the said LA and / or would not pay the debt of RM 253,500.00 and the said deposits.

**Reliance by plaintiffs on words “and vacant possession provided” present in First Schedule of said LA but absent in said CJ even though this issue is unpleaded in SOC**

[348] I noted that the plaintiffs reproduced the words “and vacant possession provided” in brackets, *viz* “(and vacant possession provided)” in paragraph 15 of the SOC when the plaintiffs reproduced Section 6 and Section 7, respectively, of the First Schedule in the said LA.

[349] However, I also noted that the plaintiffs did not raise any issue in the SOC that these words which were present in brackets towards the end of the wordings in Section 6 and Section 7, respectively, of the First Schedule in the said LA were absent in the said CJ.

[350] However, in the POS, the plaintiffs raised this unpleaded issue and submitted that the words “and vacant possession provided” were never explicitly mentioned in paragraph 4 (b) of the said CJ.

[351] The plaintiffs submitted that the plaintiffs are entitled to rely on the evidence of Karpayah (PW4), Mr. Mogan (DW1) and Baskaran (DW3) in relation to the words “and vacant possession provided” in the said LA even though this issue was not pleaded in the SOC.

[352] The plaintiffs submitted that this is because the plaintiffs have led evidence to show that Mr. Mogan (DW1) did not know who inserted these words into Sections 6 and 7 of the First Schedule, at pp. 111 and 112 of the said LA, and Baskaran (DW3) testified that he was person who inserted these words into Sections 6 and 7 of the First Schedule, at pp. 111 and 112 of the said LA.

[353] The plaintiffs referred to the Federal Court case of *Gurbachan Singh s/o Bagawan Singh & Ors v. Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773, in particular, paragraph [90], at pg. 811.

[354] The plaintiffs submitted that in that case, the Federal Court referred to the case of *Superintendent of Lands and Surveys (4<sup>th</sup> Div) & Anor v. Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567) and decided that the evidence led by one party on a matter during the trial without the objection of the opposing party can cure a defect in a pleading when the defect is a failure to state a plea on the matter in the pleading.

**Reliance by plaintiffs on words “and vacant possession provided” inserted by 5<sup>th</sup> defendant in First Schedule of said LA as evidence of 5<sup>th</sup> defendant’s fraudulent intention to cheat plaintiffs even though this issue is unpleaded in SOC**

[355] The plaintiffs submitted that the 5<sup>th</sup> defendant, Baskaran (DW3), inserted the words “and vacant possession provided” in the said LA with the fraudulent intention to cheat the plaintiffs by not making payment to the plaintiffs, as the stakeholder, of the said deposits allegedly paid by the 1<sup>st</sup> defendant, pursuant to



paragraph 4 (b) of the said CJ, when the 1<sup>st</sup> defendant executed the said LA.

[356] However, I noted that nowhere in the SOC, did the plaintiffs raise any issue that the words “and vacant possession provided” present in Section 6 and Section 7 of the First Schedule in the said LA and reproduced by the plaintiffs in brackets, *viz* “(and vacant possession provided)” in paragraph 15 of the SOC were inserted fraudulently by the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant, with the intention to induce the SAR to sign the said LA and/or to cheat/misrepresent and/or conspire against the plaintiffs by not paying the arrears of rent to the plaintiffs on 15.08.2015 and by not paying the said deposits to the plaintiffs on 18.01.2016 or 27.01.2016.

**Reliance by plaintiffs on words “and vacant possession provided” inserted by 5<sup>th</sup> defendant in said LA and suppressed by 4<sup>th</sup> defendant from SAR as evidence of 4<sup>th</sup> defendant’s fraudulent inducement of SAR to execute said LA, 4<sup>th</sup> defendant’s misrepresentation and 4<sup>th</sup> defendant’s conspiracy with 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants to cheat plaintiffs even though this issue is unpleaded in SOC**

[357] The plaintiffs submitted that the 4<sup>th</sup> defendant, Ananthan (DW2), had fraudulently succeeded in inducing Puan Zura (PW1) to execute the said LA by referring to paragraph 4 of the SP Judgment and making a fraudulent representation to her that the 1<sup>st</sup> defendant had complied with the said CJ by showing her the worthless cheques and by suppressing the material fact that Baskaran (DW3) had fraudulently inserted into the said LA, the phrase “and vacant possession provided” in order to deceive Puan Zura (PW1) into signing the said LA.

[358] The plaintiffs submitted that Issue 1 (a) ought to be decided in the affirmative as the 1<sup>st</sup> defendant breached paragraph 3 of the said CJ by executing a LA with the added phrase “and vacant possession provided” and the 1<sup>st</sup> defendant also breached paragraph 4 (b) of the said CJ when the said deposits were not paid by the 1<sup>st</sup> defendant upon the execution of the LA.

[359] However, I noted that nowhere in the SOC, did the plaintiffs raise any issue that the 4<sup>th</sup> defendant, Ananthan (DW2), had fraudulently succeeded in inducing Puan Zura (PW1) to execute the said LA by suppressing the material fact that Baskaran (DW3) had fraudulently inserted the words “and vacant possession provided” into Section 6 and Section 7, respectively, of the First Schedule in the said LA in order to deceive Puan Zura (PW1) into signing the said LA.

**Said LA is void due to non registration under Section 221 of NLC 1965 even though this issue is unpleaded in SOC**

[360] The plaintiffs submitted that the said LA is void in law for want of registration under Section 221 of the NLC 1965.

[361] The plaintiffs submitted that this is because the section requires the execution of a Form 15A by the SAR on behalf of the plaintiffs but the 4<sup>th</sup> defendant, Ananthan (DW2), did not bring along with him a Form 15A for the SAR to execute.

[362] The plaintiffs also submitted that the 1<sup>st</sup> defendant did not plead the compliance of Section 221 of the NLC 1965, *viz* that the said LA was registered under Section 221 of the NLC 1965.

[363] The plaintiffs referred to the case of *Wan Salimah bte Wan Jaafar v. Mahmood bin Omar (Anim bte Abdul Aziz, Intervener)* (“**Wan Salimah**”) [1998] 5 MLJ 162, at pg. 172, paragraphs H-I

and at pg. 175, paragraphs C-D, Tab J, and the case of *Pembinaan Eastern Aluminium Sdn Bhd v. Narita Shipping & Transport Sdn Bhd* [2014] 4 MLJ 534, Tab K, reaffirmed the position in **Wan Salimah** that non-registered leases are void under the law.

[364] However, I noted that nowhere in the SOC, did the plaintiffs raise any issue that the said LA is void in law for want of registration under Section 221 of the NLC 1965.

**Non-payment of outstanding rentals under said CJ and said deposits under said LA and 6 (six) worthless CIMB Bank cheques given by 1<sup>st</sup> defendant to 6<sup>th</sup> defendant through 5<sup>th</sup> defendant**

[365] On the issue of the non-payment of the outstanding rentals by the 1<sup>st</sup> defendant, the plaintiffs submitted that Issue 2 ought to be decided in the affirmative and Issue 2 (a) ought to be decided in the negative.

[366] The plaintiffs submitted that this is based on the oral evidence of DW1, DW2, DW3, DW4 and DW6 that the outstanding rentals which should have been paid on 15.08.2015 followed by subsequent instalments which should have been paid by the 1<sup>st</sup> defendant were not paid to the plaintiffs and the evidence of DW3 that the 6 (six) CIMB Bank cheques, Exhibits D(D4-D6)25 to D(D4-D6)30, given to him by the 1<sup>st</sup> defendant, through the 2<sup>nd</sup> defendant, Alagar (DW4), were not paid to the plaintiffs under the pretext that vacant possession was not provided but this was not stated in the said CJ.

[367] The plaintiffs submitted that Issue 2 (c) and Issue 2 (d) ought to be decided in the affirmative.



[368] The plaintiffs submitted that this is because firstly, the insertion of the phrase “and vacant possession provided” was done fraudulently by DW3 and DW2 with the intention to cheat the plaintiffs by not paying to the plaintiffs the said deposits as provided under the said LA even though the words “and vacant possession provided” were not stated in the said CJ.

[369] Secondly, the plaintiffs have proven the allegation that the 6 (six) CIMB Bank cheques, Exhibits D(D4-D6)25 to D(D4-D6)30, given to DW3, as stakeholder, by the 1<sup>st</sup> defendant, through the 2<sup>nd</sup> defendant (DW4), are worthless and this has been confirmed by the CIMB Bank officer, Zafri (PW3), who was recalled on 17.07.2019.

[370] Zafri (PW3) testified that based on the 6 (six) bank statements of the 1<sup>st</sup> defendant’s bank account (Exhibits P48-P53, Bundles “Aa”, “Cc” and “Dd”), the 1<sup>st</sup> defendant did not have enough money in the 1<sup>st</sup> defendant’s bank account on 18.01.2016 to meet the cheques for moneys owing by the 1<sup>st</sup> defendant of a total sum of RM 323,500.00 when the SAR (PW1) executed the said LA.

[371] Zafri (PW3) explained that this was because the bank balance of the 1<sup>st</sup> defendant for the month of January 2016 was only RM 2,249.61 (see Exhibit D(D1-D3)38) whereas the amount owing to the plaintiffs was RM 323,500.00.

**Fraud committed by 1<sup>st</sup> defendant on plaintiffs due to non payment of outstanding rentals since 01.04.2013 despite residing at the Ground Floor and entering into said CJ**

[372] The plaintiffs submitted that Issue 2 (e) ought to be decided in the negative as the 1<sup>st</sup> defendant has perpetrated fraud on the





plaintiffs by not paying the outstanding rentals since 01.04.2013 despite residing at the Ground Floor and entering into the said CJ.

**Inducement of SAR to execute said LA on behalf of plaintiffs by 4<sup>th</sup> defendant upon 5<sup>th</sup> defendant's instructions**

[373] On Issue 3, the plaintiffs submitted that the issue ought to be decided in the negative as the SAR (PW1) was induced to sign the said LA by the 4<sup>th</sup> defendant, Ananthan (DW2), on the instructions of the 5<sup>th</sup> defendant, Baskaran (DW3), after the SAR, a Court officer, was misled by DW2 who said to her that the 1<sup>st</sup> defendant had complied with the said CJ but the plaintiffs refused to sign the LA “and vacant possession provided” by suppressing the fact that this phrase was not in the said CJ.

[374] The plaintiffs submitted that based on the reasons as set out in the POS, Issue 4 ought to be decided in the negative and Issues 5 to 9 ought to be decided in the affirmative.

**Corporate veil of 1<sup>st</sup> defendant ought to be lifted due to fraud committed by 2<sup>nd</sup> and 3<sup>rd</sup> defendants through their conspiracy with 4<sup>th</sup> and 5<sup>th</sup> defendants**

[375] On Issue 7, the plaintiffs submitted that the evidence showing the fraud perpetrated by the 2<sup>nd</sup> defendant (DW4) and the 3<sup>rd</sup> defendant (DW6) through their conspiracy with the 4<sup>th</sup> defendant (DW2) and the 5<sup>th</sup> defendant (DW3) to cheat the plaintiffs have lifted the corporate veil of the 1<sup>st</sup> defendant.

[376] On Issue 7, the plaintiffs also submitted that after the assessment decision was made on 31.03.2017 to contra the payments owing to the plaintiffs in paragraph 1 of the said CJ, a

sum of RM 37,000.00 was due to the plaintiffs, but to date, no payment was made by the 1<sup>st</sup> defendant to the plaintiffs for the Ground Floor which the 1<sup>st</sup> defendant is still occupying.

[377] In the POS (Part II), the plaintiffs have repeated the reasons as set out in the POS for Issues 4 to 9 and elaborated on them.

**4 (four) special circumstances for non applicability of principles of *res judicata*, estoppel and waiver to this case**

[378] On Issue 10 on the applicability of the principles of *res judicata*, estoppel and waiver, the plaintiffs submitted that this issue ought to be decided in the negative based on the following reasons:

- (1) The 2 (two) groups of defendants filed 2 (two) striking out applications to strike out the Writ and SOC based on the principles of *res judicata*, estoppel and waiver but both applications were dismissed by the learned High Court Judge;
- (2) In her grounds of judgment, in Bundle ‘I’, the learned High Court Judge stated as follows in paragraph 30:

“30. Furthermore, *res judicata* especially in respect of the High Court ruling does not apply as it was an application for extension of time. The litigation history does not conclusively established that the issues raiswd in this claim have been litigated with finality in the previous proceedings.”
- (3) Furthermore, the defendants filed notices of appeal against the dismissals of their striking out applications by the the

learned High Court Judge but they subsequently withdrew the same with costs of RM 1,000.00 for appeal;

- (4) Hence, the defendants have waived their rights to litigate the issue;
- (5) Hence, the defendants ought to be estopped from relying on the principles of *res judicata*, estoppel and waiver in this case;
- (6) In the case of *Manoharan a/l Malayalam v. Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 MLJ 660, Tab M, the Federal Court held that the principles of *res judicata*, estoppel and waiver do not apply if there are special and exceptional circumstances; and
- (7) The special circumstances in this case are as follows:
  - i. Fraud, misrepresentation and / or conspiracy against the the 6<sup>th</sup> defendant as a stakeholder were never raised in any proceedings before;
  - ii. Failure of the 6<sup>th</sup> defendant in performing their duty as the stakeholder;
  - iii. Active concealment of a material fact in order to induce the SAR, Puan Zura (PW1), to execute the said LA, by by the 4<sup>th</sup> defendant, Ananthan (DW2), the 5<sup>th</sup> defendant, Baskaran (DW3) and also the 6<sup>th</sup> defendant by conspiring with the 2<sup>nd</sup> defendant, Alagar (DW4); and
  - iv. Active fraud by the 2<sup>nd</sup> defendant, Alagar (DW4), and his wife, the 3<sup>rd</sup> defendant, Selvi (DW6), in issuing cheques without having sufficient money in

the 1<sup>st</sup> defendant's bank account in order to induce the SAR, Puan Zura (PW1) to execute the said LA (Exhibit D1).

[379] On the issue of damages, the plaintiffs submitted that their claim for losses suffered by them as pleaded in paragraph 33, on pg. 14 of Bundle A, ought to be allowed based on the following reasons:

- (1) The calculation of the plaintiffs' losses of a sum of RM 1,573,500.00 as at 04.10.2018 was provided by the 1st plaintiff, Karpayah (PW4);
- (2) The plaintiffs' continuing losses from 04.10.2018 to 23.07.2019 as testified by PW4 is RM 20,000.00 a month multiplied by 9 months totaling RM 180,000.00; and
- (3) Hence, the plaintiffs ought to be awarded damages of a sum of RM 1,688,500.00 calculated as follows:
  - i. total damages of RM 2, 113,500.00 for unpaid rentals as at the date of trial; and
  - ii. less a sum of RM 425,000.00 as assessed by the Sessions Court.

[380] Therefore, the plaintiffs submitted in the POS that the Court ought to grant to the plaintiffs all the prayers sought in paragraph 34 (i) to (vi) in the SOC.

### **16 (sixteen) authorities referred to by plaintiffs in support of POS**

[381] In support of the POS, the plaintiffs referred to the following 16 (sixteen) authorities in the Plaintiffs' Bundle of Authorities ("PBOA"):

- (1) Section 17 of the Contracts Act 1950, Tab O;
- (2) *Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu (Personal Representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45, Tab P;
- (3) *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 544, Tab Q;
- (4) Section 18 of the Contracts Act 1950, Tab R;
- (5) *Travelsight (M) Sdn Bhd & Anor v. Atlas Corp Sdn Bhd* [2003] 6 MLJ 658, Tab S;
- (6) Rule 17 of the Legal Profession (Practice and Etiquette) Rules 1978, Tab T;
- (7) *Re Zainur Zakaria* [1999] 2 MLJ 577; Tab U;
- (8) *Dato' Wong Gek Meng v. Pathmanathan a/l Mylavaganam & Ors* [1998] 5 MLJ 560, Tab V;
- (9) *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] Malaysian Reports 196, Tab W;
- (10) *Md Sidek bin Salim & Anor v. Rosli bin Abu Hasan & Ors* [2018] MLJU 2002, Tab X;
- (11) *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, Tab Y;
- (12) *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301, Tab Z;
- (13) *Boustead Trading (1995) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, Tab ZA;



- (14) *Sim Thong Realty Sdn Bhd v. The Kim Dar @ Tee Kim* [2003] 3 MLJ 460, Tab ZB;
- (15) *Commissioner of Wealth Tax v. Dr Karan Singh And Others Etc* [1993] 1 SCR 569, Tab ZE; and
- (16) Sections 66 & 76 of the Contracts Act 1950.

## POS (II)

### Non-payment of outstanding rentals by 1<sup>st</sup> defendant

[382] On the issue of the non-payment of the outstanding rentals by the 1<sup>st</sup> defendant, the plaintiffs submitted in the POS (Part II) that Mr. Mogan (DW1) agreed during cross-examination that according to the said CJ, *viz* Paragraph 2, the payment of the outstanding rentals should be made on 15.08.2015 to Karpayah (PW4), the 1<sup>st</sup> plaintiff (see NP Jilid 1 dated 26/10/2019, pg. 371, paragraph 9) and NP Jilid 1 dated 05/10/2018, pg. 326, paragraphs 28-35).

[383] The plaintiffs submitted in the POS (Part II) that DW1 agreed that the outstanding rentals were not paid (see NP Jilid 1 dated 05/10/2018, pg. 324, paragraphs 7-12).

[384] The plaintiffs submitted in the POS (Part II) that DW1 also agreed that he was the lawyer on record (for the plaintiffs at the material time) (see NP Jilid 1 dated 26/10/2019, pg. 371, paragraph 22).

[385] The plaintiffs submitted in the POS (Part II) that DW1 testified that he asked Baskaran (DW3) through the telephone why the moneys, *viz* the outstanding rentals, were not paid (see NP Jilid 1 dated 26/10/2019, pg. 371, paragraphs 31-35).



[386] The plaintiffs submitted in the POS (Part II) that DW1 testified that he did not write to DW3 to demand payment of the outstanding rentals due on 15/08/2015 (see NP Jilid 1 dated 26/10/2019, pg. 373, paragraphs 30-36).

[387] I noted that when Mr. Selvam, the plaintiffs learned lead counsel, questioned DW1 repeatedly on why he did not write to DW3 to demand payment of the (outstanding) rentals due on 15/08/2015, *viz* the money or the cheques in the 6<sup>th</sup> defendant's stakeholder's account, DW1 did not answer Mr. S. Selvam's questions and merely said "I did ask".

[388] I noted that DW1 also refused to answer the question posed to him by the Court as follows:

"Now, Mr. S. Selvam's question now is, why didn't you write to him to demand for the money? That is the question. Answer that question, Mr. Mogan."

[389] But DW1 merely said as follows:

"No, I didn't write to him."

[390] The plaintiffs submitted in the POS (Part II) that DW1 testified that no payment (of the outstanding rentals) was made on 02/09/2015 (see NP Jilid 1 dated 05/10/2018, pg. 327, paragraphs 1-5).

[391] The plaintiffs submitted in the POS (Part II) that DW1 also gave evidence that the letter dated 02/09/2015 (IDD (D4-D6) 4) is only concerned about the postponement of the vacant possession and there were no changes to the obligation of payment of rental under the said CJ (see NP Jilid 1 dated 05/10/2018, pg. 325, paragraphs 9-19).



[392] The plaintiffs submitted in the POS (Part II) that Ananthan (DW2) also admitted that based on the letter dated 30.12.2015 from Messrs. D. Prasad & Partners (P6), the rentals from 2013 must be forwarded to the plaintiffs and a TA executed (see NP Jilid 1 dated 03/12/2018, pg. 472, paragraphs 11-16 and pg. 473, paragraphs 9-12).

[393] The plaintiffs also submitted in the POS (Part II) that Baskaran (DW3) testified that Messrs. D. Prasad & Partners, the plaintiffs' (second set of) solicitors, demanded for outstanding rentals to be paid *vide* the letter dated 30.12.2015 (see NP Jilid 2 dated 11/03/2019, pg. 568, paragraphs 24-29).

**Fraud/misrepresentation/conspiracy arising from addition of (unpleaded) words “and vacant possession provided” in the Addendum of said LA**

[394] On the issue of fraud/misrepresentation/conspiracy arising from the addition of the words “and vacant possession provided” in the Addendum of the said LA, the plaintiffs submitted in the POS (Part II) that Mr. Mogan (DW1), the solicitor acting for the plaintiffs at the time the plaintiffs entered into the said CJ, and the 4<sup>th</sup> to the 6<sup>th</sup> defendants' first witness, gave evidence that the words “and vacant possession provided” which were present at pp. 111 and 112 of the said LA were not there at pp. 445 and 446 of the draft TA (see NP Jilid 1 dated 05/10/2018, pg. 319, paragraph 2, and paragraphs 17-36).

[395] The plaintiffs also submitted in the POS (Part II) that Ananthan (DW2), the 4<sup>th</sup> defendant, and the 4<sup>th</sup> to the 6<sup>th</sup> defendants' second witness, had given evidence that he showed paragraph 4 of the SP Judgment to the SAR as she only asked to see the SP Judgment and that the SAR also perused the LA and then the





SAR signed the LA (on behalf of the plaintiffs) (see NP Jilid 1 dated 03/12/2018, pg. 513, paragraphs 11-14).

**6<sup>th</sup> defendant's failure as stakeholder to pay 1<sup>st</sup> defendant's 6 (six) cheques to plaintiffs**

[396] The plaintiffs also submitted in the POS (Part II) that during his re-examination, DW2 admitted that he brought the cheques to show the SAR (PW1) in order to explain to the SAR that the 6<sup>th</sup> defendant could not comply with being a stakeholder, *viz* make payment of the 1<sup>st</sup> defendant's cheques to the plaintiffs, due to the plaintiffs' failure to execute the LA "and vacant possession provided" as stated in the LA (see NP Jilid 1 dated 03/12/2018, pg. 510, paragraphs 36-37 and pg. 511, paragraphs 1-9).

**4<sup>th</sup> defendant's (DW2's) evidence that SAR did not ask for 1<sup>st</sup> defendant's 6 (six) cheques**

[397] The plaintiffs also submitted in the POS (Part II) that during cross-examination, DW2 testified that the SAR did not ask for the cheques (see NP Jilid 1 dated 03/12/2018, pg. 478, paragraph 20).

**4<sup>th</sup> defendant's (DW2's) evidence of 1<sup>st</sup> defendant's 6 (six) valueless cheques as at end of December 2015**

[398] The plaintiffs also submitted in the POS (Part II) that during cross-examination, DW2 testified that the amounts in the 6 pieces of cheques when added up came to RM 323,500.00 and the closing balance in the 1<sup>st</sup> defendant's bank account for the month of December was RM 2,249.63 and hence, the plaintiffs submitted that the cheques were of no value by the end of

December (see NP Jilid 1 dated 22/11/2018, pg. 462, paragraphs 19-36).

**Breach of Legal Profession (Practice and Etiquette) Rules 1978 by 4<sup>th</sup> defendant (DW2) due to his failure to carbon copy letter to SAR to plaintiffs**

[399] The plaintiffs also submitted in the POS (Part II) that during cross-examination, DW2 admitted that he did not carbon copy to the plaintiffs' solicitors a copy of the letter to the SAR (PW1) requesting for an appointment with her to sign the LA on behalf of the plaintiffs due to the plaintiffs' refusal to sign the LA (see NP Jilid 1 dated 26/10/2018, pg. 402, paragraphs 14-16 and paragraphs 30-32) as he did not get the instruction from the 5<sup>th</sup> defendant (DW3) to inform Messrs. D. Prasad & Partners, the opponent's solicitors (see NP Jilid 1 dated 26/10/2018, pg. 404, paragraphs 30-32 and pg. 405, paragraph 4).

[400] The plaintiffs also submitted in the POS (Part II) that DW2 also admitted that he was not aware of the rule that as a solicitor, he was duty bound under the Legal Profession (Practice and Etiquette) Rules 1978 to notify the opponent's solicitors (see NP Jilid 1 dated 26/10/2018, pg. 402, paragraphs 34-36 and pg. 403, paragraph 18).

[401] The plaintiffs also submitted in the POS (Part II) that during his re-examination by the 4<sup>th</sup> to the 6<sup>th</sup> defendants' learned Counsel, DW2 admitted that he was involved in the drafting of the said LA, that he had liaised with Mr. D. Prasad, the plaintiffs' former lawyer, *viz* from the plaintiffs' second set of solicitors, and that he had acted on the instructions of the 5<sup>th</sup> defendant (DW3) (see NP Jilid 1 dated 03/12/2018, pg. 509, paragraphs 15-36 and pg. 510, paragraphs 1-2).



**Fraudulent insertion in said LA of words “and vacant possession provided” which are absent in said CJ by 5<sup>th</sup> defendant (DW3) but this issue was not pleaded in SOC**

[402] The plaintiffs also submitted in the POS (Part II) that during the cross-examination of Baskaran (DW3), the 5<sup>th</sup> defendant, and the 4<sup>th</sup> to the 6<sup>th</sup> defendant’s third witness, by the Counsel for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ solicitors, DW3 testified that he amended the finalized draft of the LA by taking out the date 01.08.2015 and replacing it with the words “and vacant possession provided” (see NP dated 12/03/2019, pg. 604, paragraphs 14-30).

[403] The plaintiffs also submitted in the POS (Part II) that during his cross-examination of DW3, DW3 admitted that the words “and vacant possession provided” (as pleaded in subparagraph 10.1 of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ SOD and in subparagraph 10.1 of the 4<sup>th</sup> to the 6<sup>th</sup> defendants’ SOD), were absent in the said CJ (see NP dated 13/03/2019, pg. 760, paragraphs 4-19) and that he had added these words without the approval of the plaintiffs’ solicitors or the plaintiffs (see NP Part 2 dated 13/03/2019, pg. 759, paragraphs 27-33).

[404] The plaintiffs also submitted in the POS (Part II) that DW3 admitted that he did not write to Messrs. D. Prasad & Partners & Associates, the plaintiffs’ (second set of solicitors) to inform him of his addition of the words “and vacant possession provided” (see NP Part 2 dated 14/03/2019, pg. 859, paragraphs 7-11) and that Mr. Mogan (DW1) also had no knowledge of this addition by him (DW3) (see NP Part 2 dated 14/03/2019, pg. 865, paragraphs 7-9).

[405] The plaintiffs also submitted in the POS (Part II) that Baskaran (DW3), the 5<sup>th</sup> defendant, gave evidence that he did not reveal to Ananthan (DW2) that he had added the words “and vacant possession provided” in the Addendum in the copy of the LA that he had handed over to DW2 with the instruction to see Puan Zura (PW1) and to get her signature for the LA on behalf of the plaintiffs (see NP dated 13/03/2019, pg. 761, paragraphs 23-30).

[406] The plaintiffs also submitted in the POS (Part II) that DW3 attempted to mislead this Court during the trial of this case (see NP dated 13/03/2019, pg. 758, paragraphs 34-36 and pg. 759, paragraphs 1-14).

### **DW3 had misled other courts with the “worthless” cheques**

[407] The plaintiffs also submitted in the POS (Part II) that DW3 had misled other courts with the worthless cheques.

[408] On this point, the plaintiffs also submitted in the POS (Part II) that DW3 had deceived Her Ladyship Yeoh Wee Siam J (“Her Ladyship”) when in his submissions, DW3 basically told Her Ladyship that the client, the 1<sup>st</sup> defendant, has given him the cheques and was ready to comply with the said CJ (see NP dated 13/03/2019, pg. 784, paragraphs 31-37).

[409] On this point, the plaintiffs also submitted in the POS (Part II) that DW3 had suppressed the fact that he had inserted the words “and vacant possession provided” in his affidavit against the plaintiffs (see pp.170 -205, Bundle ‘C’) that was used before Her Ladyship (see NP Part 2 dated 14/03/2019, pg. 860, paragraphs 1-13).

[410] On this point, the plaintiffs also submitted in the POS (Part II) that DW3 had admitted in the trial of this case during cross-

examination that he did not state in his affidavit that was used before Her Ladyship how he had prepared the LA and how he had inserted the words “and vacant possession provided” in the LA (see NP Part 2 dated 14/03/2019, pg. 861, paragraphs 18-22).

[411] On this point, the plaintiffs also submitted in the POS (Part II) that DW3 had submitted the information on how he had prepared the LA and how he had inserted the words “and vacant possession provided” in the LA in the Court of Appeal during the hearing of the plaintiffs’ appeal against the decision of Her Ladyship.

[412] The plaintiffs also submitted in the POS (Part II) that Baskaran (DW3), the 5<sup>th</sup> defendant, had admitted that under the Legal Profession (Etiquette & Practice) Rules 1978, the 6<sup>th</sup> defendant must carbon copy to the plaintiffs’ solicitors a copy of the letter to Puan Zura requesting for an appointment with her to sign the LA on behalf of the plaintiffs due to the plaintiffs’ failure or refusal to sign the LA.

[413] In regard to the postdated cheques that were given by Ananthan, the 2<sup>nd</sup> defendant (DW4) to the 5<sup>th</sup> defendant, Baskaran (DW3) as payment of the arrears of rent payable by the 1<sup>st</sup> defendant under the said CJ and the deposits under the LA, the plaintiffs submitted in the POS (Part II) that the cheques were worthless pieces of paper.

[414] The plaintiffs submitted in the POS (Part II) that the reason is because there were insufficient moneys in the 1<sup>st</sup> defendant’s bank account to meet the amounts stated in the cheques on the date, 18.01.2016, when DW2 took the cheques with him to show to the SAR to obtain her signature in the LA on behalf of the plaintiffs.

[415] The plaintiffs also submitted in the POS (Part II) that Baskaran (DW3) admitted that he knew that the cheques were worthless as early as 01.08.2015 (see NP Part 2 dated 13/03/2019, pg. 790, paragraphs 12-13).

[416] The plaintiffs also submitted in the POS (Part II) that Baskaran (DW3) admitted that it was his duty to find out from the 2<sup>nd</sup> defendant (DW4) whether the 1<sup>st</sup> defendant had sufficient moneys in the 1<sup>st</sup> defendant's bank account to meet the amounts stated in the cheques on the date he instructed DW2 to take them to show the SAR (PW1) to obtain her signature on the LA prepared by him (see NP Part 2 dated 13/03/2019, pg. 792, paragraphs 29-34).

[417] The plaintiffs also submitted in the POS (Part II) that circumstantial evidence indicates conspiracy and the plaintiffs relied on the evidence of Baskaran (DW3) and Alargar (DW4).

[418] The plaintiffs submitted in the POS (Part II) that Baskaran (DW3) gave evidence that he did not call up the 1<sup>st</sup> defendant to inform him that "they (1<sup>st</sup> defendant's solicitors) are going to execute the so-called LA" and to ask "is there money in the account?" (see NP dated 13/03/2019, pg. 775, paragraphs 6-12, pg. 776, paragraphs 20-22, and pg. 775, paragraphs 27-30).

[419] The plaintiffs also submitted in the POS (Part II) that Alargar (DW4) gave evidence that he could not remember whether he communicated about money in the 1<sup>st</sup> defendant's bank account with the 5<sup>th</sup> defendant, Baskaran (DW3), *viz* whether the cheques given by him to DW3 could be cashed on the dates written on the cheques (see NP dated 12/06/2019, pg. 32, paragraphs 16-31).



[420] The plaintiffs also submitted in the POS (Part II) that Baskaran (DW3) gave evidence that the cheques were made worthless by the plaintiffs (see NP Part 2 dated 13/03/2019, pg. 773, paragraphs 32-33).

[421] The plaintiffs also submitted in the POS (Part II) that Baskaran (DW3) admitted during cross-examination in the trial that he had used an affidavit prepared by him containing this evidence in many proceedings in the courts including the matter before Her Ladyship (see NP Part 2 dated 14/03/2019, pg. 861, paragraphs 1-22 and pg. 864, paragraph 3-12).

[422] The plaintiffs also submitted in the POS (Part II) that Alagar (DW4) in his oral evidence stated that he did not discuss about the money in his account with Baskaran (DW3), the 5<sup>th</sup> defendant, and Ananthan (DW2), the 4<sup>th</sup> defendant (see NP 12/06/2019, pg.1020, paragraphs 4-10 and pg. 1022, paragraphs 11-14).

**Breach of duty by 6<sup>th</sup> defendant as stakeholder of the cheques but this issue was not pleaded in SOC**

[423] In regard to the 6<sup>th</sup> defendant's breach of duty as a stakeholder of the cheques, the plaintiffs submitted in the POS (Part II) that Mr. Mogan (DW1), the 4<sup>th</sup> to the 6<sup>th</sup> defendants' first witness, testified that the 6<sup>th</sup> defendant had received the rental payments as stakeholder (see NP Jilid 1 dated 05/10/2018, pg. 325, paragraphs 25-27 and NP dated 26/10/2018, pg. 367, paragraphs 16-26).

[424] The plaintiffs also submitted in the POS (Part II) that Ananthan (DW2), the 4<sup>th</sup> defendant, testified that the cheques 6 (six) cheques were held by the 6<sup>th</sup> defendant as stakeholder and that

when he was physically holding the cheques when he went to see the SAR (PW1), he was holding them as a stakeholder (see NP Jilid 1 dated 22/11/2018, pg. 450, paragraphs 15-18).

[425] Therefore, the plaintiffs submitted in the POS (Part II) that the plaintiffs have proved cheating / fraud, misrepresentation and conspiracy against the 1<sup>st</sup> to the 6<sup>th</sup> defendants and that the plaintiffs' claim in paragraph 34 of the plaintiffs' SOC, enclosure (2), filed together with the Writ, enclosure (2), ought to be allowed with costs.

[426] However, I noted that nowhere in the SOC did the plaintiffs raise any issue that the 6<sup>th</sup> defendant had breached their stakeholder's duty by holding onto the cheques and by not paying the cheques to the plaintiffs upon the execution of the said LA by the SAR on behalf of the plaintiffs or upon the execution of the said LA by the 1<sup>st</sup> defendant.

[427] I also noted that the plaintiffs pleaded only 3 (three) causes of action against the defendants, which are cheating/fraud, misrepresentation and/or conspiracy committed by the defendants against the plaintiffs, based on the failure and/or refusal of the 1<sup>st</sup> defendant to pay the arrears of rent of RM 253,500.00 and the said deposits under the said LA to the plaintiffs thereby causing the plaintiffs to suffer losses as pleaded in paragraph 33 of the SOC.

**24 (twenty-four) authorities referred to by plaintiffs in support of POS (II)**

[428] In support of their submissions in the POS (Part II), the plaintiffs referred to 24 (twenty-four) authorities in the PBOA



which included the 16 (sixteen) authorities referred to in the POS. The 24 (twenty-four) authorities are as follows:

- (1) *Tengku Azmi Bin Tengku Yusoff & Anor v. Tengku Ahmad Bin Tengku Abdul Ghaffar & Ors* [1982] 1 MLJ 78, Tab A, at pg. 78;
- (2) *Newton Engineering & Manufacturing (Pte) Ltd v. Sam Aik Industries Sdn Bhd* [1996] MLJU 492, Tab B, at pg. 7;
- (3) *Gurbachan Singh s/o Bagawan Singh & Ors v. Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773, Tab H, at pg. 811;
- (4) *Superintendent of Lands and Surveys (4<sup>th</sup> Div) & Anor v. Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567), Tab I, at pg. 185;
- (5) Section 221 of the NLC 1965;
- (6) *Pembinaan Eastern Aluminium Sdn Bhd v. Narita Shipping & Transport Sdn Bhd* [2014] 4 MLJ 534, Tab K;
- (7) *Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor* [1976] 2 MLJ 177, Tab L;
- (8) Section 17 of the Contracts Act 1950, Tab O;
- (9) *Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu (Personal Representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45, Tab P;
- (10) *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 544, Tab Q;



- (11) Section 18 of the Contracts Act 1950, Tab R;
- (12) *Travelsight (M) Sdn Bhd & Anor v. Atlas Corp Sdn Bhd* [2003] 6 MLJ 658, Tab S;
- (13) Rule 17 of the Legal Profession (Practice and Etiquette) Rules 1978, Tab T;
- (14) *Re Zainur Zakaria* [1999] 2 MLJ 577; Tab U;
- (15) *Dato' Wong Gek Meng v. Pathmanathan a/l Mylavaganam & Ors* [1998] 5 MLJ 560, Tab V;
- (16) *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] Malaysian Reports 196, Tab W;
- (17) *Md Sidek bin Salim & Anor v. Rosli bin Abu Hasan & Ors* [2018] MLJU 2002, Tab X;
- (18) *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, Tab Y;
- (19) *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301, Tab Z;
- (20) *Boustead Trading (1995) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, Tab Za;
- (21) *Sim Thong Realty Sdn Bhd v. The Kim Dar @ Tee Kim* [2003] 3 MLJ 460, Tab Zb;
- (22) *Hitachi Zosen Robin Dockyard (Pte) Ltd v. Lee Pui Keng & Anor* [1998] 2 MLJ 473, Tab Zc;
- (23) *Eikobina (M) Sdn Bhd v. Mensa Mercantile (Far East) Pte Ltd* [1994] 1 MLJ 553, Tab Zd; and

(24) *Commissioner of Wealth Tax v. Dr Karan Singh And Others Etc* [1993] 1 SCR 569, Tab Ze.

### **Plaintiffs' oral submissions made on 23.07.2019**

[429] In their oral submissions made through Mr. Selvam, the plaintiffs' lead counsel, on 23.07.2015, the plaintiffs informed the Court that the plaintiffs have agreed that the "Perjanjian" (in Malay or "Agreement" in English) in the said CJ should be a LA and that the only issue left is the insertion by Baskaran (DW3), the 5<sup>th</sup> defendant, of the words "and vacant possession provided" in the LA, which were absent in the said CJ.

[430] Mr. Selvam submitted that even though the plaintiffs have orally conceded that the preparation of a draft LA by the 1<sup>st</sup> defendant for the execution of the SAR (PW1), is not a breach of the said CJ due to the duration of the initial term of the tenancy being for a period of 8 (eight) years as agreed upon between the plaintiffs and the 1<sup>st</sup> defendant, the execution of the LA by the SAR (PW1) was fraudulently procured on behalf of the 1<sup>st</sup> defendant by the 6<sup>th</sup> defendant acting through the 4<sup>th</sup> defendant (DW2) and the 5<sup>th</sup> defendants (DW3), through the use of postdated cheques without sufficient moneys in the 1<sup>st</sup> defendant's bank account to meet the postdated cheques allegedly issued by the 1<sup>st</sup> defendant for the payment of the arrears of rent of RM253,500.00 for the Ground Floor and the deposits under the said LA.

### **Plaintiffs' oral submissions-in-reply made on 23.07.2019**

[431] In the plaintiffs' oral submissions-in-reply made on 23.07.2019, Mr. Selvam submitted that the principles of *res judicata*,

estoppel and waiver do not apply in the instant case as there are special and exceptional circumstances due to the fraud committed by the defendants on the plaintiffs. He referred to the Federal Court case of *Manoharan a/l Malayalam v. Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 MLJ 660, Tab M, in support of the plaintiffs' oral submissions-in-reply.

[432] Therefore, the plaintiffs submitted that the plaintiffs' claim against the defendants ought to be allowed.

[433] In answer to a question from the Court, Mr. Selvam informed the Court that in the event that this Court were to give judgment in the plaintiffs' favour, *viz* firstly, that there was fraud committed by the defendants on the plaintiffs when the 4<sup>th</sup> defendant obtained the signatures of the SAR on behalf of the plaintiffs in the said LA on 18.01.2016, without prior notification to the plaintiffs' second set of solicitors, by using the 1<sup>st</sup> defendant's worthless cheques and by suppressing from the SAR the evidence that the words "and vacant possession provided" in the said LA were inserted by the 5<sup>th</sup> defendant, and secondly, there was conspiracy on their part to defraud the plaintiffs when the 1<sup>st</sup> defendant issued worthless cheques through the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the 2<sup>nd</sup> defendant handed them to the 6<sup>th</sup> defendant and the 6<sup>th</sup> defendant having knowledge that the 1<sup>st</sup> defendant's cheques were worthless did not hand them over to the plaintiffs after the SAR executed the said LA on behalf of the plaintiffs, the plaintiffs would file 2 (two) applications to review the 2 (two) judgments for specific performance of the said CJ and for assessment of damages, respectively.

[434] In my view as the plaintiffs have conceded that the 6<sup>th</sup> defendant acted in accordance with the applicable law, *viz* Section 221 of

the NLC 1965, by preparing a final draft of the LA instead of a TA for the execution of the SAR (PW1) as the duration of the initial term of the tenancy of the building as stated in the said CJ is 8 (eight) years, there was no necessity for me to deal with the submissions of the plaintiffs to the contrary on this issue in the POS and the POS (Part II). Hence, I have not dealt with them.

### **1<sup>st</sup> to 3<sup>rd</sup> defendants' proven case**

[435] Below is the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' proven case.

[436] The 2 (two) witnesses called by the 1<sup>st</sup> to the 3<sup>rd</sup> defendants are as follows:

- (1) Mr. Alagarsamy ("Alagar"), the 2<sup>nd</sup> defendant himself, who gave evidence for himself and on behalf of the 1<sup>st</sup> defendant, as DW4; and
- (2) Mdm. Selvi Rani A/L Kandiah ("Selvi"), the 3<sup>rd</sup> defendant herself, who gave evidence for herself and on behalf of the 1<sup>st</sup> defendant, as DW6.

[437] In his examination-in-chief given *vide* his Witness Statement, enclosure (71), efiled on 28.08.2018, Exhibit D(D4-D6)46, Alagar (DW4), aged 46 years, gave evidence in the Tamil language through a Tamil language interpreter, *inter alia*, as follows:

- (1) DW4 is one of the two directors of the 1<sup>st</sup> defendant;
- (2) DW4 has given the cheques to his solicitor and the plaintiffs have to sign the agreement and give vacant possession in accordance with the said CJ;



- (3) DW4 identified the cheques which were signed by his wife, Selvi, the 3<sup>rd</sup> defendant, and which he has given to his solicitor;
- (4) DW4 did not sign any of the cheques;
- (5) The 1<sup>st</sup> defendant took the initiative through the 6<sup>th</sup> defendant to prepare the TA and it was sent to the plaintiffs' solicitors, Messrs. S. Mogan & Co., for approval;
- (6) Messrs. S. Mogan & Co., made some changes to the TA and changed the TA to a LA;
- (7) The plaintiffs breached the said CJ when the plaintiffs failed to show any intention to sign the LA;
- (8) DW4 acting on behalf of the 1<sup>st</sup> defendant instructed his solicitor to write to Messrs. S. Mogan & Co. to ask the plaintiffs to comply with the said CJ;
- (9) In their letter of reply dated 02.09.2015 to his solicitor's letter dated 25.08.2015, Messrs. S. Mogan & Co. gave frivolous reasons why the plaintiffs were unable to give vacant possession, *viz* that there are existing tenants and the tenancy will only expire on 31.12.2015;
- (10) On the same day, *viz* 02.09.2015, the 6<sup>th</sup> defendant sent a letter of reply to Messrs. S. Mogan & Co. but there was no reply from the latter;
- (11) So the 6<sup>th</sup> defendant, in accordance with DW4's instruction, sent a letter dated 23.09.2019 to the plaintiffs' solicitors to inform them that the 1<sup>st</sup> defendant has



instructed the 6<sup>th</sup> defendant to take legal action to obtain an order of specific performance of the said CJ;

- (12) However, even though letters and / or notices were sent to the plaintiffs, they still refused, failed and / or neglected to comply with the said CJ and to sign the LA;
- (13) So the 1<sup>st</sup> defendant filed the 2015 OS case dated 20.10.2015 and the plaintiffs engaged Messrs. D. Prasad & Partners to handle the case for them;
- (14) The 1<sup>st</sup> defendant obtained the SP Judgment after the Sessions Court Judge allowed the 1<sup>st</sup> defendant's application for SP of the said CJ;
- (15) The plaintiffs applied *vide* the 2015 writ case dated 04.11.2015 to set aside the said CJ but on 08.03.2016, the plaintiffs' writ was struck out due to the absence of the plaintiffs' solicitor;
- (16) DW4 identified the draft order, at pg. 226, Bundle 'C', ID(D1-D3)42;
- (17) On 23.12.2015, the 6<sup>th</sup> defendant acting upon DW4's instructions on behalf of the 1<sup>st</sup> defendant sent a letter to the plaintiffs' solicitors but there was no reply from the plaintiffs' solicitors;
- (18) On 30.12.2015, the 6<sup>th</sup> defendant received a fax from the plaintiffs' solicitors requesting for a copy of the LA for their perusal and execution and for the cheques for the arrears of rental to be paid even though the LA was not executed yet and the said J clearly stated for the new LA to be executed on 01.08.2015 before payment of the arrears of rental on 15.08.2015;



- (19) On the same date, on 30.12.2015, the 6<sup>th</sup> defendant replied to the plaintiffs' solicitors' letter enclosing a copy of the LA and in the letter of reply, the 6<sup>th</sup> defendant stated clearly and in detail how the LA has to be executed and the obligations of both the parties;
- (20) But the plaintiffs did not sign the LA and there was no reply from the plaintiffs' solicitors;
- (21) So the 1<sup>st</sup> defendant had no option but to instruct the 6<sup>th</sup> defendant to communicate with the SAR to execute the LA;
- (22) On 18.01.2016, at about 10.30 AM in the morning, the 4<sup>th</sup> defendant acting under the instruction of the 6<sup>th</sup> defendant met the SAR, Puan Zura (PW1), and obtained her signatures for the LA on behalf of the plaintiffs;
- (23) Subsequently, the 6<sup>th</sup> defendant acting on the 1<sup>st</sup> defendant's instructions got the LA stamped and on 28.01.2016, the 6<sup>th</sup> defendant sent a copy of the said LA to the plaintiffs' solicitors;
- (24) DW4 identified the said LA, at pp. 99 to 112, Bundle 'C', ID1;
- (25) DW4 identified his signatures in the said LA, at pp. 110 and 112, Bundle 'C', ID1, and the Court marked them as P1C and P1D, respectively;
- (26) However, I noted that DW4 did not state when he signed the said LA, at pp. 110 and 112, Bundle 'C', ID1;
- (27) After the 6<sup>th</sup> defendant sent the letter dated 28.01.2016 to the plaintiffs' solicitors together with a copy of the said





LA, the plaintiffs changed their solicitors for the third time and their (third set of) solicitors, Messrs. Selvam Shanmugam & Partners filed the 2015 Sessions Court OS case to stay the execution of the SP Judgment and to set aside the said LA dated 27.01.2016;

- (28) But on 25.03.2016, the Sessions Court Judge dismissed the plaintiffs' application with costs of RM 1,500.00 and the plaintiffs have not paid the costs ordered against them until todate;
- (29) On 08.03.2016, the plaintiffs filed the 2016 OS case to apply for extension of time to file their appeal out of time against the dismissal of their application by the Sessions Court Judge;
- (30) The 1<sup>st</sup> defendant instructed the 6<sup>th</sup> defendant to oppose the plaintiffs' application in the 2016 OS case and the 6<sup>th</sup> DW4 defendant filed an affidavit-in-reply affirmed by DW4 on 24.03.2016, at p. 118 to 139, Bundle 'C', Exhibit D(D1-D3)44, an affidavit affirmed by Mr. Mogan on 25.03.2016, an affidavit affirmed by Baskaran on 25.03.2016, and an affidavit affirmed by Ananthan on 25.03.2016;
- (31) In the 2016 OS case, on 15.04.2016, Yeoh Wee Siam J dismissed the plaintiffs' application and the plaintiffs filed a notice of appeal dated 15.04.2016 to the Court of Appeal;
- (32) But their appeal, W-02(IM)NCvC-782-04/2016, was dismissed by the Court of Appeal on 15.07.2016 with costs of RM 10,000.00 and until todate, the costs have not been paid by them;



- (33) The plaintiffs did not appeal against the decision of the Court of Appeal to the Federal Court;
- (34) The plaintiffs then issued a Section 218 notice to the 1<sup>st</sup> defendant under the Companies Act 1965;
- (35) The 1<sup>st</sup> defendant applied for an injunction against the plaintiffs *vide* OS No; WA-24NCVC-222-05/2016 and on 27.06.2016, Noorin Binti Badaruddin JC allowed the 1<sup>st</sup> defendant's application and ordered the plaintiffs to pay costs of RM 2,000.00 and until todate, the costs have not been paid by the plaintiffs;
- (36) DW4 identified the Injunction Order dated 27.06.2016 and the Grounds of Judgment of the learned High Court Judge, at pp. 27 to 59, Bundle 'B');
- (37) The plaintiffs appealed to the Court of Appeal *vide* their notice of appeal dated 27.07.2016 and on 15.12.2016, the Court of Appeal allowed their appeal, WA-02(NCC)(A)-1391-08/2016, set aside the Injunction Order with costs of RM 10,000.00 and ordered the 1<sup>st</sup> defendant to pay the arrears of rental and enforce the said LA;
- (38) The 1<sup>st</sup> defendant filed a Notice of Motion dated 29.12.2016 for leave to appeal to the Federal Court but the 1<sup>st</sup> defendant withdrew the Notice of Motion;
- (39) After the Court of Appeal set aside the Injunction Order dated 27.06.2016, the plaintiffs did not file a Winding Up Petition against the 1<sup>st</sup> defendant;
- (40) After the 1<sup>st</sup> defendant obtained the SP Judgment against the plaintiffs, the 1<sup>st</sup> defendant instructed the 6<sup>th</sup> defendant to apply for Assessment of Damages against the plaintiffs



and the 1<sup>st</sup> defendant's application *vide* the 2015 Sessions Court OS case was allowed by the Sessions Court;

- (41) The Sessions Court ordered the plaintiffs to pay damages of RM 425,000.00 less the rental of RM 178,500.00 for the Ground Floor and the arrears of rental of RM283,500.00 leaving a balance of RM 37,000.00 to be paid by the 1<sup>st</sup> defendant with costs of RM 5,000.00 to the 1<sup>st</sup> defendant;
- (42) DW4 identified the Sessions Court Order dated 31.03.2017 and the Grounds of Judgment of the learned Sessions Court Judge, at pp. 6 and 61 and pp. 83 to 98, Bundle 'B', respectively;
- (43) During the Assessment of Damages, the plaintiffs did not object to the validity of the said LA and the plaintiffs relied on the clauses in the said LA that favoured them, *viz* the clauses for the payments of the deposits and rental under the said LA and this shows that the plaintiffs have accepted and admitted the validity of the said LA;
- (44) So the plaintiffs cannot withdraw their acceptance and admission (of the validity of the said LA) and should be estopped from touching on the same subject matter in this Writ;
- (45) I noted that the 1<sup>st</sup> defendant has pleaded ordinary estoppel in paragraph 11 of the 1<sup>st</sup> defendant's SOD, *viz* that the plaintiffs must be estopped from challenging the validity of the said LA, at pg. 42, Bundle of Pleadings, Bundle 'A';
- (46) DW4 identified the Witness Statement of Raja Kumary A/P Panjacharam, the 2<sup>nd</sup> plaintiff, in the Notes of Evidence of the 2015 Sessions Court OS case, at pp. 2 to 4, Bundle 'F',

- (47) The Court had marked the Witness Statement of Raja Kumary A/P Panjacharam, the 2<sup>nd</sup> plaintiff, at pp. 2 to 4, in the 2015 Sessions Court OS case, Bundle ‘F’, as Exhibit D(D1-D3)45, upon the request of Mr. Nair but subsequently cancelled this marking on the misunderstanding that the contents of Bundle ‘F’, viz pp. 1 to 4, was earlier marked as Exhibit P37 by the Court during the cross-examination of Baskaran (DW3) by Mr. Selvam;
- (48) Even though Mr. Selvam had explained that upon his request only the 6<sup>th</sup> defendant’s letter to the SAR, at pg. 1, Bundle ‘F’, was marked as Exhibit P37, the Court made an error and did not reinstate the marking of the Witness Statement of Raja Kumary A/P Panjacharam, the 2<sup>nd</sup> plaintiff, at pp. 2 to 4, Bundle ‘F’, as Exhibit D(D1-D3)45, until after Mr. Nair raised the matter again, after he had completed the examination-in-chief of DW4;
- (49) The plaintiffs appealed to the High Court against the Assessment of Damages by the Sessions Court Judge but on 16.10.2017, Wan Ahmad Farid Bin Wan Salleh JC dismissed the plaintiffs’ appeal with costs of RM 3,000.00;
- (50) DW4 identified the Grounds of Judgment of the learned High Court Judge, at pp. 62 to 76, Bundle ‘B’;
- (51) The plaintiffs appealed to the Court of Appeal against the dismissal of their appeal by the High Court Judge but on 14.02.2018, the Court of Appeal dismissed the plaintiffs’ appeal with costs of RM 10,000.00;
- (52) The 1<sup>st</sup> defendant then filed OS No. WA-474-2954-08/2017 dated 01.08.2017 in the KL Magistrate’s Court to obtain an

order for vacant possession of the premises (“the 2017 KL Majistrate’s Court OS case”);

- (53) But on 07.03.2018, upon the advice of the Majistrate, the 1<sup>st</sup> defendant withdrew the 2017 KL Majistrate’s Court OS case with costs of RM 1,400.00 so as to file a similar application in the KL Sessions Court;
- (54) So the 1<sup>st</sup> defendant filed OS No. WA-A54-103-07/2018 in the KL Sessions Court (“the 2018 KL Sessions Court OS case to obtain an order for vacant possession of the premises but the 1<sup>st</sup> defendant’s application has not been heard yet;
- (55) DW4 strongly denied the plaintiffs’ allegation that the 1<sup>st</sup> to the 3<sup>rd</sup> defendants had conspired with the 4<sup>th</sup> to the 6<sup>th</sup> defendants and obtained the signatures of the SAR through fraud to execute the LA;
- (56) The reason is because the 1<sup>st</sup> defendant obtained the SP Judgment to obtain the signatures of the SAR to execute the LA if the plaintiffs refused to sign the LA and the plaintiffs have refused to sign the LA despite having been given repeated notices to do so and the issue of fraud raised by the plaintiffs has been decided by Yeoh Wee Siam J when considering the plaintiffs’ application for extension of time to file an appeal against the decision of the Sessions Court and the decision of the High Court Judge in dismissing the plaintiffs’ application for extension of time has been affirmed by the Court of Appeal;
- (57) So DW4 believes that this action filed by the plaintiffs is vexatious and has wasted the time of all the parties;

- (58) In regard to his earlier evidence on the giving of the cheques by him to the 1<sup>st</sup> defendant's solicitor, at p. 427 and 428, Bundle 'D', DW4 could not recall the date that the event took place but he could recall that the event took place 2 (two) weeks before 01.08.2015;
- (59) When DW4 was referred to the bank statements in Bundle 'Aa' and Bundle 'Cc' and asked to explain why he had given the cheques to the 1<sup>st</sup> defendant's solicitor when there were insufficient moneys in the 1<sup>st</sup> defendant's bank account on the dates stated in the cheques, DW4 said that based on the bank statements, the 1<sup>st</sup> defendant had sufficient moneys in the 1<sup>st</sup> defendant's bank account to meet the cheque for RM 70,000.00 when DW4 handed the cheque to the 1<sup>st</sup> defendant's solicitor 2 (two) weeks before 01.08.2015 but he had withdrawn the moneys on 04.08.2015; and
- (60) DW4 explained that he had withdrawn the moneys on 04.08.2015 due to 3 (three) reasons, firstly, he should have gotten vacant possession on 01.08.2015 so he waited until 04.08.2015 for vacant possession to be delivered to him but until 04.08.2015, he did not get vacant possession, secondly, he runs a business near the building and he saw that the occupants of the premises were new people and not the same people who had occupied the premises before, and this caused him to withdraw the moneys from the 1<sup>st</sup> defendant's account and he used the moneys for his other business.

[438] During cross-examination by Mr. Nekoo, DW4 said, *inter alia*, as follows:



- (1) DW4 agreed with the suggestions that during the recording of the said CJ he and the plaintiffs were present in the Sessions Court and he was represented by Baskaran (DW3), the 5<sup>th</sup> defendant, and the plaintiffs were represented by Mr. Mogan (DW1);
- (2) DW4 agreed with the suggestion that his solicitor, Baskaran (DW3) had informed him of Mr. Mogan's (DW1's) proposal to convert the name of the TA to a LA and he had agreed with the proposal;
- (3) DW4 agreed with the suggestion that the 2015 Sessions Court OS case was filed by his solicitor, Baskaran (DW3), the 5<sup>th</sup> defendant, upon his instructions;
- (4) DW4 agreed with the suggestion that in the 2015 Sessions Court OS case, the plaintiffs were represented by Messrs. D. Prasad & Partners;
- (5) DW4 agreed with the suggestion that the 6<sup>th</sup> defendant had sent the letter, at pg. 393, Bundle 'C', to the plaintiffs' solicitors, Messrs. D. Prasad & Partners, in which the 6<sup>th</sup> defendant had mentioned the LA in the third paragraph;
- (6) DW4 agreed with the suggestion that he was not informed that Messrs. D. Prasad & Partners had raised any objection to the use of the word "Lease" Agreement;
- (7) DW4 agreed with the suggestion that to the best of his knowledge, Messrs. D. Prasad & Partners did not object to the use of the words "Lease Agreement";
- (8) DW4 agreed with the suggestion that the 6<sup>th</sup> defendant had enclosed a copy of the SP Judgment together with their



letter at pg. 393, Bundle ‘C’, and advised the plaintiffs’ solicitors to direct their clients to sign the LA;

- (9) DW4 agreed with the suggestion that to the best of his knowledge, the plaintiffs did not sign the LA within the time stated in the 6<sup>th</sup> defendant’s letter;
- (10) DW4 agreed with the suggestion that the 6<sup>th</sup> defendant sent the letter dated 15.01.2016 to the SAR to make an appointment with the SAR, at pg. 1, Bundle ‘F’, Exhibit P37;
- (11) DW4 agreed with the suggestion that the reason that is stated in the letter is to obtain the signatures of the SAR on the ground of the plaintiffs’ non-compliance of the SP Judgment;
- (12) DW4 did not accompany the 4<sup>th</sup> defendant to the court to meet the SAR;
- (13) DW4 agreed with the suggestion that the first time the plaintiffs in this case raised the issue concerning the use of the words “Lease Agreement” was by the plaintiffs’ third set of solicitors, Messrs. Selvam Shanmugam & Partners;
- (14) DW4 agreed with the suggestion that he had given the cheques, at pp. 427 and 428, Bundle ‘D’, to Baskaran (DW3), the 5<sup>th</sup> defendant;
- (15) DW4 agreed with the suggestions that the first term of the said CJ requires him to make payment to the plaintiffs, and that the said CJ does not require him to give postdated cheques to the plaintiffs;



- (16) DW4 had given the cheques to Baskaran (DW3), the 5<sup>th</sup> defendant, with his instruction to hand over the first cheque dated 28.07.2015 upon the plaintiffs executing the LA and giving vacant possession and to hand over the other cheques on the dates as stated in the respective cheques;
- (17) DW4 could not remember whether at the time he gave the cheques to DW3 he had informed DW3 whether the cheques could be cashed on the dates as stated in the respective cheques; and
- (18) DW4 had instructed DW3 that he was ready to make any payment that had to be made after the LA was signed and vacant possession given.

[439] In his cross-examination by Mr. Selvam, DW4 testified, *inter alia*, as follows:

- (1) DW4 agreed with the suggestion that the 1<sup>st</sup> defendant did not make payment on 15.08.2015 of RM 26, 700.00 being the first instalment of the outstanding rentals of RM283,500.00 as stated in paragraph 1 after deducting the RM 30,000.00 deposit as stated in paragraph 2 to the plaintiffs;
- (2) However, DW4 denied that he has breached paragraph 1 of the said CJ by not making payment of the sum of RM 253,500.00 after deducting the RM 30,000.00 deposit as stated in paragraph 2 from the outstanding rentals of RM 283,000.00 as stated in paragraph 1;
- (3) DW4 explained that he handed over the cheque for RM 26, 700.00 for the payment of the first instalment of the



outstanding rentals to the 1<sup>st</sup> defendant's solicitor so that the solicitors of both parties, *viz* the plaintiffs and the 1<sup>st</sup> defendant, can ensure that both parties comply with the said CJ;

- (4) DW4 agreed with the suggestion that he was ordered by the Sessions Court under the said CJ to make the payment of the first instalment on 15.08.2015;
- (5) DW4 explained that he had given the cheque to his solicitor prior to 01.08.2015 for the purpose of making the payment of the first instalment under the said CJ on 15.08.2015;
- (6) DW4 identified the second cheque dated 15.08.2015 as the cheque for the purpose of making the payment on 15.08.2015 of the first instalment under the said CJ;
- (7) DW4 agreed with the suggestion that his 4 (four) other cheques dated 15.09.2015, 15.10.2015, 15.11.2015 and 15.12.2015, respectively, were also not handed over to the plaintiffs;
- (8) DW4 disagreed with the suggestion that the reason why he refused to pay the plaintiffs in accordance with paragraph 1 of the said CJ was because the 1<sup>st</sup> defendant did not have the money to pay the plaintiffs;
- (9) DW4 disagreed with the suggestion that due to this reason, he had conspired to cheat the plaintiffs and to refuse to pay the plaintiffs;
- (10) DW4 also disagreed with the suggestion that he had used a company, *viz* the 1<sup>st</sup> defendant, that did not have money to cheat the plaintiffs;



- (11) DW4 disagreed with the suggestion that on the date that is stated in the cheque there must be sufficient moneys in the 1<sup>st</sup> defendant's bank account;
- (12) DW4 explained that there must be sufficient moneys in the 1<sup>st</sup> defendant's bank account on the date that the cheque is presented to the bank for encashment;
- (13) DW4 is the person in charge of giving instructions in the 1<sup>st</sup> defendant;
- (14) DW4 had instructed his solicitors to inform him the dates of the handing over of the respective cheques to the plaintiffs;
- (15) DW4 did not discuss with his solicitor the matter on whether the 1<sup>st</sup> defendant has money in the bank to meet the respective cheques;
- (16) DW4 agreed with the suggestion that Baskaran was holding the cheques as the stakeholder;
- (17) However, DW4 disagreed with the suggestion that he had instructed Baskaran to hold the cheques which were "worthless", viz had no value;
- (18) DW4 also disagreed with the suggestion that he had the knowledge that the cheques had no value and that there were no moneys to meet the cheques;
- (19) DW4 agreed with the suggestion that he knew that the balance in the 1<sup>st</sup> defendant's bank account on 15.12.2015 was RM 2, 249.63 even though the total amount of 5 (five) of the cheques was RM 253,500.00;

- (20) However, DW4 disagreed with the suggestion that the reason why he did not inform or discuss with Baskaran, who was holding the cheques as the 1<sup>st</sup> defendant's stakeholder, was that he wished to cheat the plaintiffs or to commit fraud on the plaintiffs;
- (21) DW4 agreed with the suggestion that the total amount of 2 (two) of the cheques for RM 70,000.00 and RM 26,700.00 ("the 2 (two) cheques"), respectively, was RM 96,000.00 but the closing balance in the 1<sup>st</sup> defendant's account for the month of August 2018 was only RM 34,831.23;
- (22) However, DW4 disagreed with the suggestion that the 2 (two) cheques had no value and could not be cashed;
- (23) DW4 agreed with the suggestion that he, in his capacity as a director of the 1<sup>st</sup> defendant, had handed over the 2 (two) cheques to the 5<sup>th</sup> defendant before the 6<sup>th</sup> defendant sent the letter dated 25.08.2015, written by the 5<sup>th</sup> defendant, at pg. 385, Bundle 'C', Exhibit P7, to Messrs. Mogan & Co., the plaintiffs' solicitors, informing the latter, in the second paragraph, that the 1<sup>st</sup> defendant had complied with the said CJ by depositing the 2 (two) cheques with the 6<sup>th</sup> defendant for the said deposits and the balance of the first instalment for the payment of the outstanding rentals;
- (24) When it was suggested to him that on 25.08.2015 when the letter dated 25.08.2015 was sent to Messrs. Mogan & Co. by the 6<sup>th</sup> defendant, the 2 (two) cheques had no value, DW4 said that on 25.08.2015, there were no moneys in the 1<sup>st</sup> defendant's account for the 2 (two) cheques;

- (25) DW4 explained that on 25.08.2015, he had money for the 2 (two) cheques but he had not put the moneys into the 1<sup>st</sup> defendant's account yet;
- (26) DW4 also explained that the reason why he, as a director of the 1<sup>st</sup> defendant, had applied to the court to strike out this Writ against the 2<sup>nd</sup> defendant (“the striking application”) is because he is a separate entity from the 1<sup>st</sup> defendant, which is a limited company;
- (27) DW4 disagreed with the suggestion that the purpose of filing the striking application was to prevent the evidence from being revealed to the court;
- (28) DW4 reiterated that he did not commit any wrong, fraud or conspiracy and he had acted in accordance with the said CJ;
- (29) DW4 explained that as a businessman, he waited until 04.08.2015 for the plaintiffs to sign the LA and to give vacant possession but the plaintiffs did not sign the LA and give vacant possession and so he withdrew a sum of RM 125,000.00 on 04.08.2015 from the 1<sup>st</sup> defendant's account to pay for his business expenses;
- (30) DW4 disagreed with the suggestion that it is not stated in the said CJ that the 1<sup>st</sup> defendant does not have to pay the arrears of rent if vacant possession is not given to the 1<sup>st</sup> defendant;
- (31) DW4 disagreed with the suggestion that the plaintiffs did not want to sign the LA because the said CJ does not have the words “*Perjanjian Pajakan*”;



- (32) DW4 disagreed with the suggestion that he fraudulently instructed his solicitor to take the fraudulent LA and the cheques, which had no value, to the SAR for the signing of the LA;
- (33) DW4 disagreed with the suggestion that he had conspired with the other defendants to commit fraud on the plaintiffs;
- (34) DW4 disagreed with the suggestion that he had conspired with the other defendants to commit misrepresentation on Puan Zura (PW1);
- (35) DW4 disagreed with the suggestion that due to the fraud and misrepresentation, the plaintiffs have suffered loss until today;
- (36) DW4 disagreed with the suggestion that the 1<sup>st</sup> defendant has not made any payment until today;
- (37) DW4 explained that the 1<sup>st</sup> defendant has paid the plaintiffs as the amount of the outstanding rentals was set off from the damages (awarded to the 1<sup>st</sup> defendant by the Sessions Court);
- (38) Mr. Suaran Singh highlighted to the Court that it is not pleaded in the SOC that the judgment for the Assessment of Damages is tainted with fraud;
- (39) In response, Mr. Selvam submitted that fraud and misrepresentation are the plaintiffs' 2 (two) causes of action in the SOC; and
- (40) DW4 disagreed with the suggestion that the reason why the plaintiffs filed this action is due to the acts of the 2<sup>nd</sup>

defendant and the solicitors of the 1<sup>st</sup> to the 3<sup>rd</sup> defendant, viz the 4<sup>th</sup> to the 6<sup>th</sup> defendants.

[440] On 17.07.2019, when the full trial continued with the calling of DW4 for further examination-in-chief by Mr. Suaran Singh, I noted that in the SOC, the plaintiffs have pleaded the words “tidak mampu membayar” in regard to the 1<sup>st</sup> defendant’s inability to pay the outstanding rentals. I also noted that in the SOD, the 1<sup>st</sup> defendant has pleaded a denial to the plaintiffs’ averment to that effect.

[441] In his further examination-in-chief by Mr. Suaran Singh, DW4 said, *inter alia*, as follows:

- (1) When DW4 was referred to pg. 1, Bunde ‘Ee’, and asked what is it, DW4 said that it is a Fixed Deposit Joint Account (“FDJA”) statement dated 15.07.2015 in his and his wife’s names for the amount of RM 1,133,271.82;
- (2) When DW4 was referred to pp. 2 to 8, Bunde ‘Ee’, and asked what are they, DW4 said they are statements for the same FDJA;
- (3) DW4 said that the statement at pg. 8 is dated 15.02.2016 and the amount is RM 1,170,668.40;
- (4) DW4 said that the statement at pg. 7 is dated 15.01.2016 and the amount is RM 1,170,668.40; and
- (5) DW4 said that the statements at pp. 2 to 6 are for the months of August 2015 to December 2015, respectively, and the amount is RM 1,133,271.82 for each of the statements.

[442] DW4 purportedly produced the original copies of the 8 (eight) statements and Mr. Suaran Singh requested for pp. 1 to 8, Bundle 'Ee', to be marked as Exhibits D (D1-D3) 54 to 60, respectively. However, Mr. Selvam objected on the ground that it is doubtful that the copies produced by DW4 are the original copies as the CIMB Bank's logo is not in colour.

[443] DW4 explained that after he had seen a bank officer by the name of Ms. Farah to request for copies of the 8 (eight) statements of his FDJA with his wife, he was instructed by Ms. Farah to make his request in writing. Subsequently, the 8 (eight) statements were handed over to him by Ms. Farah.

[444] However, the Court rejected Mr. Suaran Singh's request for the 8 (eight) statements to be marked as Exhibits D (D1-D3) 54 to 60, respectively, on the ground that since the purported original copies of the 8 (eight) statements were not produced through a bank officer, the purported original copies ought to have the CIMB Bank's chop and the initials of the bank officer, Ms. Farah, who allegedly printed them out and handed them over to DW4.

[445] Hence, the Court marked the 8 (eight) statements as ID (D1-D3) 54 to 60, respectively.

[446] In his further cross-examination by Mr. Selvam, DW4 said, *inter alia*, as follows:

- (1) When DW4 pleaded that as a director of the 1<sup>st</sup> defendant he was not responsible for the 1<sup>st</sup> defendant's debt, what he meant was that he and his wife do not have any personal debts;



- (2) The 1<sup>st</sup> defendant did not carry on any business because the 1<sup>st</sup> defendant was not given vacant possession;
- (3) At the time the 1<sup>st</sup> defendant was registered, DW4 and his wife as the shareholders were responsible for investing money in the 1<sup>st</sup> defendant;
- (4) If the plaintiffs had given their cooperation, the 1<sup>st</sup> defendant would have been able to carry on the business (of a hotel in the building);
- (5) DW4 had tried to pay off the 1<sup>st</sup> defendant's debts with his own money; and
- (6) DW4 disagreed with the suggestion that he had produced the 8 (eight) statements, ID (D1-D3) 54 to 60, to deceive this Court and that the 1<sup>st</sup> defendant did not aver in the 1<sup>st</sup> defendant's pleading that the 1<sup>st</sup> defendant has money.

[447] In his further re-examination by Mr. Suaran Singh, DW4 said, *inter alia*, as follows:

- (1) DW4 has produced the 8 (eight) statements, ID (D1-D3) 54 to 60, to show to this Court that as the shareholder and director of the 1<sup>st</sup> defendant, which was set up to commence a business, he has the money to pay the 1<sup>st</sup> defendant's debt;
- (2) This is because the amount as stated in the statement dated 15.01.2016 for the FDJA, at pg. 7, Bundle 'Ee', is RM 1,170,668.40; and
- (3) It was the plaintiffs who did not give their cooperation to the 1<sup>st</sup> defendant and as a result the 1<sup>st</sup> defendant could not proceed to the next stage.

[448] Selvi (DW6), the 1<sup>st</sup> defendant's wife and the other shareholder and director of the 1<sup>st</sup> defendant, gave evidence in her examination-in-chief *vide* her Witness Statement, enclosure (71), efiled on 28.08.2018, Exhibit D(D4-D6)47.

[449] After she produced the original copies of the 1<sup>st</sup> defendant's 6 (six) cheques, at pp. 427 and 428, Bundle 'D', and she identified the signatures in the 6 (six) cheques as her signatures, the Court converted the markings of the copies of the 6 (six) cheques, from ID(D1-D3)25 to 30 to Exhibits D(D1-D3)25 to 30, respectively.

[450] When DW6 was referred to the 8 (eight) statements, at pp. 1 to 8, Bundle 'Ee', she identified them as the statements of her FDJA with her husband, DW4. DW6 said that the statement at pg. 8, Bundle 'Ee', is dated 15.02.2016 and the amount is RM 1,170,668.40. DW6 also said that the statement at pg. 7, Bundle 'Ee', is dated 15.01.2016 and the amount is RM 1,170,668.40.

[451] Mr. Suaran Singh again requested for the 8 (eight) statements, at pp. 1 to 8, Bundle 'Ee', to be marked as Exhibits D (D1-D3) 54 to 60, respectively, but the Court again rejected his request based on the same ground as stated by the Court earlier.

[452] Ms. Parvinder Kaur, the junior counsel for the 4<sup>th</sup> to the 6<sup>th</sup> defendants, informed the Court that she had no cross-examination questions for DW6.

[453] In her cross-examination by Mr. Selvam, DW6 said, *inter alia*, as follows:

- (1) DW6 agreed with the suggestion that she has affixed her signatures to the cheques as a director of the 1<sup>st</sup> defendant;



- (2) DW6 had issued the cheques on the instructions of her husband and she identified the 2<sup>nd</sup> defendant (DW4) as her husband;
- (3) DW6 agreed with the suggestion that she is responsible as a director of the 1<sup>st</sup> defendant but her role in the 1<sup>st</sup> defendant is limited as the 2<sup>nd</sup> defendant is the one who handles everything as he is in charge of managing the accounts;
- (4) DW6 explained that she just signed the cheques on the 2<sup>nd</sup> defendant's instructions and she gave the cheques to the 2<sup>nd</sup> defendant;
- (5) DW6 disagreed with the suggestion that because she signed the cheques, the plaintiffs suffered losses;
- (6) DW6 disagreed with the suggestion that when she signed the cheques there was no money in the bank account to meet the cheques;
- (7) DW6 explained that the reason is because when she prepared the cheques there was enough money in the bank account;
- (8) DW6 does not know that on 08.12.2015, there was only slightly more than RM 2,000.00 in the bank account and that there was insufficient money to meet the total amount of the cheques of RM 323,500.00 on that date;
- (9) DW6 disagreed with the suggestion that she and her husband have cheated the plaintiffs and committed fraud on the plaintiffs and together with the 4<sup>th</sup> to the 6<sup>th</sup> defendants have misrepresented and collectively, committed fraud on the plaintiffs;

- (10) However, DW6 agreed with the suggestion that the cheques that she signed were used by the 4<sup>th</sup> defendant on 18.01.2016 to induce Puan Zura to execute the LA, *viz* to affix her signatures;
- (11) DW6 also disagreed with the suggestion that she is liable for the fraud and misrepresentation committed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the 4<sup>th</sup> to the 6<sup>th</sup> defendants; and
- (12) DW6 also disagreed with the suggestion that she, the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant conspired with the 4<sup>th</sup> to the 6<sup>th</sup> defendants to commit fraud on the plaintiffs and that due to what they did, the plaintiffs have suffered losses.

[454] In her re-examination by Mr. Suaran Singh, DW6 said, *inter alia*, as follows:

- (1) DW6's signature does not appear in the said LA, at pg. 112, Bundle 'C';
- (2) DW6 was not present during the signing of this document, *viz* the said LA;
- (3) DW6's role was only to prepare the cheques in July 2015 and the 2<sup>nd</sup> defendant was in charge of getting the documents done with the lawyer;
- (4) When DW6 was asked to explain why she had agreed with the suggestion that the cheques that she signed were used by the 4<sup>th</sup> defendant on 18.01.2016 to induce Puan Zura to execute the LA, *viz* to affix Puan Zura's signatures in the LA, DW6 apologised and she asked for the correct meaning of the word "induce"; and



(5) After Mr. Suaran Singh explained to her that the words “to induce” mean “to persuade or to compel or to cheat someone, try to get them to do something”, DW6 apologised and she said that the 2<sup>nd</sup> defendant did not cheat, that she did not prepare the cheques to get anyone to cheat and the 2<sup>nd</sup> defendant did not cheat the SAR by getting the signatures from the SAR for the LA.

[455] After Mr. Suaran Singh completed his re-examination of DW6, the Court posed 2 (two) questions to DW6.

[456] In her answer to the first question from the Court on what are her academic qualifications, DW6 said she has only a *SPM*.

[457] Before the Court posed the second question to DW6, the Court referred her to her testimony that she is the one who issues the cheques and to her testimony that she has issued the cheques based on the instructions of her husband. The Court then asked DW6 whether she knows what is the period that a cheque issued by her will be valid and can be cashed at the bank and DW6 said that she was not sure.

### **1<sup>st</sup> to 3<sup>rd</sup> defendants’ Written Submissions dated 23.07.2019**

[458] In their Written Submissions dated 23.07.2019, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants submitted that the plaintiffs’ action must be dismissed with costs based on the reasons with which I agreed and which I have incorporated in my Grounds of Judgment.

### **1<sup>st</sup> to 3<sup>rd</sup> defendants’ oral submissions**

[459] Mr. Suaran Singh submitted that the plaintiffs’ cause of action is based on the cheating of Puan Zura by the 4<sup>th</sup> defendant using

the cheques to induce her to sign the said LA. However, there was no evidence that the 4<sup>th</sup> defendant showed her the cheques and that she signed the LA after she saw the alleged “worthless” cheques.

[460] Mr. Suaran Singh also submitted that the 1<sup>st</sup> plaintiff, Karpayah (PW4), is not a credible witness because he has given differing reasons why vacant possession of the First, Second and Third Floors of the premises were not given to the 1<sup>st</sup> defendant in accordance with the said CJ.

[461] Mr. Suaran Singh also submitted that the particulars of fraud were not pleaded by the plaintiffs, that the plaintiffs are changing the particulars of fraud during the course of the full trial and that up until the date fixed for oral submissions / clarification / decision of this case after the conclusion of the full trial, the plaintiffs have not provided vacant possession of the First, Second and Third Floors of the premises to the 1<sup>st</sup> defendant.

### **1<sup>st</sup> to 3<sup>rd</sup> defendants’ oral submissions-in-reply**

[462] In the 1<sup>st</sup> to the 3<sup>rd</sup> defendants’ oral submissions-in-reply, Mr. Suaran Singh submitted that the 1<sup>st</sup> defendant did not comply with the said LA, *viz* make payment to the plaintiffs of the said deposits, because vacant possession of the First, Second and Third Floors of the building was not given to the 1<sup>st</sup> defendant on 01.08.2015 as specified in the said CJ and again on 01.01.2016 despite the plaintiffs stating in their solicitors’ letter, *viz* Messrs. S. Mogan & Co.’s letter, that the plaintiffs have given notice to the existing tenant to vacate the premises by 31.12.2015.

[463] Mr. Suaran Singh also submitted that the case of *Commissioner of Wealth Tax v. Dr Karan Singh And Others Etc* [1993] 1 SCR 569, referred to by the plaintiffs in Tab Ze of the PBOA, is inapplicable to this case as the Judgment in this case is a CJ recorded by the Sessions Court and not a Judgment delivered by the Sessions Court after a full trial.

#### **4<sup>th</sup> to 6<sup>th</sup> defendants' proven case**

[464] Below is the 4<sup>th</sup> to the 6<sup>th</sup> defendants' proven case.

[465] The 4 (four) witnesses called by the 4<sup>th</sup> to the 6<sup>th</sup> defendants are as follows:

- (1) Mr. Santhiran Mogan A/L Rengasamy ("Mr. Mogan"), the plaintiffs' previous solicitor, who acted for the plaintiffs at the time the plaintiffs entered into the said CJ with the 1<sup>st</sup> defendant, as DW1;
- (2) Ananthan A/L Vijayakumar ("Ananthan"), the 4<sup>th</sup> defendant himself, who gave evidence for himself and also on behalf of the 6<sup>th</sup> defendant, as DW2;
- (3) Baskaran Manikam ("Baskaran"), the 5<sup>th</sup> defendant himself, who gave evidence for himself and also on behalf of the 6<sup>th</sup> defendant, as DW3; and
- (4) Encik Mohd Hairi Izwan bin Mohd Yusoff ("Hairi"), an officer of the Income Tax Department, attached to the Stamp Office of Wangsa Maju, who was subpoenaed by the 4<sup>th</sup> to the 6<sup>th</sup> defendants to answer questions raised by the Court in regard to the stamping of the said LA. as DW5,



[466] In his examination-in-chief by Mr. Nekoo, Mr. Mogan (DW1), aged 61 years old, gave evidence, *inter alia*, as follows:

- (1) The 1<sup>st</sup> plaintiff (PW4) was his client in the year 2015;
- (2) He filed a civil suit on behalf of the plaintiffs and a CJ was entered into and he identified a copy of the said CJ recorded by Puan Roszianayati, at pp. 1-3, Bundle 'B', as the CJ entered into between the plaintiffs and the 1<sup>st</sup> defendant;
- (3) The plaintiffs understood the terms because DW1 explained the terms and conditions in Tamil and English to them and the learned Judge also read them out and asked some questions and the plaintiffs agreed to the terms and conditions;
- (4) DW1 was referred to paragraph 3 of the said CJ by Mr. Nekoo and asked to explain it and DW1 said that it simply says to prepare and sign a resh TA and it will take effect on 01.08.2015;
- (5) DW1 has called the plaintiffs several times but they did not turn up at his office so he asked the other side's solicitor, Baskaran, to prepare a LA as the tenancy is for more than 3 (three) years;
- (6) So I noted that it was DW1 who asked for the label of the agreement to be changed from TA to LA;
- (7) DW1 identified an email dated Wed, 29 Jul, 2015, at 4:42 PM, at pg. 430, Bundle 'D', ID(D4-D6)9, that he received from the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant;





- (8) Attached to the email, ID(D4-D6)9, was a TA in the Words format, ID(D4-D6)9A;
- (9) In the email, ID(D4-D6)9, the 5<sup>th</sup> defendant requested DW1 to “please do the necessary amendments and revert back as soon as possible” and “I will get the agreement assigned by others as that will secure the interest of our client”;
- (10) DW1 identified another email dated Thu, Jul 30, 2015, at 2:25 PM, at pg. 431, Bundle ‘D’, Exhibit D(D4-D6)10, that he received from the 6<sup>th</sup> defendant, also through the 5<sup>th</sup> defendant;
- (11) DW1 identified yet another email dated Thu, Jul 30, 2015, at 3:40 PM, Exhibit D(D4-D6)11, at pg. 432, Bundle ‘D’, that he received from the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant;
- (12) I noted that in this email, the 5<sup>th</sup> defendant stated that having considered the issues raised by him (DW1), the 6<sup>th</sup> defendant, have converted the TA into a LA with previous terms and conditions unchanged and making Karpayah and Raja Kumary to sign on behalf of other minority co-owners and hoping these will resolve issues and if there is any term to be amended, they are happy to do so immediately so that they can sign the agreement tomorrow, *viz* on 31.07.2015;
- (13) DW1 identified another email dated Fri, Jul 31, 2015, at 4:27 PM, Exhibit D(D4-D6)11, at pg. 432, Bundle ‘D’, that he sent to the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant, in which he (DW1) referred to the 6<sup>th</sup> defendant’s email dated Jul 30, 2015, and he appended to his email the duly



amended draft LA for the 6<sup>th</sup> defendant's approval, Exhibit D(D4-D6)11A;

- (14) I noted that in this email, DW1 also stated that further their clients also reserved their rights to amend the same if required and take note that since their clients have agreed to purchase the shares of Francis Sandasamy they believed that his signature is not necessary and kindly revert with the 6<sup>th</sup> defendant's client's comments (if any) and approval for their further action;
- (15) DW1 identified yet another email dated Wed, Sep 9, 2015, at 3:43 PM, at pg. 433, Bundle 'D', ID(D4-D6)12, allegedly, sent to the 6<sup>th</sup> defendant by one Moorthy Perumal from his (DW1's) law firm, Messrs. S. Mogan & Co., with a copy of a draft LA prepared by the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant, and approved by him (DW1), attached to the email, at pp. 434-446, Bundle 'D', ID(D4-D6)12A;
- (16) I noted that in this email, it is stated "Enclosed herewith the duly amended draft lease agreement for your approvals.";
- (17) The sum of RM 253,500.00, *viz* the total amount of moneys stated in the cheques, was not given to DW1 but the 1<sup>st</sup> defendant's solicitors, *viz* the 6<sup>th</sup> defendant, confirmed that it was deposited with them;
- (18) The 1<sup>st</sup> plaintiff was supposed to notify the other side that apparently, the First, Second and Third Floors are occupied by tenants and that the tenancy is valid until 31.12.2015 and so the plaintiffs have given a notice to the respective tenants to vacate them;



- (19) DW1 notified the 6<sup>th</sup> defendant *vide* his letter dated 02.09.2015, at pp. 387-388, Bundle ‘C’, (referred by Mr. S. Selvam to Mr. Prasad(PW2) in the examination-in-chief of PW2 during the plaintiffs’ case) but the 6<sup>th</sup> defendant responded by letter also dated 02.09.2015, at pp. 202-203, Bundle ‘C’, subsequently, marked as Exhibit D(D4-D6)32, when Baskaran (DW3) was giving evidence in his examination-in-chief during the 4<sup>th</sup> to the 6<sup>th</sup> defendants’ case) by stating that it was unacceptable to the 1<sup>st</sup> defendant; and
- (20) After DW1’s receipt of the 6<sup>th</sup> defendant’s letter dated 02.09.2015, Exhibit D(D4-D6)32, the plaintiffs did not finalize the LA because DW1 did not get any response from the plaintiffs to that effect.

[467] In his cross-examination by Mr. S. Selvam, Mr. Mogan (DW1) gave evidence, *inter alia*, as follows:

- (1) Upon a comparison between Section 6 of the original LA, at pg. 111, Bundle ‘C’, and Section 6 of the draft LA, at pg. 445, Bundle ‘C’, DW1 saw that the words “and vacant possession provided” are present in Section 6 of the original LA, at pg. 111, Bundle ‘C’, after the words “execution of this agreement”, but are missing in Section 6 of the draft LA, at pg. 445, Bundle ‘C’, after the words “execution of this agreement”;
- (2) Upon a comparison between Section 7 of the original LA, at pg. 112, Bundle ‘C’, and Section 7 of the draft LA, at pg. 446, Bundle ‘C’, DW1 saw that the words “and vacant possession provided” are present in Section 7 of the original LA, at pg. 112, Bundle ‘C’, after the words “execution of this agreement”, but are missing in Section 7



of the draft LA, at pg. 446, Bundle ‘C’, after the words “execution of this agreement”;

- (3) DW1 did not know who had inserted those words;
- (4) When DW1 was referred to pp. 200-201, Bundle ‘C’, Exhibit P13, and asked to read out the letter dated 02.09.2015, authored by him, addressed to the 6<sup>th</sup> defendant, in particular, the last paragraph, DW1 said that it was his client’s instructions that the outstanding rentals have to be paid on 01.01.2016;
- (5) When DW1 was referred to the second last paragraph of the same letter, DW1 said that his client’s instructions were that all the terms and conditions of the new TA are to be exactly as per the said CJ and that his client will give vacant possession and his client will give a notice to the existing tenants to move out;
- (6) DW1 said that the letter was written only on the issue of his client giving vacant possession to the 1<sup>st</sup> defendant as the 1<sup>st</sup> defendant had already given the outstanding rentals to the 6<sup>th</sup> defendant, as stakeholder, and that upon his client giving due vacant possession to the 1<sup>st</sup> defendant, the 6<sup>th</sup> defendant will pass the outstanding rentals to his law firm, *viz* Messrs. S, Mogan & Co.;
- (7) When DW1 was referred to paragraph 2 of the said CJ, he said that the outstanding rentals are to be paid to the plaintiffs on 15.08.2015 and that as at the date of his letter to the 6<sup>th</sup> defendant, 02.09.2015, the outstanding rentals were not paid to his client;



- (8) DW1 was able to produce a copy of the unsigned original draft CJ handwritten by the 5<sup>th</sup> defendant (DW3), ID14;
- (9) DW1 disagreed with Mr. S. Selvam's suggestion that ID14 is a sham document as it was not signed by the parties;
- (10) When DW1 was referred to paragraphs 1, 2 and 3 of a letter dated 25.08.2015 by the 5<sup>th</sup> defendant (DW3) to him, at pg. 385, Bundle 'C', DW1 said that it is true that in the letter it was stated by the 5<sup>th</sup> defendant that he was holding the 1<sup>st</sup> defendant's cheques as a stakeholder;
- (11) DW1 said that it did not occur to him to ask the 5<sup>th</sup> defendant whether the cheques were banker's cheques or personal cheques;
- (12) DW1 said that the cheques were not paid to him by the 6<sup>th</sup> defendant as the 6<sup>th</sup> defendant, being the 1<sup>st</sup> defendant's solicitors, were holding them as stakeholder;
- (13) I noted that DW1 said he did not write to the 6<sup>th</sup> defendant to demand for the cheques;
- (14) I noted that DW1 said that the 5<sup>th</sup> defendant did not refuse to hand over the cheques to him and that he did ask the 5<sup>th</sup> defendant for the cheques but the 5<sup>th</sup> defendant said upon the delivery of vacant possession, he would hand over all the cheques;
- (15) However, I also noted that there was some inconsistency and contradiction in DW1's testimony on this issue when DW1 agreed with the suggestion of Mr. S. Selvam that the 1<sup>st</sup> defendant did not comply with paragraphs 1 and 2 of the said CJ when the 5<sup>th</sup> defendant did not give the cheques to him; and



(16) I noted that DW1 said that after his phone call to the 5<sup>th</sup> defendant (DW3), to request DW3 to convert the TA to a LA as the tenancy was for a period of more than 3 years, DW3 converted the TA to a LA.

[468] In his re-examination by Mr. Nekoo, Mr. Mogan (DW1) gave evidence, *inter alia*, as follows:

- (1) DW1 explained that he thought about the period of the tenancy was for 3 years and that caused him to ask the 5<sup>th</sup> defendant to change the TA to a LA and the 5<sup>th</sup> defendant changed the label from TA to LA;
- (2) DW1 reiterated that ID14 is not a sham agreement as it was written in the Court and then submitted to the Court; and
- (3) DW1 explained that he discharged himself from continuing to act for the plaintiffs in regard to the LA because they made a lot of excuses and they did not go to see him in his office.

[469] In his answer to one of the questions from the Court, DW1 said he called the plaintiffs and told them that he was discharging himself from continuing to act for the plaintiffs in regard to the LA because he was not getting any instructions from them.

[470] In his examination-in-chief by Mr. Nekoo, Ananthan (DW2), aged 32 years, gave evidence *vide* his Witness Statement, Exhibit D(D4-D6)16, *inter alia*, as follows:

- (1) DW2 is an advocate and solicitor, he works as a Legal Assistant at the 6<sup>th</sup> defendant and he takes instructions from the 5<sup>th</sup> defendant in the discharge of his day to day activities;



- (2) The 1<sup>st</sup> to the 3<sup>rd</sup> defendants are the 6<sup>th</sup> defendant's clients, he was instructed by the 5<sup>th</sup> defendant to handle the brief and at all times, he took instructions from the 5<sup>th</sup> defendant in handling the brief;
- (3) Upon being instructed by his boss and superior, the 5<sup>th</sup> defendant, DW2 made a telephone call to Puan Zura (PW1) to make an appointment to see her to execute the LA on behalf of the plaintiffs;
- (4) DW2 then put it down in writing to confirm what had transpired in his teleconversation with the SAR;
- (5) DW2 identified the 6<sup>th</sup> defendant's letter dated 15.01.2016 to PW1, at pg. 421, Bundle 'C', Exhibit D(D4-D6)17;
- (6) On 18.01.2016, DW2 brought the copies of the LA together with the cheques and the SP Judgment to see the SAR;
- (7) Upon appearing before the SAR at the Kuala Lumpur High Court, on 18.01.2016, the SAR made her own independent decision to sign the LA based on the SP Judgment;
- (8) DW2 did not make any false representation to the SAR;
- (9) The SAR signed the copies of the LA after she had checked the documents; and
- (10) The SAR told DW2 to e-file the duly stamped LA.

[471] In his cross-examination by Mr. Selvam, Ananthan (DW2) testified, *inter alia*, as follows:



- (1) On 18.01.2016, when DW2 appeared before the SAR and got the LA executed, DW2 was already practising for less than 5 (five) years;
- (2) DW2 drafted the 6<sup>th</sup> defendant's letter dated 15.01.2016 to PW1 upon the instructions of the 5<sup>th</sup> defendant;
- (3) At that time, DW2 knew that the solicitors on record for the plaintiffs were Messrs. D. Prasad & Partners but he did not carbon copy the 6<sup>th</sup> defendant's letter to D. Prasad because he was not instructed to do so by the 5<sup>th</sup> defendant;
- (4) He was not aware that under the Legal Profession (Practice and Etiquette) Rules 1978, he has to notify the opponent's solicitor on record;
- (5) DW2 disagreed with the suggestion that he had discreetly written the letter to the SAR and quietly approached the SAR and got it signed;
- (6) DW1 disagreed with the suggestion that the reason why he did not write to Messrs. D. Prasad & Partners was to cheat the SAR;
- (7) DW2 did not inform Messrs. D. Prasad & Partners that he was going to see the SAR for the signing of the LA because he did not get the instruction from the 5<sup>th</sup> defendant to inform the opponent's solicitors;
- (8) DW2 knew that the LA involved a property which is worth millions of Ringgit but he did not know that there were no payments made to the plaintiffs in this case;



- (9) DW2 strongly disagreed with the suggestion that his ultimate aim was to cheat the SAR and the plaintiffs in this case;
- (10) DW2 identified the copy of the stamped LA, at pp. 99-112, Bundle 'C', Exhibit P1, as the LA that he was instructed by the 5<sup>th</sup> defendant to bring along with him to see the SAR on 18.01.2016;
- (11) DW2 disagreed with the suggestion that his conduct in bringing a LA with him instead of a TA to see the SAR on 18.01.2016 was against the SP Judgment as the SP Judgment only mentioned a TA and not a LA;
- (12) DW2 explained that although the term "*Perjanjian Penyewaan*" in Malay or TA in English is mentioned in paragraphs 1, 2 and 3 of the SP Judgment, paragraph 4 of the SP Judgment only mentioned "*perjanjian*" in Malay or "agreement" in English and hence, in essence the "agreement" in paragraph 4 of the SP Judgment should be an agreement which the 6<sup>th</sup> defendant made sure the tenant can rent that place, that premise;
- (13) DW2 agreed with the suggestion that in essence, the "agreement" should be a TA;
- (14) However, DW2 disagreed with the suggestion that his conduct in bringing a LA instead of a TA to see the SAR on 18.01.2016 for her execution was fraudulent and mischievous;
- (15) DW2 explained that paragraph 4 of the SP Judgment only mentioned alternatively, "agreement" and that the word "agreement" means any agreement which the tenant can



rent the premise and he completely disagreed with the suggestion that his intention in bringing a LA instead of a TA to see the SAR on 18.01.2016 for her execution was to commit fraud and to make a misrepresentation to the SAR;

- (16) DW2 went to see the SAR alone on 18.01.2016 and he disagreed that he went with the 2<sup>nd</sup> defendant to see the SAR on 18.01.2016;
- (17) DW2 brought along 6 (six) pieces of the physical cheques (“the cheques”) with him;
- (18) Initially DW2 said that the 2<sup>nd</sup> defendant gave him the cheques but subsequently he explained that the cheques were given to the 5<sup>th</sup> defendant by the 2<sup>nd</sup> defendant and the 5<sup>th</sup> defendant then gave the cheques to him;
- (19) DW2 identified pp. 427 and 428, Bundle ‘D’, as the copies of the cheques that he brought with him to see the SAR on 18.01.2016;
- (20) In answer to the question what is the worth of a cheque if there is no money in the bank, DW2 said that the cheque has no worth;
- (21) DW2 disagreed that he had taken the responsibility to satisfy himself that there was money in the bank account to meet the cheques that were given to him by the 5<sup>th</sup> defendant;
- (22) DW2 also disagreed with the suggestion that when he brought along the cheques with him to see the SAR on 18.01.2016, it was his responsibility to satisfy himself that there must be sufficient funds in the bank account before he presented the cheques to the SAR;



- (23) Upon being asked by Mr. Selvam to add up the amounts of money as stated in the cheques, dated 28<sup>th</sup> July 2015 to 15<sup>th</sup> December 2015, DW2 used a calculator, a piece of paper and a pen provided by the Court, through the Court Interpreter, and DW2 said that the total amount was RM 323,500.00;
- (24) DW2 disagreed with the suggestion that by the end of December 2015, there must be a balance of RM 323,500.00 in the bank account from which the cheques were issued;
- (25) DW2 did not know whether on 18.01.2016 the 6<sup>th</sup> defendant's client had sufficient money in the bank account to meet the total amount of the cheques;
- (26) DW2 agreed with the suggestion that if the cheques were given to his firm on 28.07.2015, 15.08.2015, 15.09.2015, 15.10.2015, 15.11.2015 and 15.12.2015, his firm, viz the 6<sup>th</sup> defendant, as solicitors, was holding the cheques as a stakeholder, on those dates;
- (27) However, DW2 again disagreed with the suggestion that by the end of December 2015, there must be a balance of RM 323,500.00 in the bank account from which the cheques were issued;
- (28) DW2 did not know what was the bank balance of the 6<sup>th</sup> defendant's client, at the end of December 2015;
- (29) DW2 explained that although he has a duty to the Court when he brought with him the cheques to see the SAR on 18.01.2016, it was not necessary for him to total up the amounts of the cheques and to find out whether the total amount of the cheques was in his firm's client's account;



- (30) DW2 disagreed with the suggestion that since he did not know whether there was sufficient money in the bank account to meet the total amount of the cheques, he was basically carrying with him 6 (six) pieces of paper to the SAR's room on 18.01.2016;
- (31) DW2 explained that the reason is because all the cheques were postdated cheques;
- (32) DW2 said that all the cheques were issued from the same bank account by the same issuer and that the issuer was My Home Budget Hotel Sdn Bhd., the 1<sup>st</sup> defendant;
- (33) When DW2 was referred to subparagraph Roman vi of paragraph 6 of the plaintiffs' Reply to the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD, at pg. 83 of the *Ikatan Pliding*, Bundle 'A', where it was pleaded by the plaintiffs that the 6<sup>th</sup> defendant as stakeholder to those cheques "knew and/or had the knowledge those cheques could not be cashed out and (sic) of no value;" and asked whether he (DW2) checked with his (firm's) client whether there was sufficient money in the bank account to meet those cheques, DW2 said he did not ask his (firm's) client;
- (34) DW2 also disagreed with the suggestion that his (firm's) client had told him "don't give all these cheques to the Plaintiffs because those cheques has (sic) got no money?";
- (35) DW2 also disagreed with the suggestion that he had the knowledge that there was no money in the 1<sup>st</sup> defendant's bank account to meet those cheques;
- (36) After Mr. Selvam had obtained the leave of the Court to refer to DW2 new documentary evidence in the form of 6

- (six) bank statements of the 1<sup>st</sup> defendant's bank account, which Mr. Selvam obtained from Zafri (PW3), after PW3 had produced documents in the trial, DW2 was asked to look at the 6 (six) bank statements of the 1<sup>st</sup> defendant's bank account;
- (37) DW2 was also asked to look at the balance in the 1<sup>st</sup> defendant's bank account on 31.12.2015 as shown in the bank statement for December 2015, ID18, and to state whether the 6 (six) pieces of paper, *viz* the cheques, kept by him were of value;
- (38) After DW2 looked at ID18, DW2 said that he has to agree with the suggestion that the cheques were of no value because the closing balance in the 1<sup>st</sup> defendant's bank account on 31.12.2015 was RM 2,249.63 whereas the total amount of the cheques as at 31.12.2015 was RM 323,500.00;
- (39) Subsequently, as directed by the Court, the plaintiffs filed an additional Common Bundle of Documents, *viz* *Ikatan Dokumen Bersama Tambahan 4*, to include the 6 (six) bank statements of the 1<sup>st</sup> defendant's bank account, to which the Court gave the alphabetical marking as Bundle 'Aa' and when DW2 was referred to Messrs. D. Prasad & Partners' letter dated 30.12.2015 to the 6<sup>th</sup> defendant, Exhibit P6, in which the plaintiffs' solicitors were asking for the cheques which represented the outstanding rentals commencing from April 2013 as per the said CJ, and DW2 was asked whether on 30.12.2015, was the 1<sup>st</sup> defendant in a position to satisfy the debts by looking at the closing balance of the 1<sup>st</sup> defendant's bank account, DW2 gave a negative answer, *viz* "Based on the statement, no.";



- (40) However, DW2 disagreed with the suggestion that it was illegal on his part to appear before the SAR on 18.01.2016 with the cheques for the execution of the LA as the cheques were of no value;
- (41) DW2 also disagreed with the suggestion that his sole intention was to cheat the SAR by showing the cheques which have no value because although he brought the cheques with him to the SAR's room, the SAR did not ask for the cheques;
- (42) DW2 was present during the hearing on 03.12.2015 for the 2015 Sessions Court OS case and he agreed with the suggestion that the cheques were exhibited in an affidavit for that case but he could not remember most of what transpired as it was the 5<sup>th</sup> defendant who conducted the case for the 1<sup>st</sup> defendant's application for execution of the said CJ;
- (43) Upon the application of Mr. Selvam, the Court marked the 1<sup>st</sup> defendant's bank statements for August 2015, September 2015, October 2015 and November 2015 as ID19, ID20, ID21 and ID22, respectively, and the Court overruled the objection raised by Mr. Suaran Singh, Counsel for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' solicitors, that the 6 (six) bank statements of the 1<sup>st</sup> defendant's bank account should have been adduced through the bank officer while the bank officer was giving evidence before they can be referred by Mr. S. Selvam to DW2 during cross-examination but this was not done;
- (44) The reason why I overruled Mr. Suaran Singh's objection was because I was of the view that since these documents are very crucial to the plaintiffs' case which is based on



fraud, the Court is always very vigilant to prevent any abuse of the process of the Court;

- (45) I explained that if the 1<sup>st</sup> to the 6<sup>th</sup> defendants' defence is that the 1<sup>st</sup> defendant has sufficient funds and if the Court does not allow Mr. Selvam to cross-examine DW2 with these documents then the Court is allowing the defendants to abuse the process of the Court;
- (46) Mr. Suaran Singh then applied for leave to adduce documents to show to the Court that the 1<sup>st</sup> to the 3<sup>rd</sup> defendants are capable of making payment as they have funds but I said that I will not give leave yet;
- (47) I explained that this is because they were not upfront about it as they did not produce those documents at the outset and only when the plaintiffs have produced these documents, *viz* the bank statements, then they say they have other documents to show that they have funds (to meet the cheques);
- (48) I also said that I will hear both parties first before deciding whether I will allow his application and that I will consider (the submissions of both parties);
- (49) When DW2 was referred to the 1<sup>st</sup> defendant's cheques for the months of July and August 2015, ID19 and 1D20, respectively, DW2 agreed with the suggestion that based on the 2 (two) bank statements, there were no funds in the 1<sup>st</sup> defendant's account to meet the 2 (two) cheques for the months of July and August 2015;
- (50) However, DW2 disagreed with the suggestion that the 2 (two) cheques were worthless;



- (51) When DW2 was asked to explain by Mr. S. Selvam why he disagreed with the suggestion that the 2 (two) cheques were worthless, DW2 explained that this is because the 1<sup>st</sup> defendant can at anytime bank in funds into the 1<sup>st</sup> defendant's account;
- (52) DW2 also explained that based on his knowledge, whether the cheques are worthless or not depends on whether when the cheques are banked in and the cheques bounced and then only can it be confirmed that the cheques are worthless;
- (53) DW2 disagreed with the suggestion that all the 6 defendants, viz he, Baskaran (DW3), the 5<sup>th</sup> defendant, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants and the 6<sup>th</sup> defendant, jointly committed the fraud on the plaintiffs;
- (54) DW2 also disagreed with the suggestion that he conspired with the rest of the defendants to cheat the plaintiffs;
- (55) When Mr. Selvam cross-examined DW2 on the 3 (three) cheques for the months of September to November 2015, ID21 to 1D22, respectively, in a similar manner, DW2 gave answers that were similar to his answers for the 2 (two) cheques for the months of July and August 2015;
- (56) DW2 explained that he brought the cheques with him to show to the SAR that the 1<sup>st</sup> defendant was ready as at 01.08.2015 to comply with the said CJ;
- (57) When Mr. Selvam continued to cross-examine DW2 on the alleged "worthless cheques" and the fraudulent use of the alleged "worthless cheques" by all the defendants in this case including by the 1<sup>st</sup> defendant in his affidavit for the





2015 Sessions Court OS case, and DW2 was not able to recall the details in the affidavits that were used in that case, Mr. Suaran Singh objected to Mr. Selvam's line of questioning of DW2 on the ground that the plaintiffs are going outside the ambit of their pleaded case;

- (58) I had understood based on Mr. Selvam's line of questioning in his cross-examination of DW2 that the plaintiffs' pleaded case is that the 6 (six) defendants conspired together to use worthless cheques in order to induce the judicial officers to do things which the judicial officers would not have done had they known that these cheques were worthless;
- (59) However, Mr. Suaran Singh explained that he was raising his objection because the plaintiffs' pleaded case relates to the alleged inducement or conspiracy to defraud the SAR and it is not the the plaintiffs' pleaded case, which the plaintiffs are now saying, that the granting of the SP Judgment by the Sessions Court Judge was also part of that whole scheme of defrauding;
- (60) I then asked Mr. Selvam whether he was taking this line of questioning of DW2 to establish the plaintiffs' case (which I would not have allowed due to Mr. Suaran Singh's objection and explanation) or to demolish the veracity of DW2;
- (61) Mr. Selvam said that he could not separate his questions to DW2 on the use of the cheques by DW2 in this case, on 18.01.2016, when DW2 appeared before the SAR for execution (of the LA) based on the SP Judgment and his questions to DW2 on the use of the cheques in the 1<sup>st</sup> defendant's affidavit by the 1<sup>st</sup> defendant when the 5<sup>th</sup>

defendant appeared before the Sessions Court Judge on 08.12.2015 and obtained the SP Judgment;

- (62) Mr. Suaran Singh then raised another objection and he said that what was said by Mr. S. Selvam was not pleaded and that the plaintiffs' averment on fraud has to be very specific, that it was not pleaded by the plaintiffs that the Sessions Court Judge was also defrauded by the defendants and that it is trite law that fraud and misrepresentation or allegations of conspiracy have to be pleaded but the plaintiffs have not done so and now Mr. Selvam is saying that he is also extending the scope of what the plaintiffs have pleaded;
- (63) However, I overruled Mr. Suaran Singh's objection and I allowed Mr. Selvem to continue with his line of questioning as I was of the view that Mr. Selvam was not submitting on the plaintiffs' case and was merely, cross-examining the witness, DW2, on the veracity of the witness;
- (64) DW2 was not involved in the 2015 Kuala Lumpur Sessions Court writ case in which the parties entered into the said CJ and he only appeared in Court for the 2015 Sessions Court OS case but it was the 5<sup>th</sup> defendant who handled the case for the 1<sup>st</sup> defendant in the 2015 Sessions Court OS case;
- (65) In response to the suggestion that he was coached by the 5<sup>th</sup> defendant to give his evidence in the trial of this case due to the massive additions made by the 5<sup>th</sup> defendant to his Witness Statement for this case, DW2 denied that he was coached by the 5<sup>th</sup> defendant to give his evidence in the trial of this case;

(66) DW2 disagreed with the suggestion that he had committed fraud and misrepresentation to the Court and that he had committed a serious crime by cheating Puan Zura (PW1); and

(67) DW2 completely disagreed with the suggestion that he is not a truthful witness and that he was lying all the way in the trial of this case.

[472] After Mr. Selvam completed his cross-examination of DW2, Mr. Suaran Singh informed the Court that he wished to cross-examine DW2. However, I did not allow Mr. Suaran Singh to cross-examine DW2. There are 2 (two) reasons. Firstly, Mr. Nair had earlier on before Mr. Selvam commenced his cross-examination of DW2 informed the Court that he has no cross-examination questions for DW2. Secondly, it is the standard practice for a plaintiff to cross-examine a defendant's witness after all the other defendants have cross-examined the witness.

[473] In his re-examination by Mr. Nekoo, Ananthan (DW2), gave evidence, *inter alia*, as follows:

- (1) DW2 explained that he disagreed with Mr. Selvam's suggestion that he had discreetly written the letter to the SAR and quietly approached the SAR and got it signed because the 5<sup>th</sup> defendant had already notified the opponent's lawyer that "If your client refuses to sign the LA, then we will approach the PKP to execute the LA;
- (2) DW2 also explained that he was told by the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant, that based on the documentary evidence, the 6<sup>th</sup> defendant, as the solicitors, for the 1<sup>st</sup> defendant, have already informed D. Prasad (that the 6<sup>th</sup>

defendant will have the LA executed by the SAR for the plaintiffs if the plaintiffs refused to sign the LA);

- (3) He explained that he disagreed with the suggestion that he has failed in his duty as an officer of the Court because he had brought the cheques to see the SAR as they were in the file in the first place and to explain to the PKP that the cheques, which were all valid, should be given to the plaintiffs upon the execution of the LA and also vacant possession should be given and that it was the delay due to the plaintiffs' refusal to sign the LA which has resulted in the 6<sup>th</sup> defendant being not able to comply with their duty as a stakeholder;
- (4) DW2 explained that he disagreed with the suggestion that as a stakeholder he must satisfy himself that there is money in the account because it is the duty of his (firm's) client to make sure that there is sufficient money in the account;
- (5) DW2 also explained that he believed that the 5<sup>th</sup> defendant would have advised the client, *viz* the 1<sup>st</sup> defendant, that the 1<sup>st</sup> defendant should have sufficient money in the account;
- (6) DW2 also said that Puan Zura (PW1) only asked for the SP Judgment from him, which he produced and he drew PW1's attention to paragraph 4 of the SP Judgment; and
- (7) DW2 also said that PW1 perused the said LA before PW1 signed the said LA.

[474] In his answers to questions from the Court, DW2 said, *inter alia*, as follows:

- (1) DW2 obtained his Bachelor of Law degree from the Universiti Kebangsaan Malaysia (“UKM”) and he studied the NLC 1965 for his land law paper while he was in the UKM but he has forgotten about the difference between a TA and a LA as provided in the NLC 1965; and
- (2) DW2 did his pupillage in 2 law firms after he graduated from the UKM, initially in the law firm of Messrs. Gurbachan & Kartar where he handled only criminal matters and subsequently, in Messrs. Tay Ibrahim & Partners, a conveyancing law firm.

[475] The 4<sup>th</sup> to the 6<sup>th</sup> defendants had efiled on 20.8.2018, a Witness Statement, enclosure (64), for their third witness, Baskaran. Subsequently, the 4<sup>th</sup> to the 6<sup>th</sup> defendants had efiled a Revised Witness Statement for Baskaran but no leave was obtained from the Court for its use during the full trial.

[476] Subsequently, the 4<sup>th</sup> to the 6<sup>th</sup> defendants had efiled a Re-Revised Witness Statement for Baskaran to correct typographical errors, enclosure (92). During the 2<sup>nd</sup> PTCM before the trial Judge, upon the application of Mr. Nekoo, I had granted leave for the use of enclosure (92) by the 4<sup>th</sup> to the 6<sup>th</sup> defendants in the full trial.

[477] However, on 03.12.2018 and on 11.03.2019, when Baskaran was called as a witness I did not allow Baskaran to use his Re-Revised Witness Statement, enclosure (92), because I had overlooked that I had granted leave to Mr. Nekoo on 25.09.2018 to use Baskaran’s Re-Revised Witness Statement, enclosure (92), in the full trial.

[478] To give credit to Mr. Nekoo, on 03.12.2018 and again on 11.03.2019, Mr. Nekoo tried his level best to inform the Court

that based on his recollection and his notes the Court had granted him leave to use Baskaran's Re-Revised Witness Statement, enclosure (92), in the full trial, during the 2<sup>nd</sup> PTCM before the trial Judge, on 25.09.2018. But on 11.03.2019, after checking my handwritten notes in the Judge's Notebook, I said that this was not recorded in my notes.

[479] However, in the course of writing my Grounds of Judgment, I went through my handwritten notes in the Judge's Notebook for the 2<sup>nd</sup> PTCM before the trial Judge, on 25.09.2018, and I realized that what I said on 11.03.2019, that after checking my handwritten notes in the Judge's Notebook, I had not recorded in the Judge's Notebook that the Court had granted leave to Mr. Nekoo to use Baskaran's Re-Revised Witness Statement, enclosure (92), in the full trial, (see NP Jilid II dated 11.03.2019, lines 10 to 20), was an error on my part.

[480] This is because the fact that I had granted leave to Mr. Nekoo to use Baskaran's Re-Revised Witness Statement, enclosure (92), in the full trial was recorded in my handwritten notes, on 25.09.2018, during the 2<sup>nd</sup> PTCM before the trial Judge. I wish to apologise to Mr. Nekoo for my error.

[481] In my view, during the 2<sup>nd</sup> PTCM before the trial Judge, on 25.09.2018, had Mr. Nekoo handed over to the Court a hard copy of Baskaran's Revised Witness Statement that was filed without the leave of the Court and obtained the leave of the Court for its use in the full trial and also handed over to the Court a hard copy of Baskaran's Re-Revised Witness Statement, enclosure (92), that was filed without the leave of the Court before obtaining the leave of the Court to use enclosure (92) in the full trial, in all probabilities, the error on the part of the Court might not have occurred.



[482] This is because had I seen a hard copy of Baskaran's Revised Witness Statement and also a copy of Baskaran's Re-Revised Witness Statement, enclosure (92), on 25.09.2018, during the 2<sup>nd</sup> PTCM before the trial Judge, I would at least have had a recollection of Baskaran's Re-Revised Witness Statement, enclosure (92), and its contents when Mr. Nekoo sought to use it on 03.12.2018 and on 11.03.2019, when Baskaran was in the witness box.

[483] It is my practice to disallow the use of a Revised Witness Statement or an Amended Witness Statement in the full trial without the leave of the Court unless the leave of the Court has already been obtained to file it for use in the full trial.

[484] Hence, in his examination-in-chief by Mr. Nekoo, Baskaran (DW3) gave evidence *vide* his Witness Statement efiled on 20.8.2018, enclosure (64), subsequently marked as Exhibit D36, *inter alia*, as follows:

- (1) The 1<sup>st</sup> defendant entered into a TA with the plaintiffs in relation to the building sometime in 2013;
- (2) There was a dispute in regard to this TA and the plaintiffs filed the 2015 KL Sessions Court case against the 1<sup>st</sup> defendant;
- (3) The 2<sup>nd</sup> defendant then appointed the 6<sup>th</sup> defendant to act for the 1<sup>st</sup> defendant;
- (4) I noted that DW3's evidence on the events leading to the recording of the said CJ for the 2015 KL Sessions Court case was similar to and consistent with the evidence given by Mr. Mogan (DW1);



- (5) I also noted that DW3's evidence that he had prepared a draft TA for the execution by the plaintiffs and the 1<sup>st</sup> defendant as per the terms of the said CJ upon Santhiran's (DW1's) request was similar to and consistent with the evidence given by Mr. Mogan (DW1);
- (6) I also noted that DW3's evidence on the exchanges of emails between himself and Mr. Mogan (DW1) in relation to the draft TA and the relabeling of the draft TA as a draft LA was similar to and consistent with the evidence given by Mr. Mogan (DW1);
- (7) DW3 identified and dealt with the contents of each of his emails that he had sent to Mr. Mogan (DW1), and Santhiran's (DW1's) email in reply, viz his 1<sup>st</sup> email dated 24.07.2015, at pg. 429, Bundle 'D', ID(D4-D6)23, his 2<sup>nd</sup> email dated 29.07.2015 at 4:42 PM, at pg. 430, Bundle 'D', D(D4-D6)9, his 3<sup>rd</sup> email dated 30.07.2015, at 2:25 PM, at pg. 431, Bundle 'D', his 4<sup>th</sup> email dated 30.07.2015, at 3:40 PM, at pg. 432, Bundle 'D', Exhibit D(D4-D6)4, Santhiran's (DW1's) email in reply dated 31.07.2015, at 4:27 PM, at pg. 432, Bundle 'D', D(D4-D6)11, and his 5<sup>th</sup> email dated 31.07.2015, at 6:01 PM, at pg. 432, Bundle 'D', Exhibit D(D4-D6)24;
- (8) When he was referred to Question 7 of his Witness Statement and to paragraph 1 of the said CJ, DW3 said that the 1<sup>st</sup> defendant has complied with this term as the 2<sup>nd</sup> defendant had gone to his office and handed to him several cheques to be kept as stakeholder;
- (9) DW3 stated the details of each of the 6 (six) cheques and he identified the copies of 6 (six) cheques at pp. 427 and



- 428, Bundle 'D' as the copies of the 6 (six) cheques handed to him by th 2<sup>nd</sup> defendant;
- (10) The Court marked them as ID(D4-D6)25 to ID(D4-D6)30 since the 2<sup>nd</sup> defendant, who had issued them, had not given his evidence yet;
- (11) After DW3 received the cheques from the 2<sup>nd</sup> defendant, he notified Mr. Mogan (DW1) of Messrs. S. Mogan & Co. of the deposit of the cheques by the 2<sup>nd</sup> defendant for the 1<sup>st</sup> defendant *vide* his letter dated 25.08.2015, at pg. 198, Bundle 'C', Exhibit D(D4-D6)31;
- (12) Mr. Mogan (DW1) then replied *vide* a letter dated 02.09.2015, at pp. 200 and 201, Bundle 'C', P13, stating that they will forward a reply on the proposed TA for the 6<sup>th</sup> defendant's final approval and that the plaintiffs were not able to give vacant possession in accordance with the terms of the CJ as the First to the Third Floors were being tenanted until 31.12.2015;
- (13) DW3 then replied *vide* a letter dated the same date, 02.09.2015, at pp. 202 and 203, Bundle 'C', Exhibit D(D4-D6)32, putting on record the 1<sup>st</sup> defendant's disappointment of the blatant disregard of the said CJ, and informing the plaintiffs' solicitors that they shall be seeking remedies and reliefs from the Court in this regard;
- (14) The 1<sup>st</sup> defendant then filed the 2015 Sessions Court OS case, which was heard on 03.12.2015 by Puan Roszianayati in the presence of himself representing the 1<sup>st</sup> defendant and Mr. Prasad (PW2) representing the plaintiffs, as the plaintiffs' new solicitor, and the 1<sup>st</sup> defendant obtained the



SP Judgment with costs of RM 8,000.00 and the SP Judgment;

- (15) But the plaintiffs still refused to execute the final draft of the LA for the new tenancy of the building;
- (16) DW3 then wrote a letter dated 30.12.2015 to the plaintiffs' second set of solicitors putting the plaintiffs on notice that if the plaintiffs still refused to execute the LA with the Addendum of the First Schedule, which needed to be annexed under the same Agreement due to delay caused by the plaintiffs, and failure to do so immediately or in any event before 08.01.2016 by the plaintiffs would entitle the 1<sup>st</sup> defendant to execute the same with the Court officials and for vacant possession to be given to the 1<sup>st</sup> defendant at the time of execution of the LA;
- (17) DW3 identified the copy of the letter at pp. 397 to 399, Bundle 'C', Exhibit P7, as his letter dated 30.12.2015 to the plaintiffs' second set of solicitors to this effect;
- (18) He received an email dated 14.01.2016 from the plaintiffs' solicitors, in reply to his letter dated 30.12.2015 to the plaintiffs' second set of solicitors, stating that the plaintiffs have not complied with the 1<sup>st</sup> defendant's request to execute the LA;
- (19) As a result of the plaintiffs' solicitors' email dated 14.01.2016, DW3 was instructed by the 1<sup>st</sup> defendant, acting through the 2<sup>nd</sup> defendant, to enforce the SP Judgment by getting a SAR to execute all the relevant documents;



- (20) Hence, DW3 instructed the 4<sup>th</sup> defendant, Ananthan (DW2), to get a SAR to execute all the relevant documents and after that the LA was stamped and a copy of the said LA was sent to Messrs. D. Prasad & Partners on 28.01.2016;
- (21) DW3 identified the copy of the letter at pg. 447, Bundle 'D', Exhibit D(D4-D6)34, as the copy of the letter dated 28.01.2016 that he had sent to Messrs. D. Prasad & Partners;
- (22) The plaintiffs filed a fresh suit *vide* the 2015 writ case dated 04.11.2015 to set aside the said CJ but it was struck out due to the absence of Mr. Prasad, the plaintiffs' second solicitor, and the plaintiffs' application to reinstate the suit was dismissed with costs of RM 1,500.00, which remained unpaid;
- (23) The plaintiffs filed an application to stay the SP Judgment and to strike out the said LA but the application was dismissed with costs of RM 1,500.00, which remained unpaid;
- (24) The plaintiffs did not file an appeal against the SP Judgment;
- (25) But the plaintiffs' third and current set of solicitors, Messrs. Selvam Shanmugam & Partners, filed an application for extension of time to file an appeal out of time against the SP Judgment *vide* the 2016 KL High Court OS case;
- (26) However, on 15.04.2016, Yeoh Wee Siam J dismissed the plaintiffs' application on the grounds, *inter alia*, that it

was the plaintiffs who had failed to comply with the said CJ, and the learned Judge had considered the plaintiffs' allegation that the defendants had blinded the SAR but the learned Judge did not accept the plaintiffs' allegation and the learned Judge made a finding of fact that the SAR had considered all documents, letters, including the letter dated 23.12.2015, the Court Orders and cheques for arrears of rental and deposits before executing the said LA (see paragraph 42, at pp. 23 and 24 of the learned Judge's Grounds of Judgment, at pp. 12 to 16, Bundle 'B');

- (27) The plaintiffs appealed to the Court of Appeal against the dismissal of their application but the Court of Appeal dismissed the plaintiffs' appeal on 15.07.2016 on the grounds that the said LA was properly executed and there are no merits to give extension of time (see the Draft Order of the Court of Appeal, at pp. 422 to 438, Bundle 'C');
- (28) The 1<sup>st</sup> defendant applied under paragraph 5 of the SP Judgment for assessment of damages and on 31.03.2017, the learned Sessions Court Judge allowed the application and ordered damages to be paid with costs of RM 5,000.00 (see the Sessions Court Order dated 31.03.2017, at pp. 60 and 61, Bundle 'B');
- (29) The plaintiffs appealed to the High Court and Wan Farid Bin Wan Salleh JC dismissed the plaintiffs' appeal with costs of RM 3,000.00 (see the learned Judge's Grounds of Judgment, at pp. 62 to 76, Bundle 'B');
- (30) The plaintiffs appealed to the Court of Appeal which dismissed the plaintiffs' appeal with costs of RM 10,000.00;



- (31) In his answer to the last question, *viz* Question 21 in his Witness Statement, enclosure (64), DW3 denied the plaintiffs' allegation that he had cheated, misrepresented and conspired with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants to obtain the signatures of the SAR for the purpose of executing the said LA and DW3 relied on Yeoh Wee Siam J's Grounds of Judgment in which the learned Judge had considered the plaintiffs' allegation that the defendants had blinded the SAR but the learned Judge did not accept the plaintiffs' allegation;
- (32) In his answer to the first additional oral question that was related to Question 6 of his Witness Statement, enclosure (64), that was asked by Mr. Nekoo, DW3 said that he had prepared a TA and he had sent it to Mr. Mogan but it was Mr. Mogan who had called him and asked him to change it to a LA due to the initial term of the new tenancy, *viz* 8 (eight) years;
- (33) In his answer to the second additional oral question that was related to Question 7 of his Witness Statement, enclosure (64), that was asked by Mr. Nekoo, DW3 said that the cheques were not handed over to the plaintiffs because he was instructed by the 1<sup>st</sup> defendant to hand over the cheques to the plaintiffs only after the plaintiffs have executed the new rental agreement for the building and also handed over to the 1<sup>st</sup> defendant vacant possession (of the First Floor to the Third Floor of the building);
- (34) In his answer to the third additional oral question that was related to the table at pp. 301 and 302, Bundle 'C', that was asked by Mr. Nekoo, DW3 said that he had added the words "and vacant possession provided" in the initial draft

of the LA because the SP Judgment , which was made by the same learned Sessions Court Judge who recorded the said CJ, allowed the parties to sign any agreement to rent the whole premises without affecting or altering the spirit of the said CJ;

(35) DW3 explained that the wording “and vacant possession provided” added by him is in tandem or consistent with the said CJ because the said CJ clearly states that the new rental agreement and the giving of vacant possession have to be done on the same day; and

(36) DW3 further explained that the addition of the words “and vacant possession provided” did not alter the said CJ in any way.

[485] In his cross-examination by Mr. Suaran Singh, Baskaran (DW3) gave evidence, *inter alia*, as follows:

(1) DW3 had changed the date of the commencement of the new tenancy in the LA due to the 5 to 6 months of delay by the plaintiffs in the giving of vacant possession to the 1<sup>st</sup> defendant and that was the reason why he had taken out the initial commencement date of 01.08.2015 and added the words “and vacant possession provided”;

(2) When DW3 was referred to the exchanges of emails between himself and Mr. Mogan, DW3 was able to recognize and identify the emails sent by him to Mr. Mogan and the emails that he received from Mr. Mogan including the email sent by Mr. Murthy Perumal of Messrs. Mogan & Co. with the attached draft of the LA;



- (3) When DW3 was referred to the 1<sup>st</sup> defendant's cheques, DW3 said that the cheques were given to him, as stakeholder, on 28.07.2015, by the 2<sup>nd</sup> defendant on behalf of the 1<sup>st</sup> defendant, with the instruction to release them to the plaintiffs' solicitors after the plaintiffs have executed the LA on 01.08.2015 and handed over vacant possession of the Ground Floor to the Third Floor (of the building) to the 1<sup>st</sup> defendant on 01.08.2015;
- (4) DW3 could not bank the cheques into the 6<sup>th</sup> defendant's client's account as the cheques were issued in the name of the 1<sup>st</sup> plaintiff and the cheques were given to him for release to the plaintiffs' solicitors after the plaintiffs have fulfilled their obligations under the said CJ;
- (5) As the stakeholder of the cheques, DW3 could only release the cheques in accordance with the 1<sup>st</sup> defendant's instruction and if he does not release the cheques in accordance with the instructions given to him by his client, he will be breaching his duty to his client;
- (6) As the stakeholder of the cheques, DW3 has no authority to check with the bank to see whether there are sufficient funds in the 1<sup>st</sup> defendant's account to meet the cheques;
- (7) DW3 identified the SP Judgment that the 1<sup>st</sup> defendant obtained from the Sessions Court, at pp. 4 to 6, Bundle 'B', P2, and the letter dated 23.12.2015 that he had sent to Messrs. D. Prasad & Partners, the plaintiffs' second set of solicitors, who had taken over the matter from Messrs. Mogan & Co., at pg. 393, Bundle 'C', D(D4-D6)41, attaching a sealed copy of the SP Judgment , P2, and requiring the plaintiffs to execute the LA within 14 days



- failing which the 6<sup>th</sup> defendant will take the necessary action to have the LA executed by the Court officials;
- (8) On the same date, on 23.12.2015, DW3 also sent a copy of the same letter, Exhibit D(D4-D6)41, to Messrs. D. Prasad & Partners, by email, at pg. 395, Bundle ‘C’;
- (9) It was only on 30.12.2015, that DW3 received a letter dated 30.12.2015 from Messrs. D. Prasad & Partners, P6, in reply to his letter dated 23.12.2015, requesting for a copy of the agreement and also the outstanding rentals commencing from April 2013;
- (10) However, I noted that the letter dated 30.12.2015 from Messrs. D. Prasad & Partners to Bas Vin Associates, the 6<sup>th</sup> defendant, did not make any reference to the letter dated 23.12.2015 that DW3 had sent to Messrs. D. Prasad & Partners or to the email dated 23.12.2015, that DW3 had sent to Messrs. D. Prasad & Partners with a copy of the letter dated 23.12.2015;
- (11) On the same date, on 30.12.2015, DW3 sent a letter in reply to Messrs. D. Prasad & Partners, at pg. 397, Bundle ‘C’, Exhibit D(D4-D6)7, to inform the latter that due to the latter’s client’s failure and / or neglect to comply with the said CJ, the 6<sup>th</sup> defendant has obtained a further judgment, viz the SP Judgment, to enforce the said CJ;
- (12) Subsequently, due to the failure of the plaintiffs to execute the LA despite his letter dated 23.12.2015 to Messrs. D. Prasad & Partners, Exhibit D(D4-D6)41, DW3 instructed Ananthan (DW2), the 4<sup>th</sup> defendant, to get the LA signed by the SAR pursuant to the SP Judgment and he gave the documents for the signing of the LA to DW2;



- (13) When DW3 was referred to the 1<sup>st</sup> defendant's cheques, he agreed with the suggestion that the cheques were issued pursuant to the said CJ; and
- (14) When DW3 was shown the original copies of the 1<sup>st</sup> defendant's cheques, and he had compared them with the copies of cheques, at pp. 427 and 428, Bundle 'D', ID(D4-D6)25 to 30, DW3 identified the original copies of the 1<sup>st</sup> defendant's cheques as the cheques which he had received from the 2<sup>nd</sup> defendant on behalf of the 1<sup>st</sup> defendant, the copies of which have been marked as ID(D4-D6)25 to 30.

[486] In the continuation of his examination-in-chief by Mr. Nekoo, Baskaran (DW3) gave evidence, *inter alia*, as follows:

- (1) The computation of the arrears of rental of RM283,500.00 was based on the number of months the possession of the Ground Floor was already given to the 1<sup>st</sup> defendant prior to the date the said CJ was recorded multiplied by the rate of rental agreed between the plaintiffs and the 1<sup>st</sup> defendant which was at RM 10,500.00 per month;
- (2) In his letter dated 30.12.2015, Exhibit D(D4-D6)7, in reply to the plaintiffs' solicitors' letter also dated 30.12.2015, P6, DW3 had also set out the breakdown of the 5 (five) payments that the 1<sup>st</sup> defendant would have made through the 6<sup>th</sup> defendant to the plaintiffs' solicitors had the plaintiffs, on 01.08.2015, executed the LA and given vacant possession of the First to the Third Floors to the 1<sup>st</sup> defendant;
- (3) In his letter dated 30.12.2015, Exhibit D(D4-D6)7, DW3 also stated that the 6<sup>th</sup> defendant will make the 5 (five) payments to the plaintiffs' solicitors upon the plaintiffs



executing the LA and giving vacant possession of the First to the Third Floors to the 1<sup>st</sup> defendant;

- (4) In regard to the assessment of damages arrived at by the learned Sessions Court Judge, the learned Sessions Court Judge had assessed the 1<sup>st</sup> defendant's loss of use of the First to the Third Floors and loss of income from the use of the First to the Third Floors at RM425,000.00 from 01.08.2015 for a period of 17 months at a sum of RM 25,000.00 per month as the plaintiffs had failed to give vacant possession for a period of 17 months from 01.08.2015 until the date of the 1<sup>st</sup> defendant's Assessment Application;
- (5) The learned Sessions Court Judge then deducted a sum of RM283,500.00 being the outstanding rentals for the Ground Floor on the date of the said CJ and a sum of RM178,500.00 being the unpaid rentals for the Ground Floor for the 17 months from 01.08.2015 until the date of the 1<sup>st</sup> defendant's Assessment Application thereby leaving a balance of RM37,000.00 due to the plaintiffs;
- (6) The learned Sessions Court Judge failed to take into account the RM 30,000.00 deposit which has been paid by the 1<sup>st</sup> defendant;
- (7) So after deducting the deposit of RM 30,000.00, there is a balance of RM7,000.00 and the Sessions Court awarded costs of RM5,000.00;
- (8) Hence, there is only a balance of RM 2,000.00 actually owing to the plaintiffs;



- (9) The plaintiffs appealed to the High Court against the Assessment of Damages by the learned Sessions Court Judge but the High Court dismissed the plaintiffs' appeal;
- (10) The plaintiffs appealed to the Court of Appeal against the High Court's dismissal of the plaintiffs' appeal but the Court of Appeal dismissed the plaintiffs' appeal; and
- (11) It was Mr. Mogan who had asked him in a phone call to change the TA drafted by DW3 to a draft LA due to the initial term of the new tenancy being for more than 3 (three) years.

[487] In answers to questions from the Court, Baskaran (DW3) said as follows:

- (1) DW3 is not a conveyancing lawyer;
- (2) In this case DW3 did not act as a conveyancing lawyer;
- (3) In this case, DW3 just kept the cheques and he will release the cheques upon receiving the 1<sup>st</sup> defendant's instruction to do so; and
- (4) The 1<sup>st</sup> defendant wanted to operate a hotel in the building but the 1<sup>st</sup> defendant could not do so as the plaintiffs did not give vacant possession to the 1<sup>st</sup> defendant.

[488] Mr. Suaran Singh informed the Court that he did not have any cross-examination questions for Mr. Baskaran.

[489] I had converted the initial marking on the said LA from Exhibit P1 to ID1.

[490] However, in the course of writing the Grounds of Judgment for my decision for this case after the full trial I realized that since

the said LA is the main subject matter of the dispute at hand and there was no dispute that the copy of the said LA that was filed in the COBD marked Bundle ‘C’ by the Court is a copy of the said LA, the said LA is admissible as evidence and the marking of the said LA ought to have remained as Exhibit P1 throughout the trial.

[491] In his lengthy cross-examination by Mr. Selvam, Baskaran (DW3) gave evidence, *inter alia*, as follows:

- (1) The first email that DW3 sent to Mr. Mogan about the relabeling of the TA to a LA was dated 30.07.2015, at pg. 432, Bundle ‘D’, ID(D4-D6)4;
- (2) In the SP Judgment, the terminology used to describe the agreement is “*Perjanjian Penyewaan*” which was consistent with the same terminology used in the said CJ;
- (3) Paragraph 4 of the SP Judgment did not specify that only a “*Perjanjian Penyewaan*” can be executed by the SAR on behalf of the plaintiffs as the terminology used is only “perjanjian” and the said LA comes with that terminology based on the initial term of the new tenancy for 8 (eight) years;
- (4) DW3 has been practising as a lawyer for 21 (twenty-one) years, 15 years of which were in the United Kingdom and 6 years were in Malaysia;
- (5) On 15.08.2015, the 1<sup>st</sup> defendant did not pay to the plaintiffs his debt of RM283,500.00 being the arrears of rental from 01.04.2013 to the date the said CJ was recorded, *viz* on 03.07.2015, because on 01.08.2015 the plaintiffs did not execute the LA and give vacant



- possession of the First to the Third Floors to the 1<sup>st</sup> defendant as agreed upon by the parties in the said CJ;
- (6) Subsequently, the 1<sup>st</sup> defendant has paid his debt of RM283,500.00 being the arrears of rental to the plaintiffs in the Assessment of Damages by the learned Sessions Court Judge;
  - (7) The 1<sup>st</sup> defendant had handed over the cheques to DW3 but DW3 did not hand over the cheques to Mr. Mogan on 15.08.2015;
  - (8) However, DW3 did notify this event to the plaintiffs' solicitor through a telephone conversation and DW3 later wrote a letter to Mr. Mogan dated 25.08.2015 informing the latter that the 1<sup>st</sup> defendant had deposited the cheques with him;
  - (9) But DW3 did not refer to the telephone conversation in his letter to Mr. Mogan dated 25.08.2015 informing the latter that the 1<sup>st</sup> defendant had deposited the cheques with him;
  - (10) DW3 agreed with the suggestion that Mr. Mogan had in the telephone conversation with DW3 demanded for the cheques but DW3 refused to deliver the cheques to him;
  - (11) However, DW3 disagreed with the suggestion that the 1<sup>st</sup> defendant was in default of paragraph 1 of the said CJ because he did not deliver the first cheque dated 15.08.2015 to Mr. Mogan on 15.08.2015;
  - (12) When DW3 was asked to explain why he disagreed with the suggestion, DW3 said that his interpretation of the said CJ is that the plaintiffs must first discharge their duty to



sign a new agreement and give vacant possession of the First, Second and Third Floors on 01.08.2015;

- (13) DW3 also disagreed with the suggestion that he did not hand over the first cheque to the plaintiffs on 15.08.2015 because on that date he had strategized a scheme to commit fraud on the plaintiffs;
- (14) DW3 also disagreed with the suggestion that he did not hand over the first cheque to the plaintiffs on 15.08.2015 because on that date he had conspired with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants to commit fraud on the plaintiffs;
- (15) DW3 agreed with the suggestion that it is not stated in the said CJ that if the plaintiffs did not sign the new agreement on 01.08.2015, there was no need for the 1<sup>st</sup> defendant to pay the outstanding rentals of RM283,500.00 to the plaintiffs;
- (16) DW3 agreed with the suggestion that it is stated in paragraph 1 of the said CJ that the first instalment of the outstanding rentals should be paid on 15.08.2015;
- (17) However, DW3 could not agree with the suggestion that when DW3 held onto the cheques, the 1<sup>st</sup> defendant was in breach of paragraph 1 of the said CJ, construed independently from paragraph 3 of the said CJ, as paragraph 1 of the said CJ requires the 1<sup>st</sup> defendant to pay the outstanding rentals of RM283,500.00 to the plaintiffs on 15.08.2015;
- (18) DW3 identified the original unsigned draft CJ, ID14, that was handwritten by him and agreed to by the plaintiffs



prior to the recording of the said CJ by the Sessions Court and the Court converted the marking to Exhibit P14;

- (19) DW3 disagreed with the suggestion that his scheme to cheat the plaintiffs began on 03.07.2015 by drafting the unsigned draft CJ, Exhibit P14;
- (20) DW3 agreed with the suggestion that he also did not hand over the second, third, fourth and fifth cheques dated 15.09.2015, 15.10.2015, 15.11.2015 and 15.12.2015, respectively, to the plaintiffs' solicitor, on each of those dates;
- (21) DW3 disagreed with the suggestion that he intentionally held on to the cheques and did not want to release them to the plaintiffs' solicitor, and DW3 explained that this was because he was instructed by the 1<sup>st</sup> defendant not to release them until the plaintiffs have signed the new agreement and have given vacant possession of the First, Second and Third Floors to the 1<sup>st</sup> defendant;
- (22) DW3 agreed with the suggestion that based on his email to Mr. Mogan, dated 30.07.2015, ID(D4-D6)4, he had converted the TA to a LA;
- (23) In his email to Mr. Mogan, dated 30.07.2015, ID(D4-D6)4, he stated that he had considered the issue raised by Mr. Mogan and he had converted the TA to a LA;
- (24) DW3 agreed with the suggestion that in his email to Mr. Mogan, dated 30.07.2015, ID(D4-D6)4, he did not refer to the telephone conversation with Mr. Mogan in which the latter had asked him to convert the TA to a LA;



- (25) DW3 disagreed with the suggestion that in the telephone conversation with Mr. Mogan, the latter did not ask him to convert the TA to a LA because in Mr. Mogan's letter dated 02.09.2015 to him, at pp. 200 and 201, Bundle 'C', Exhibit P13, Mr. Mogan had stated that his firm will forward the proposed TA to DW3 for your final approval before signing the same;
- (26) DW3 explained that it is for Mr. Mogan to explain why he had used the words "forward the proposed tenancy agreement" in Exhibit P13, when in an earlier email dated 31.07.2015, at pg. 432, Bundle 'D', Exhibit D11, the latter had used the words "we append below a duly amended draft lease agreement";
- (27) DW3 did not forward to Mr. Prasad the TA as requested in his letter dated 30.12.2015 to DW3, at pg. 396, Bundle 'C', Exhibit P6;
- (28) DW3 replied to Mr. Prasad's letter, P6, and in his letter of reply also dated 30.12.2015, at pp. 397 and 398, Bundle 'C', Exhibit P7, DW3 has quantified his client's, the 1<sup>st</sup> defendant's, loss as RM 20,000.00 per month in accordance with the 1<sup>st</sup> defendant's instruction;
- (29) DW3 instructed Ananthan (DW2), the 4<sup>th</sup> defendant, to contact the SAR to fix an appointment (for the execution of the LA by the SAR) and upon fixing an appointment, the 4<sup>th</sup> defendant wrote a letter to confirm the appointment with the SAR;
- (30) DW3 identified the letter, which was signed by the 4<sup>th</sup> defendant, and which has the 6<sup>th</sup> defendant's letterhead and the Court marked it as Exhibit P37;





- (31) DW3 disagreed with the suggestion that he had fraudulently inserted the words “and vacant possession provided” in the LA, at pp. 111 and 112, Bundle ‘C’, to deceive the plaintiffs as well as the Court;
- (32) DW3 admitted that he added the words “and vacant possession provided” in the LA but he disagreed with the suggestion that he did not mention in the fourth paragraph and subparagraph a. in his letter of reply dated 30.12.2015, at pg. 397, Bundle ‘C’, P7, to Mr. Prasad’s letter dated 30.12.2015, Exhibit P6, that he had added the words “and vacant possession provided” in the LA;
- (33) DW3 explained that he had mentioned in the fourth paragraph and subparagraph a. in his letter of reply dated 30.12.2015, at pg. 397, Bundle ‘C’, Exhibit P7, to Mr. Prasad’s letter dated 30.12.2015, that the plaintiffs have “to execute the LA together with the Addendum of the First Schedule which needs to be annexed under the same Agreement due to delay caused by your clients” and that the words “and vacant possession provided” are stated in the annexed Addendum of the First Schedule, at pg. 419, Bundle ‘C’;
- (34) DW3 agreed with the suggestion that he had added the words “and vacant possession provided” in Sections 6 and 7 of the annexed Addendum of the First Schedule, at pp. 419 and 420, Bundle ‘C’, without the approval of the plaintiffs or their solicitors;
- (35) DW3 agreed with the suggestion that the words “and vacant possession provided” are not stated / reflected in the said CJ;



- (36) DW3 did not inform the 4<sup>th</sup> defendant that he had added the words “and vacant possession provided” in the LA when he instructed the latter to take the documents including the LA to get the LA signed by the SAR;
- (37) DW3 agreed with the suggestion that the total amount of the 6 (six) cheques is RM 323,500.00;
- (38) However, DW3 disagreed with the suggestion that he was holding the “worthless” cheques as a stakeholder because based on the closing balance for the months of August 2015 to December 2015 as stated in the bank statements of the 1<sup>st</sup> defendant’s bank account there were insufficient funds to meet the amounts stated in the cheques;
- (39) DW3 explained that the cheques, which he was holding as a stakeholder, had been made “worthless” by the plaintiffs based on the 1<sup>st</sup> defendant’s bank statements (for the 5 (five) months) and so there is no value to the cheques;
- (40) DW3 explained that he did not check with the 2<sup>nd</sup> defendant whether there were monies in the 1<sup>st</sup> defendant’s account because there was no requirement for him to do so as his duty was only to keep the cheques and to deliver the cheques to the plaintiffs’ solicitor, after the plaintiffs have fulfilled their obligations under the said CJ;
- (41) DW3 agreed with the suggestion that based on the closing balance for the month of January 2016 in the bank statement of the 1<sup>st</sup> defendant there were insufficient funds to meet the total amount of the 6 (six) cheques, *viz* RM 323,500.00;



- (42) However, DW3 disagreed with the suggestion that he had conspired with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants and the 4<sup>th</sup> defendant to deceive the Court and the plaintiffs when he instructed the 4<sup>th</sup> defendant to take the cheques to see the SAR on 18.01.2016 to get the LA signed by the SAR;
- (43) DW3 explained that he is not duty bound to check with the bank to see whether the money is in the bank account of the 1<sup>st</sup> defendant when he instructed the 4<sup>th</sup> defendant to take the cheques to see the SAR on 18.01.2016 to get the LA signed by the SAR;
- (44) DW3 explained that this is because the 6<sup>th</sup> defendant kept the cheques in the file to show to the Court that the 1<sup>st</sup> defendant had complied with the said CJ and has given the cheques to the 6<sup>th</sup> defendant to be given to the plaintiffs' solicitor, on 01.08.2015, after the plaintiffs have signed the LA and given vacant possession of the First to the Third Floors to the 1<sup>st</sup> defendant;
- (45) DW3 also explained that after 01.08.2015, the cheques became redundant because the plaintiffs failed to sign the LA and give vacant possession;
- (46) DW3 also explained that the cheques that he received from the 2<sup>nd</sup> defendant could be tendered to the 1<sup>st</sup> defendant's bank as the cheques were valid for 6 (six) months and based on this reason, he considered the cheques to be valid until the cheques bounced after the cheques were banked in;
- (47) But in this case, the cheques were not even tendered or given and the cheques were not bounced cheques;



- (48) The cheques were given to DW3 by the 2<sup>nd</sup> defendant on 28.07.2015 and DW3 has deposed an affidavit, at pp. 170 to 177, Bundle 'C', Exhibit P39, for the Assessment of Damages before the learned Sessions Court Judge, in which he stated that the 2<sup>nd</sup> defendant attended his office on 28.07.2015 and handed over the cheques to him;
- (49) DW3 explained that in his email dated 31.07.2015, at 06:01 PM, to Mr. Mogan, the plaintiffs' solicitor, he had –
- (a) expressed the hope that the slight amendments to the agreement are acceptable to Mr. Mogan's clients and that the agreement can be executed on Monday, 03.08.2015;
  - (b) urged Mr. Mogan as per his undertaking to collect the keys to the entire building on Monday, 03.08.2015;
  - (c) informed Mr. Mogan that the 6<sup>th</sup> defendant have obtained the cheque for security and utility deposits in the sum of RM 70,000.00 and it will be delivered to Mr. Mogan's office on the same day the 6<sup>th</sup> defendant collect the keys to the premises;
  - (d) expressed the hope to resolve this issue at the soonest possible; and
  - (e) thanked Mr. Mogan for all the cooperation.
- (50) Based on the 1<sup>st</sup> defendant's bank statement for the month of July 2015, there were sufficient funds when the cheque for the sum of RM 70,000.00 was issued by the 1<sup>st</sup> defendant as the closing balance was RM 128, 091.43;



- (51) DW3 agreed with the suggestion that as of 28.08.2015, there were insufficient funds to meet the cheque for the sum of RM 70,000.00 if the cheque was banked in on that date as there was a balance of RM 34,832.23;
- (52) DW3 disagreed with the suggestion that by not stating in his letter dated 30.12.2015 to Mr. Prasad that he had added the words “and vacant possession provided” in the Addendum of the First Schedule to the LA, he had suppressed the information concerning the words “and vacant possession provided” that he had added in the annexed Addendum of the First Schedule to the LA;
- (53) DW3 disagreed with the suggestion that he had the intention to commit fraud and to cheat the plaintiffs and the Courts from the moment he added the words “and vacant possession provided” (“this particular phrase”) in the Addendum of the First Schedule to the LA;
- (54) DW3 agreed with the suggestion that in paragraph 44 of Yeoh Wee Siam J’s Grounds of Judgment, in which the learned High Court Judge stated that it is provided in Sections 6 and 7 of the Addendum to the First Schedule of the LA that a Rental Security Deposit and a Utility Deposit can only be paid on the date of execution of the agreement and vacant possession provided, the learned High Court Judge had focused her decision on this particular phrase that was added by him;
- (55) DW3 agreed with the suggestion that this particular phrase is not present in Sections 6 and 7 of the First Schedule of the copy of the LA, at pp. 445 and 446, Bundle ‘D’, that was enclosed together with Messrs. Mogan & Co.’s email dated 09.09.2015, at 3:43 PM, at pg. 433, Bundle ‘D’;



- (56) DW3 also agreed with the suggestion that at that point in time when this email dated 09.09.2015, at 3:43 PM, at pg. 433, Bundle 'D', was sent to him, Mr. Mogan and the plaintiffs did not have knowledge of the addition of this particular phrase in the Sections 6 and 7 of the Addendum to the First Schedule of the LA;
- (57) The Court marked the copy of the LA with the First Schedule, at pp. 184 to 196, Bundle 'C', as Exhibit P40, upon the request of Mr. Selvam as Sections 6 and 7 of the First Schedule, at pp. 195 and 196, Bundle 'C', also did not have this particular phrase;
- (58) DW3 disagreed with the suggestion that his entire conduct in initially converting the TA to a LA and later in adding this particular phrase in the Addendum of the First Schedule annexed to the LA without specifically drawing the attention of Mr. Prasad, in his letter dated 30.12.2015 to Mr. Prasad enclosing the LA with the annexed Addendum of the First Schedule for the execution of the plaintiffs, to his addition of this particular phrase therein and subsequently, without specifically drawing the attention of the following –
- (a) the SAR, who signed the LA on behalf of the plaintiffs on 18.01.2016;
  - (b) the learned Sessions Court Judge who heard and decided the 1<sup>st</sup> defendant's application for Assessment of Damages;
  - (c) the learned High Court Judge who heard and dismissed the plaintiffs' appeal against the amount of



damages assessed by the learned Sessions Court Judge;

- (d) the Court of Appeal which heard and dismissed the plaintiffs' appeal against the decision of the learned High Court Judge who heard and dismissed the plaintiffs' appeal against the amount of damages assessed by the learned Sessions Court Judge;
- (e) the learned High Court Judge who heard and dismissed the plaintiffs' application for extension of time to file a notice of appeal out of time against the SP Judgment; and
- (f) the Court of Appeal which heard and dismissed the plaintiffs' appeal against the decision of the learned High Court Judge who dismissed the plaintiffs' application for extension of time to file a notice of appeal out of time against the SP Judgment;
- (g) to his addition of this particular phrase in the annexed Addendum of the First Schedule to the LA was with the intention to deceive and he has committed fraud against the plaintiffs as well as to the Courts, from the Sessions Court to the Court of Appeal; and
- (h) DW3 disagreed with the suggestion that he had embarrassed himself and that he had not conducted himself with dignity before the Courts in proceedings arising from the said CJ and / or that he had misled any of the Courts.

[492] In his answer to a question from the Court, Baskaran (DW3) said that as at 01.08.2015, there was sufficient money in the 1<sup>st</sup> defendant's bank account based on the 1<sup>st</sup> defendant's bank statement for the month of August 2015 to meet the cheques.

[493] In his re-examination by Mr. Nekoo, Baskaran (DW3) gave evidence, *inter alia*, as follows:

- (1) The reason why DW3 disagreed with Mr. Selvam's suggestion that it was he and not Mr. Mogan who had converted the draft TA to a draft LA is because DW3's first email at pg. 432, Bundle 'D', ID(D4-D6)4, shows that the request to convert the draft TA to a draft LA actually came from Mr. Mogan based on the words used by DW3 in the email, *viz* "Having considered the issues raised by you, ... I have converted the Tenancy Agreement to a Lease Agreement ...";
- (2) After DW3 had made the conversion there was no longer any TA and it was the LA that was the subjectmatter of all the other proceedings arising from the said CJ;
- (3) So when Mr. Prasad came into the picture, there was only the LA and when the SP Judgment was obtained by the 1<sup>st</sup> defendant, the SP Judgment was based on the said LA;
- (4) So DW3 gave a copy of the said LA to Mr. Prasad by enclosing it together with a copy of the SP Judgment in his letter to Mr. Prasad;
- (5) So DW3 does not know why Mr. Prasad was mentioning about the TA in the latter's letter to DW3 dated 30.12.2015;





- (6) The reason why DW3 had disagreed with Mr. Selvam's suggestion that he had already strategized a scheme to defraud the plaintiffs by not paying the outstanding rentals due on 15.08.2015 to the plaintiffs' solicitors is because the said CJ is a contingency contract where the plaintiffs have to execute a new rental agreement and also to give vacant possession and only upon that do the the 1<sup>st</sup> defendant's duty and obligation to pay the arrears of rental arise;
- (7) So since the new rental agreement was not signed and vacant possession was not given, the obligation to pay did not arise;
- (8) The reason why DW3 said the debt in paragraph 1 of the said CJ has been paid is because during the Assessment of Damages by the learned Sessions Court Judge, the 6<sup>th</sup> defendant informed the learned Sessions Court Judge that the 1<sup>st</sup> defendant has not paid the debt due to the plaintiffs' breach of the said CJ and after the Assessment of Damages by the learned Sessions Court Judge, the learned Sessions Court Judge decided that the debt was paid to the plaintiffs by way of set off against the damages assessed in favour of the 1<sup>st</sup> defendant (see paragraph 23, at pg. 92, Bundle 'B');
- (9) The reason why DW3 did not deliver the cheques dated 15.08.2015 that were with him to Mr. Mogan is because the events that were supposed to take place on 01.08.2015, viz the signing of the new rental agreement and the giving of vacant possession did not take place ("the 2 (two) events");
- (10) So the cheques were made redundant by the plaintiffs;



- (11) The reason why DW3 disagreed with the suggestion that his client's instruction not to release the cheques was to cheat the plaintiffs is because his client's impression was that the 2 (two) events have to take place first on 01.08.2015 and then the cheques were to be released according to the dates in the cheques, viz on 15.08.2015, 15.09.2015, 15.10.2015, 15.11.2015, and 15.12.2015, respectively;
- (12) So it was on that premise that his client said do not release the cheques until the plaintiffs sign the new rental agreement and give vacant possession of the building;
- (13) The reason why DW3 disagreed with the suggestion that paragraphs 1 and 3 of the said CJ must be read independently is because the said CJ is a contract and as a lawyer, it is his duty to interpret documents and based on his interpretation, paragraph 1 is subject to the happening of the events in paragraph 3;
- (14) DW3 has put forward his interpretation to the courts and the courts have agreed with him;
- (15) The reason why DW3 disagreed with the suggestion that he has practised deception on Yeoh Wee Siam J (later JCA) is because he has exhibited all the documents in this case in his affidavit-in-reply in the proceeding before the learned Judge, he has put in his detailed submissions of what actually happened in the case for that proceeding, he has answered the learned Judge's questions and the facts put forward by him were the true facts;
- (16) The reason why DW3 disagreed with the suggestion that he had fraudulently inserted the four words "and vacant



possession provided” (“the four words”) in Sections 6 and 7 of the Addendum of the First Schedule of the said LA is because he had first added the four words in open and close brackets in Sections 6 and 7 of the First Schedule of the draft LA, at pp. 406 to 420, Bundle ‘C’, ID(D4-D7)8, and the page concerned is pg. 417, Bundle ‘C’, that he had sent to Mr. Prasad together with his letter dated 30.12.2015 and he had also added the four words without the open and close brackets in Sections 6 and 7 of the Addendum of the First Schedule of the draft LA, at pp. 419 and 420, Bundle ‘C’, that he had sent to Mr. Prasad together with his letter dated 30.12.2015;

- (17) So Mr. Prasad (PW2) has knowledge of his addition of the four words because in his letter dated 30.12.2015 he had referred to the Addendum of the First Schedule which must be annexed to the LA due to the delay caused by Mr. Prasad’s clients and in the caption of the Addendum of the First Schedule, it is stated “DUE TO NON-COMPLIANCE OF THE CONSENT JUDGMENT DATED 03<sup>rd</sup> JULY 2015”;
- (18) In the Addendum of the First Schedule, DW3 has also not stated the date of the commencement of the new agreement because he did not know when the parties will be signing the new agreement as the dates have moved due to the delay caused by Mr. Prasad’s clients;
- (19) But Mr. Prasad (PW2) initially said he did not receive DW3’s letter dated 30.12.2015 and it was only after Mr. Prasad (PW2) was recalled that he said that he had received DW3’s letter dated 30.12.2015 and Mr. Prasad (PW2) also said he had replied to DW3’s letter dated



30.12.2015, ID7, subsequently converted to Exhibit P7, *vide* an email dated 14.01.2016, at 12:20 PM, but in his reply to DW3, Mr. Prasad (PW2) did not highlight that the 6<sup>th</sup> defendant should change (the 2 (two) Sections) and take out the four words;

- (20) On this point I noted that DW3 testified that the plaintiffs and their solicitor have knowledge of and did not object to the addition of the four words (in open and close brackets) in Sections 6 and 7 of the First Schedule of the LA, at pg. 417, Bundle ‘C’, and (without the open and close brackets) in Sections 6 and 7 of the Addendum of the First Schedule of the LA, at pp. 419 and 420, Bundle ‘C’, that he had sent to Mr. Prasad together with his letter dated 30.12.2015;
- (21) The reason is because in his email dated 14.01.2016, at 12:20 PM, to DW3, in reply to DW3’s letter dated 30.12.2015, Exhibit P7, Mr. Prasad (PW2) stated, *inter alia*, “Our clients have perused through the agreement ...” and his clients are talking about the monthly rental and about the vacant possession cannot be provided because there is an existing tenant but Mr. Prasad (PW2) did not state that he and /or his clients have any objection to the addition of the four words in the First Schedule and the Addendum of the First Schedule of the draft LA prepared by DW3 and enclosed in DW3’s letter dated 30.12.2015;
- (22) In regard to Mr. Selvam’s suggestion to DW3 that the cheques that DW3 was holding were “worthless”, and DW3 had disagreed with the suggestion saying that the cheques were not “worthless” cheques but that the cheques have been made redundant by the actions of the plaintiffs, DW3 explained that what he meant by that is, on



01.08.2015, the plaintiffs needed to execute the new rental agreement and give vacant possession and on the same day his client has to give the cheque for the security deposit of RM 70,000.00 but since they did not sign the agreement and the vacant possession was not given, the first cheque for the security deposit became redundant;

(23) After that on 15.08.2015, which is the date for the first payment of the arrears of rental, since the plaintiffs did not execute and give vacant possession, that cheque was made redundant;

(24) The same happened to the rest of the cheques dated 15.09.2015, 15.10.2015, 15.11.2015, and 15.12.2015, respectively;

(25) The reason why he disagreed with the suggestion that in the hearing of the Assessment of Damages, he had stated that there were monies in the 1<sup>st</sup> defendant's account and that the cheques were still valid is because he did not state that and in the 1<sup>st</sup> defendant's application for enforcement of the said CJ, he had exhibited the cheques to show to the court that his client had handed over the cheques to him on 28.07.2015 but the plaintiffs did not do what they have to do under the said CJ and since DW3 was not tendering the cheques to the court in that proceeding, he did not see a duty to check whether there is a balance in his client's account;

(26) If DW3 was tendering the cheques to the court he would have made sure that there is money in his client's account before he tendered the cheques to the court;

(27) DW3 has conducted his client's case in an honest way; and

(28) When DW3 was referred to the 1<sup>st</sup> defendant's bank statements, at pp. 1 to 4, Bundle 'Cc', in particular, for the month of August 2015 and asked to explain why he had said 'No' in answer to Mr. Selvam's question whether looking at the closing bank balance for that month, the first cheque dated 01.08.2015 for RM 70,000.00 that was given to him on 28.07.2015 was good to be realized with the bank balance for that month, DW3 explained that with an opening balance of RM 128,091.34 for that month which remained until 03.08.2015, if he had given that cheque to the plaintiffs' solicitor on 01.08.2015, there was sufficient money in his client's account (to meet the cheque), and this is what he has asked the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant said for the first cheque, the 1<sup>st</sup> defendant has enough money, but since the plaintiffs did not sign the agreement and give vacant possession, DW3 did not have the duty to check whether there is a balance because he did not tender the cheque to the court and so what his client had done with the money (in the client's account) DW3 is not responsible.

[494] Upon the application of Mr. Nekoo, the Court converted the ID(D4-D6)5 marking for the 1<sup>st</sup> email at the top dated 30.12.2015 sent by DW3 to Mr. Prasad (DW2), at pg. 1, Bundle 'Bb', to Exhibit D(D4-D6)5 and the ID(D4-D6)6 marking for the 2<sup>nd</sup> email at the bottom dated 14.01.2016 sent in reply by Mr. Prasad (DW2) to DW3, at pg. 1, Bundle 'Bb', to Exhibit D(D4-D6)6 as both the makers, *viz* DW3 and Mr. Prasad (DW2) have identified their respective emails while they were giving evidence in the witness box.

[495] Upon the application of Mr. Nekoo, the Court also converted the ID(D4-D6)7 marking for the letter dated 30.12.2015 sent by

DW3 to Mr. Prasad (DW2) to Exhibit D(D4-D6)7 as DW3 has identified the letter while DW3 was giving evidence in the witness box in re-examination and Mr. Prasad (DW2) has admitted he had received the letter dated 30.12.2015 sent by DW3 to him while he was giving evidence in the witness box during his further cross-examination by Mr. Nekoo after the Court allowed the 4<sup>th</sup> to the 6<sup>th</sup> defendants' application to recall him for further cross-examination.

[496] After Mr. Nekoo had completed his re-examination of DW3, upon the application of Mr. Selvam I allowed the latter to further cross-examine DW3 but only on the letter dated 30.12.2015, Exhibit P7. The reason is because DW3 did not give evidence in his examination-in-chief on the letter dated 30.12.2015, at pg. 397, Bundle 'C', Exhibit P7, sent by him to Mr. Prasad (DW2).

[497] In his further cross-examination by Mr. Selvam, DW3 testified, *inter alia*, as follows:

- (1) After receiving the email dated 14.01.2016 sent in reply by Mr. Prasad (DW2) to him, at pg. 1, Bundle 'Bb', to Exhibit D(D4-D6)6, he did not respond to the email;
- (2) On the following day, on 15.01.2016, the 6<sup>th</sup> defendant sent out the letter to the Pendaftar, in Bundle 'F', P37, to execute the LA on behalf of the plaintiffs;
- (3) DW3 agreed with the suggestion that in Mr. Prasad's (DW2's) to him, the latter has proposed an amendment to the LA sent by DW3; and
- (4) However, DW3 disagreed with the suggestion that he had rushed to the Pendaftar the next day without responding to

Mr. Prasad's (DW2's) proposal, that by doing so and by not carbon copying his letter to the Pendaftar, at pg. 1, Bundle 'F', Exhibit P37, to Mr. Prasad (DW2), his fraudulent intent continued.

[498] In his further re-examination by Mr. Nekoo, DW3 testified, *inter alia*, as follows:

- (1) DW3 explained that he did not rush to the Pendaftar to have the LA executed by the Pendaftar because after obtaining the SP Judgment to enforce the said CJ, he had given notice to Mr. Prasad (DW2) (for the plaintiffs to execute the LA and give vacant possession) but there was a long delay on Mr. Prasad's (DW2's) part in responding to his letters (dated 23.12.2015, Exhibit D(D4-D6)41 and 30.12.2015, Exhibit P7);
- (2) DW3 referred to and read out paragraphs 41 and 42 of the Grounds of Judgment of Yeoh Wee Siam J;
- (3) In paragraph 41, the learned Judge had stated that the 6<sup>th</sup> defendant had informed Mr. Prasad (DW2) in the letter dated 23.12.2015, that if the latter's clients failed to execute the LA, the 6<sup>th</sup> defendant would proceed in accordance with the SP Judgment to obtain the Court Official's signature for the LA;
- (4) In paragraph 42, the learned Judge considered the delay on the plaintiffs' part in responding to DW3's letter dated 23.12.2015 within the 14 days stated in the letter, *viz* by 06.01.2016; and
- (5) Mr. Prasad's (DW2's) response *vide* his email dated 14.01.2016 was way too late.



[499] In his answers to some questions from the Court, DW3 said, *inter alia*, as follows:

- (1) He graduated with a Bachelor of Law, Second Class Lower Honours degree from the University of Malaya and he went to the United Kingdom (“the UK”) where he obtained his qualification to practise as a solicitor in the UK;
- (2) He practised as a solicitor in the UK for 15 years dealing mainly with criminal matters and to a small extent some civil matters involving immigration; The Ground Floor of the building is occupied by the 1<sup>st</sup> defendant’s tenant as the TA that was entered into in 2013 allows the 1<sup>st</sup> defendant to sublet the Ground Floor of the building; and
- (3) The 4<sup>th</sup> to the 6<sup>th</sup> defendants will be calling a Stamp Duty officer to testify on the said LA to answer the questions raised by the Court.

#### **4<sup>th</sup> to 6<sup>th</sup> defendants’ Written Submissions dated 23.07.2019**

[500] In their Written Submissions dated 23.07.2019, the 4<sup>th</sup> to the 6<sup>th</sup> defendants submitted that based on the reasons as set out therein, the plaintiffs have failed to discharge their legal burden of proving fraud and / or cheating and conspiracy by the 4<sup>th</sup> to the 6<sup>th</sup> defendants premised on the allegations, averred by the plaintiffs in the SOC, that the 4<sup>th</sup> to the 6<sup>th</sup> defendants conspired with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants to induce the SAR to sign the said LA and that the 4<sup>th</sup> to the 6<sup>th</sup> defendants cheated and misrepresented the SAR into signing the said LA.

[501] Hence, they prayed that the plaintiffs’ claim be dismissed with costs.



[502] I agreed with the submissions of the 4<sup>th</sup> to the 6<sup>th</sup> defendants that the plaintiffs' claim ought to be dismissed with costs based on the reasons given by them in their Written Submissions dated 23.07.2019, and I have incorporated the reasons in my Grounds of Judgment.

**4<sup>th</sup> to 6<sup>th</sup> defendants' oral submissions-in-reply made on 23.07.2019**

[503] Mr. Nekoo drew the attention of the Court to pg. 6 of the 4<sup>th</sup> to the 6<sup>th</sup> defendants' Written Submissions dated 23.07.2019 on Issue 2 (d).

[504] Mr. Nekoo also submitted that in regard to Issue 5, Issue 6 and Issue 8, the plaintiffs have submitted that the SAR was induced by the 4<sup>th</sup> to the 6<sup>th</sup> defendants but no evidence of the alleged inducement was adduced by the plaintiffs during the trial.

**Documents not pleaded and not filed by plaintiffs**

[505] I noted that although the plaintiffs pleaded the 2015 Sessions Court writ case and the said CJ, the plaintiffs did not plead the tenancy agreement which was the subject matter of the 2015 Sessions Court writ case. The plaintiffs also did not include a copy of the tenancy agreement in any of the Bundles of Documents filed for use in the full trial.

[506] Hence, I did not know who were the parties to the tenancy agreement, *viz* who were the landlords and who were the tenants, and what were the terms of the tenancy agreement.

[507] I also did not know in detail why the plaintiffs sued the 1<sup>st</sup> defendant in the Shah Alam Sessions Court and why the case was, subsequently, transferred to the KL Sessions Court.

[508] Therefore, I was not able to understand and appreciate in detail the connection between the said CJ and the earlier tenancy agreement entered into in 2013 and the disputes arising between the parties in the instant case.

### **Findings of the Court**

[509] Below are my findings after having considered the evidence of the 10 (ten) witnesses against the backdrop of the parties' pleadings and in the light of the parties' submissions.

[510] Puan Zura (PW1) testified that she signed the LA on 18.01.2016 after she had considered the request of the 4<sup>th</sup> defendant. PW1 said she could not recall the documents that were shown to her by the 4<sup>th</sup> defendant.

[511] PW1 also said that paragraph four of the said SP Judgment only mentioned the word "*perjanjian*" in Malay or agreement in English. Hence, she explained that she had executed the LA that was presented to her by Ananthan (DW2), the 4<sup>th</sup> defendant, as the LA was a "*perjanjian*" viz an agreement.

[512] I found PW1 to be a credible witness as she displayed candour when she testified for the plaintiffs. I found her evidence reliable as it was consistent with the contents of the documentary evidence relied upon by the defendants, viz paragraph 3 of the said CJ, paragraph four of the said SP Judgment and Sections 6 and 7 of the Addendum to the First Schedule of the LA.



[513] If PW1 had fallen short in the eyes of the plaintiffs, it was certainly through no fault of hers. I am of this view because the plaintiffs only framed 3 questions to pose to her in the List of Questions that was filed in accordance with the PTCM directions given by the Court.

[514] I did not find the 1<sup>st</sup> plaintiff, Karpayah (PW4), to be a credible witness. I found PW4 to be an untruthful witness on the key aspects of his pleaded case against the defendants.

[515] I found that he was trying to split hairs when he kept on insisting by himself and through his learned lead counsel, Mr. Selvam, that the LA drafted by the 6<sup>th</sup> defendant upon the request of Mr. Mogan (DW1), from the plaintiffs' first set of solicitors, was drafted in breach of paragraph 3 of the said CJ due to the reason that there was no provision for the preparation and execution of a LA under the said CJ but only a TA.

[516] Yet PW4 finally admitted that he knew what a LA is and that a LA is an agreement for a tenancy for a period of more than 3 (three) years.

[517] More importantly, in the instant case, the plaintiffs did not dispute that they had agreed to let the building to the 1<sup>st</sup> defendant for an initial term of 8 (eight) years with an automatic renewal for a term of 4 (four) years and that the said CJ was recorded in their presence by the Sessions Court Judge.

[518] The plaintiffs also did not dispute that at the time the said CJ was recorded in their presence by the Sessions Court Judge, they had agreed under paragraph 3 of the said CJ to execute a new agreement for the letting of the building to the 1<sup>st</sup> defendant and the giving of vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant at an earlier point in



time, *viz* on 01.08.2015, than the date that they had agreed to receive payment of the arrears of rent under the said CJ, *viz* on 15.08.2015.

[519] The plaintiffs also did not dispute that under the terms of the said CJ the parties agreed that the 1<sup>st</sup> defendant's obligation to pay the said deposits under the new agreement for the letting of the building to the 1<sup>st</sup> defendant is 01.08.2015, which is the date the plaintiffs are contractually obliged to execute a new agreement for the letting of the building to the 1<sup>st</sup> defendant and the giving of vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[520] In my view, the plaintiffs have failed to prove on the balance of probabilities that the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant's 2 (two) shareholders and directors, *viz* the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, and the 4<sup>th</sup> to the 6<sup>th</sup> defendants have committed cheating/fraud, misrepresentation and/or conspiracy against them when in the very first place, it was the plaintiffs' own default of their contractual obligations under the said CJ, expressed in clear and unambiguous terms, to execute a new agreement for the letting of the building to the 1<sup>st</sup> defendant and to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant on 01.08.2015, which triggered off the chain of events that culminated in the 1<sup>st</sup> defendant filing the 2017 OS case to obtain a writ of possession for the building and the filing of the Writ by the plaintiffs against the 6 (six) defendants.

[521] I also took into consideration that although the plaintiffs have sued the 1<sup>st</sup> defendant for breach of the said CJ the plaintiffs themselves have breached the said CJ by not giving vacant possession of the First, Second and Third Floors of the building



to the 1<sup>st</sup> defendant right up to the date that the Court delivered its decision in this case.

[522] I am also of the view that it was because the plaintiffs intended to delay the hearing of the 2017 OS case that the plaintiffs then filed this case against the defendants alleging cheating/fraud, misrepresentation and/or conspiracy against them knowing fully well that the moment such serious allegations are levelled against the defendants the Court would err on the side of caution by giving to the plaintiffs a wider latitude than the Court would otherwise have given, for the cross-examination of the defendants' witnesses during the trial on their credibility and the veracity of their evidence.

[523] However, in the course of the trial, the plaintiffs have taken undue advantage of the laxity given to the plaintiffs by the Court to cross-examine the defendants' witnesses on veracity, in particular, Ananthan (DW2) and Baskaran (DW3), by attempting to extend or widen the scope of their pleaded case by making a radical departure from their pleaded case by alleging that the defendants not only cheated/defrauded, misrepresented and conspired against Puan Zura (PW1) to obtain her signature for the said LA on behalf of the plaintiffs by using and relying on the alleged "worthless cheques" but that they also cheated/defrauded, misrepresented and conspired against Puan Roszianayati, the learned Sessions Court Judge, to obtain the SP Judgment by using and relying on the alleged "worthless cheques".

[524] I noted that the plaintiffs did this through their learned lead counsel, Mr. Selvam, when Mr. Selvam sought to elicit evidence from DW2 during his cross-examination of DW2 that he, together with the rest of the defendants, had cheated/defrauded,

misrepresented and conspired against Puan Roszianayati, by using and relying on the alleged “worthless cheques” to obtain the SP Judgment from the Sessions Court Judge.

[525] Fortunately, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants and their solicitors, Mr. Suaran Singh was alert enough to immediately raise an objection that Mr. Selvam’s line of questioning ought not to be allowed as it was not pleaded by the plaintiffs that the defendants have cheated/defrauded, misrepresented and conspired against Puan Roszianayati, by using and relying on the alleged “worthless cheques” to obtain the SP Judgment.

[526] I also noted that when Mr. Selvam was cross-examining Baskaran (DW3) he also suggested to DW3 that DW3 had used the alleged “worthless cheques” to cheat the learned High Court Judges and the learned Court of Appeal Judges who heard the related matters when these facts were not pleaded in the SOC. However, I noted that Mr. Suaran Singh had objected strongly to this line of cross-examination of DW3 by Mr. Selvam.

[527] It is trite law that parties are bound by their pleadings. On this issue, in my view, the 2 (two) cases, *viz* the Federal Court case of *Gurbachan Singh s/o Bagawan Singh & Ors v. Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak)* and other appeals [2015] 1 MLJ 773 and the case of *Superintendent of Lands and Surveys (4<sup>th</sup> Div) & Anor v. Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567, referred to by Mr. Selvam did not assist the plaintiffs because in those 2 (two) cases there was no objection raised by the opponent’s counsel and no radical departure from the pleadings.



[528] I also did not find the plaintiffs' second witness, Mr. Prasad (PW2), to be a credible witness. I found him to be an untruthful witness on the key aspect of his testimony, *viz* his testimony that he did not receive the 6<sup>th</sup> defendant's letter dated 30.12.2015 to Messrs. D. Prasad & Partners, Exhibit P7, in reply to his letter dated 30.12.2015 to the 6<sup>th</sup> defendant, Exhibit P6.

[529] It was only when PW2 was confronted with documentary evidence that the 6<sup>th</sup> defendant did send to him at another of his email addresses, *viz* info@dprasad.com, to which was attached a copy of the 6<sup>th</sup> defendant's letter dated 30.12.2015 to Messrs. D. Prasad & Partners, Exhibit P7, in reply to his letter dated 30.12.2015 to the 6<sup>th</sup> defendant, Exhibit P6, that PW2 admitted receiving a copy of Exhibit P7.

[530] But even then in my view PW2 was trying his level best to split hairs by repeatedly refusing to admit that he was not telling the truth when he testified initially that he did not receive a copy of Exhibit P7. This is because he repeatedly tried to explain away his untruthful earlier testimony by insisting that the reason why he said he did not receive Exhibit P7 was because it was sent to him by email at another of his 2 (two) email addresses, *viz* info@dprasad.com. instead of his other email address at dsp@dprasad.com.

[531] I did not find the plaintiffs' third witness, Zafri (PW3), to be a credible witness. The reason is because of the inconsistencies between what had transpired in Court and what PW3 testified in Court when he was recalled by the plaintiffs to testify in Court.

[532] I noted that Mr. Selvam had produced the bank statements of the 1<sup>st</sup> defendant in Court during the trial even before PW3 was recalled by the plaintiffs on 16.07.2019, to produce them and to testify on the bank statements. Yet on 16.07.2019, PW3 testified



that this was the first time he was producing the bank statements before the Court and to any party.

[533] Be that as it may, PW3's evidence did not establish that the 1<sup>st</sup> to the 6<sup>th</sup> defendants had cheated/defrauded, misrepresented and conspired to induce Puan Zura (PW1) to sign the LA or that the 1<sup>st</sup> to the 6<sup>th</sup> defendants had cheated/defrauded, misrepresented and conspired to use the cheques to cheat the plaintiffs based on the reason that there were insufficient funds in the 1<sup>st</sup> defendant's accounts to meet the cheques.

[534] In my view, PW3's evidence merely showed that if the cheques were presented to the CIMB Bank for encashment purposes, the cheques would have bounced as there were insufficient funds in the bank account to honour the cheques. But I took into consideration the undisputed evidence that at that point in time, the cheques were not intended to be presented to the bank for encashment purposes as the plaintiffs had yet to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[535] In my view, if the plaintiffs were sincere in their desire and intention to obtain the cheques from the 6<sup>th</sup> defendant, after the plaintiffs were informed by their solicitors that the cheques were in the custody of the 6<sup>th</sup> defendant, as stakeholder, the plaintiffs would have promptly given vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant on 01.08.2015.

[536] This is because the plaintiffs were fully aware that they had settled the 2015 KL Sessions Court writ case with the 1<sup>st</sup> defendant by entering into the said CJ to hand over vacant

possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant on 01.08.2015.

**[537]** The plaintiffs were also fully aware that the 1<sup>st</sup> defendant was and is a business concern. Hence, in my view, it is wholly unreasonable for the plaintiffs to expect the 1<sup>st</sup> defendant to ensure that there are sufficient funds in the bank account from 04.08.2015 onwards to meet the cheques when the plaintiffs were delaying in handing over vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

**[538]** On the other hand, I found the defendants' witnesses, Mr. Mogan (DW1), Ananthan (DW2), Baskaran (DW3), Alagar (DW4), Hairi (DW5) and Selvi (DW6), to be credible witnesses. I found their evidence to be consistent and supported by documentary evidence. Hence, I found their evidence to be reliable and most probably true.

**[539]** Therefore, I found the defendants' proven case to be more probable than the plaintiffs' proven case.

**[540]** Based on the defendants' pleaded and proven cases, I found that there was no defect or irregularity in the said CJ or in the said LA despite the presence of the phrase "and vacant possession provided" after the words "execution of the LA" in Sections 6 and 7 of the Addendum of the First Schedule of the said LA, admittedly, inserted by Baskaran (DW3), the 5<sup>th</sup> defendant.

**[541]** I found that based on the testimony of Mr. Mogan (DW1), who was the solicitor acting for the plaintiffs' tenancy matter with the 1<sup>st</sup> defendant, and who was the solicitor acting for the plaintiffs on the date the said CJ was recorded by the learned Sessions Court Judge, the plaintiffs understood the terms and

conditions of the said CJ before and after the said CJ was recorded by the learned Sessions Court Judge.

[542] Furthermore, the 1<sup>st</sup> plaintiff is a qualified veterinary surgeon and he has no difficulty understanding the English language and/or the Malay language.

[543] I also did not find any ambiguity in any of the wordings used in the said CJ.

[544] I was of the view that the following facts that were established based on the testimony of Mr. Mogan (DW1) did not vitiate the said CJ:

- (1) That the draft CJ was drafted by the 5<sup>th</sup> defendant (DW3) in his own handwriting instead of by Mr. Mogan (DW1);
- (2) That the handwritten draft CJ, Exhibit P14, was unsigned by any of the parties; and
- (3) That it was the 6<sup>th</sup> defendant, the 1<sup>st</sup> defendant's solicitors at the material time, who extracted and served a sealed copy of the Consent Order on the plaintiffs, instead of Messrs. S. Mogan & Co., the plaintiffs' solicitors at the material time, extracting and serving a sealed copy of the Consent Order on the 1<sup>st</sup> defendant.

[545] I am of this view because of the following reasons:

- (1) Based on the testimony of Mr. Mogan (DW1), DW1 had explained clearly the terms and conditions of the settlement as proposed by the 1<sup>st</sup> defendant, through the 5<sup>th</sup> defendant, as per the unsigned draft CJ, to the plaintiffs in Tamil and English and the plaintiffs agreed with and accepted the terms and conditions of the settlement;

- (2) Based on the testimony of Mr. Mogan (DW1), which was corroborated by the evidence of Baskaran (DW3), the plaintiffs clearly understood the terms and conditions of the settlement as proposed by the 1<sup>st</sup> defendant, through the 5<sup>th</sup> defendant, as per the unsigned handwritten draft CJ, which were read out by the learned Sessions Court Judge and agreed by the plaintiffs before she recorded the said CJ; and
- (3) Be that as it may, in my view the principle of *res judicata* or issue estoppel applies to this issue, which means that this issue cannot be relitigated as it has been finally decided when the plaintiffs' subsequent action to set aside the said CJ was struck out and the plaintiffs' application to reinstate it was dismissed and the plaintiffs' application for extension of time to file a notice of appeal against the dismissal was dismissed.

[546] I found that based on the evidence of Mr. Mogan (DW1) as corroborated by the evidence of Baskaran (DW3), the defendants have proved on the balance of probabilities that subsequent to the recording of the said CJ, and the service of a sealed copy of the said CJ on them, the plaintiffs refused to give instructions to Messrs. S. Mogan & Co., their first set of solicitors, to prepare a draft TA incorporating the terms as stated in the said CJ for the approval of the 6<sup>th</sup> defendant, who were the 1<sup>st</sup> defendants' solicitors.

[547] Hence, Mr. Mogan (DW1), who was the solicitor acting for the plaintiffs' tenancy matter with the 1<sup>st</sup> defendant, and who was the solicitor acting for the plaintiffs on the date the said CJ was recorded by the learned Sessions Court Judge, requested the 5<sup>th</sup> defendant, who was the solicitor acting for the 1<sup>st</sup> defendant on



the date the said CJ was recorded by the learned Sessions Court Judge, to prepare a draft TA for the plaintiffs' approval.

[548] This was duly done by the 5<sup>th</sup> defendant and a draft TA was sent to Mr. Mogan (DW1) of the plaintiffs' first set of solicitors, for the plaintiffs' approval.

[549] DW1 made some minor amendments and returned the draft TA to the 5<sup>th</sup> defendant with the request made in a phone call to change the label from TA to LA as the initial term of the tenancy was for 8 (eight) years and under the law, a tenancy agreement is only for a maximum period of 3 (three) years.

[550] Baskaran (DW3), the 5<sup>th</sup> defendant, agreed with the amendments and a final draft of the LA was sent to DW1.

[551] I found that based on the evidence of Mr. Mogan (DW1) as corroborated by the letter that he wrote to the 6<sup>th</sup> defendant, and the evidence of Baskaran (DW3), the defendants have proved on the balance of probabilities that the plaintiffs refused to execute the LA on the ground, initially, that there were tenants occupying the First, Second and Third Floors under a valid tenancy and they had given notice to the tenants to vacate on 31.12.2015.

[552] Mr. Mogan (DW1) testified that, subsequently, due to the repeated failures of the plaintiffs to see him in his office and to give him instructions for the execution of the LA, in a phone call to the 1<sup>st</sup> plaintiff, he discharged himself from continuing to act for the plaintiffs for the tenancy matter between the plaintiffs and the 1<sup>st</sup> defendant.

[553] Based on Mr. Prasad's (PW2's) testimony as corroborated by the letter written by him dated 30.12.2015 to the 6<sup>th</sup> defendant,



Exhibit P6, I found that the 2<sup>nd</sup> plaintiff, who was not called as a witness, then appointed Messrs. D. Prasad & Partners as her second set of solicitors for the tenancy matter between the plaintiffs and the 1<sup>st</sup> defendant under the said CJ.

[554] But again, I found that the plaintiffs failed to execute the final draft of the LA and give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[555] I also took into consideration that there was no evidence of any letter written by the plaintiffs' second set of solicitors to the 6<sup>th</sup> defendant stating that the reason for the plaintiffs' refusal to sign the draft LA that was sent to the plaintiffs' second set of solicitors was because it should be a draft TA under paragraph 3 of the said CJ and not a draft LA.

[556] Hence, I found that based on the evidence of Baskaran Manikam (DW3) as corroborated by the admissions of Mr. Prasad (PW2) elicited by Mr. Nekoo when PW2 was recalled for further cross-examination during the plaintiffs' case and the testimony of Mr. Mogan (DW1) given during the 4<sup>th</sup> to the 6<sup>th</sup> defendants' case, the defendants have established on the balance of probabilities as follows:

- (1) that pursuant to the terms of the said CJ, a draft of a new Tenancy Agreement ("TA") was prepared by the 6<sup>th</sup> defendant, on the request of Mr. Mogan (DW1) of Messrs. S. Mogan & Co., the plaintiffs' first set of solicitors, and sent by the 6<sup>th</sup> defendant to Messrs. S. Mogan & Co. for approval;
- (2) that Messrs. S. Mogan & Co. made some amendments to the draft TA;



- (3) Messrs. S. Mogan & Co. then sent the amended draft TA to the 6<sup>th</sup> defendant for approval with a request for the draft TA to be relabeled as a draft LA;
- (4) that the 6<sup>th</sup> defendant then approved the amended draft TA, relabeled it as a draft LA; and
- (5) that the 6<sup>th</sup> defendant then sent a final draft of the LA to Messrs. D. Prasad & Partners, the plaintiffs' second set of solicitors, who had taken over the plaintiffs' tenancy matter from Messrs. S. Mogan & Co., for the plaintiffs' execution and for vacant possession of the First, Second and Third Floors of the building to be handed over by the plaintiffs to the 1<sup>st</sup> defendant and for payment by the 1<sup>st</sup> defendant to the plaintiffs of the outstanding rentals payable as agreed between the parties in the said CJ and the deposits payable in accordance with the draft LA as per the said CJ.

[557] Based on the evidence of the defendants' witnesses, I found that the defendants have established on the balance of probabilities as follows:

- (1) It was incumbent on the plaintiffs to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant in accordance with the terms of paragraph 3 of the said CJ before the arrears of rent of RM253,500.00 became due and payable by the 1<sup>st</sup> defendant to the plaintiffs in accordance with the terms of paragraphs 1 and 2 of the said CJ;
- (2) Due to the failure, refusal and / or neglect of the plaintiffs to execute the draft LA, the 1<sup>st</sup> defendant commenced



execution proceedings against the plaintiffs *vide* the 2015 Sessions Court OS case and obtained the SP Judgment;

- (3) Despite having served the SP Judgment on the plaintiffs, the plaintiffs still refused to execute the draft LA;
- (4) The 1<sup>st</sup> defendant's solicitors acted correctly, when in accordance with the 1<sup>st</sup> defendant's instructions, the 6<sup>th</sup> defendant took the alternative course of action as provided in paragraph 4 of the SP Judgment to have the SAR execute the LA on the plaintiffs' behalf; and
- (5) That despite the SAR having signed the LA, the 6<sup>th</sup> defendant could not hand over the cheques to the plaintiffs as the vacant possession of the building was not yet handed over to the 1<sup>st</sup> defendant.

[558] In coming to the above conclusion, I took into consideration the undisputed evidence and the plaintiffs' admission that even after the said LA was executed by the SAR on the plaintiffs' behalf and a stamped copy of said LA was served on the plaintiffs' second set of solicitors, the plaintiffs still refused to give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[559] Hence, this had caused the 1<sup>st</sup> defendant to file the Originating Summons No.: WA-A74-2954-08/2017 dated 01.08.2017 ("the 2017 OS case") to seek for an order of possession against the plaintiffs.

[560] In my view, the defendants have established that the plaintiffs are "vexatious litigants", who refused, failed and / or neglected to accept the reality that all the problems concerning the tenancy were caused by themselves and that it was they, themselves, who



have abused the process of the court by filing case after case to achieve a situation that would favour them as pleaded in subparagraph 11 (xv) of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' SOD and in subparagraph 11 (xv) of the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD.

[561] In my view, the 1<sup>st</sup> defendant was correct in taking the position that the plaintiffs must execute the final draft of the LA and give vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant in accordance with the said CJ because the date on which the plaintiffs have agreed to give vacant possession to the 1<sup>st</sup> defendant is earlier in point of time, *viz* on 01.08.2015, than the date that the parties are to execute the LA and to pay the arrears of rent under the said CJ and pay the deposits under the LA, *viz* on 15.08.2015.

[562] It is undisputed that acting on the instructions of the 1<sup>st</sup> defendant, the 6<sup>th</sup> defendant then filed execution proceedings against the plaintiffs *vide* the 2015 Sessions Court OS case and obtained the SP Judgment.

[563] Despite the service of the SP Judgment on the plaintiffs, the plaintiffs still refused to execute the LA giving various excuses as stated in the 6<sup>th</sup> defendant's letter dated 30.12.2015 to Messrs. D. Prasad & Partners, the plaintiffs' second set of solicitors.

[564] Hence, Ananthan (DW2), the 4<sup>th</sup> defendant, an advocate and solicitor, practising in the 6<sup>th</sup> defendant, having about 5 (five) years of experience and acting under the instructions of his boss and superior, Baskaran (DW3), the 5<sup>th</sup> defendant, initially called Puan Zura (PW1), the SAR of the High Court of Malaya, attached to the Kuala Lumpur High Court, to request for an appointment to appear before her for the execution of the LA on behalf of the plaintiffs based on the fourth paragraph of the SP

Judgment and the plaintiffs' refusal to sign the LA in accordance with the said CJ even though the 1<sup>st</sup> defendant has complied with the said CJ.

[565] Having obtained her verbal consent, DW2, subsequently, followed up with a letter to Puan Zura, to confirm the teleconversation between them.

[566] Hence, it transpired that on 18.01.2016, the 4<sup>th</sup> defendant appeared before Puan Zura in her room in the Kuala Lumpur High Court building, for the execution of the final draft of the LA by Puan Zura on behalf of the plaintiffs in accordance with the fourth paragraph of the SP Judgment.

[567] The 4<sup>th</sup> defendant had brought along with him copies of the LA, the said CJ, the SP Judgment and the cheques given by the 2<sup>nd</sup> defendant to the 5<sup>th</sup> defendant, which were in the file, to show to Puan Zura that the 1<sup>st</sup> defendant had complied with the said CJ by giving the cheques, through the 2<sup>nd</sup> defendant, to the 6<sup>th</sup> defendant, through the 5<sup>th</sup> defendant, but that due to the plaintiffs' refusal to sign the LA and vacant possession provided, the 6<sup>th</sup> defendant, as the 1<sup>st</sup> defendant's solicitors could not perform their duty as stakeholder of the 1<sup>st</sup> defendant's cheques.

[568] I noted that the plaintiffs did not plead in the SOC that the 4<sup>th</sup> defendant knew that there were insufficient funds in the 1<sup>st</sup> defendant's account to meet the cheques and/or that he showed the cheques to Puan Zura and/or that Puan Zura was induced by the 4<sup>th</sup> defendant to sign the said LA under the belief that there were sufficient funds in the 1<sup>st</sup> defendant's account to meet the cheques on the date Puan Zura signed the LA.

[569] On this issue, it is undisputed that PW1 did not testify that DW2 showed her the cheques when he went to see her on 18.01.2016 to obtain her signatures for the LA, on behalf of the plaintiffs.

[570] On the other hand, DW2 testified that Puan Zura (PW1) did not ask him for the cheques and he did not show the cheques to PW1. On this issue I believed and accepted DW2's testimony. There was no reason for him to lie.

[571] I also believed and accepted DW2's evidence that when he took the cheques with him to see the SAR on 18.01.2016 to obtain her signatures for the LA, on behalf of the plaintiffs, he did not know that the 1<sup>st</sup> defendant did not have sufficient funds in the bank account to meet the cheques.

[572] Hence, even if it was pleaded in the SOC that the 1<sup>st</sup> to the 6<sup>th</sup> defendants have cheated/defrauded, misrepresented and conspired to induce Puan Zura (PW1) to sign the LA by using the 1<sup>st</sup> defendant's cheques with the knowledge that there were insufficient funds in the bank account to meet the cheques, in my view, the plaintiffs have failed to prove this allegation on the balance of probabilities.

[573] I also took into consideration that the defendants have taken strong objections to the plaintiffs raising issues and asking questions and making suggestions to the witnesses on several unpleaded issues and matters.

[574] In my view, just because the 6<sup>th</sup> defendant did not hand over the cheques to the plaintiffs' solicitors on 15.08.2015 and right until the date of the trial did not mean that the 6<sup>th</sup> defendant have breached their duty as a stakeholder and / or the 6<sup>th</sup> defendant have cheated/defrauded, misrepresented and conspired against the plaintiffs.

[575] This is because I accepted the evidence of Baskaran (DW3) which was consistent with and corroborated by the evidence of Alagar (DW4) that the 6<sup>th</sup> defendant's duty as the stakeholder of the cheques was to hand over the cheques after the plaintiffs have executed the LA and given vacant possession of the First to the Third Floors of the building to the 1<sup>st</sup> defendant.

[576] I believed and accepted the evidence of Alagar (DW4) that his instruction to the 6<sup>th</sup> defendant was only to hand over the cheques to the plaintiffs' solicitors after the plaintiffs have executed the LA and given vacant possession of the First to the Third Floors of the building to the 1<sup>st</sup> defendant.

[577] I also believed and accepted the evidence of Alagar (DW4) that being a shareholder and director of the 1<sup>st</sup> defendant, if it was necessary for him to bank his own moneys into the 1<sup>st</sup> defendant's account to meet the cheques, he would have done so.

[578] I also believed and accepted the evidence of Selvi (DW6) that she had no knowledge whether the SAR was induced to sign the LA on behalf of the plaintiffs on 18.01.2015 as her only role was to prepare and sign cheques on behalf of the 1<sup>st</sup> defendant as instructed by the 2<sup>nd</sup> defendant.

[579] I am of the view that the 8 (eight) statements of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' FDJA, at pp. 1 to 8, Bundle 'Ee', ought to be marked as Exhibits D (D1-D3) 54 to 60, respectively.

[580] This is because Mr. Selvam only objected to their admissibility on the ground that the bank's logo in the bank statements was not in colour. I had also allowed the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' formal application *vide* enclosure (151) to adduce these bank



statements and the bank statements were computer generated documents.

[581] The bank statements of the 1<sup>st</sup> defendant, Exhibits P18 to P22, were also never part of the initial CBOD and they were only first referred to by the plaintiffs on 22.11.2018 during the cross-examination of the the 4<sup>th</sup> defendant (DW2).

[582] I had allowed the plaintiffs' solicitors to refer to them during the cross-examination of the 4<sup>th</sup> defendant (DW4) and DW4 was cross-examined on the same. I did this even though there was no formal application made to this Court by the plaintiffs, no order granted by the Court and/or the obtaining of the consent of the 1<sup>st</sup> defendant to disclose these bank statements which are the personal and sensitive information of the 1<sup>st</sup> defendant.

[583] Hence, I agreed with Mr. Suaran Singh that on the same basis that the Court had allowed the plaintiffs to adduce the bank statements of the 1<sup>st</sup> defendant, Exhibits P18 to P22, it is equally crucial in the interest of justice for the Court to allow the 1<sup>st</sup> to the 3<sup>rd</sup> defendants to adduce rebuttal evidence to ensure that the full transparency of the relevant facts is available before this Court.

[584] Therefore, the bank statements of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' FDJA is admissible evidence to prove that the defendants have funds in their FDJA, that they are capable of making payment of the outstanding rent and the said deposits and the rent under the said LA and that there was never any intention to cheat/defraud the plaintiffs.

[585] Furthermore, at all times, the plaintiffs have never disputed/objected to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' attempt to produce evidence to show that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as the

directors of the 1<sup>st</sup> defendant are capable of making payment on behalf of the 1<sup>st</sup> defendant.

[586] I also noted that the plaintiffs have also failed to cross-examine the 3<sup>rd</sup> defendant (DW6) on her testimony that she had ample funds to enable a transfer of the same to the 1<sup>st</sup> defendant's accounts if and when the need arises.

[587] It is trite law that where a party fails to challenge the testimony of a witness, who is under cross-examination, the party must be taken to have accepted the truth of the testimony (see *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors* [1995] 2 MLJ 770, at paragraphs F to I, referred to by Mr. Suaran Singh, BOA Tab 6).

[588] I found that due to the plaintiffs' failure to give vacant possession of the First to the Third Floors of the building to the 1<sup>st</sup> defendant, the 6<sup>th</sup> defendant could not discharge the 6<sup>th</sup> defendant's duty as the stakeholder of the cheques.

[589] I also accepted the explanation of DW3 that the cheques were made "worthless" or redundant by the plaintiffs' failure on 01.08.2015 to execute the LA for the letting of the building to the 1<sup>st</sup> defendant and the giving of vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[590] It is trite law that a party cannot be allowed to take an inconsistent approach. In the instant case, the plaintiffs are approbating and reprobating in that they have prayed in paragraph 34(i) of the SOC for a declaration that the said LA is null and void whereas at paragraph 34(iii), they have sought for, among others, special damages of RM1,043,500.00 from the defendants based on the validity of the said LA.

[591] In addition, the plaintiffs' prayer for damages in paragraph 34(iii) is for outstanding rent, among others, for the premises, even though the vacant possession of the premises were never given by the plaintiffs to the 1<sup>st</sup> defendant. Hence, I agreed with Mr. Suaran Singh that the position taken by the plaintiffs may be characterized as one which violates the principle against 'approbating and reprobating' (see *Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd* [2007] 6 CLJ 570, at pg. 572, paragraph A, referred to by Mr. Suaran Singh, BOA Tab 8).

[592] In regard to the plaintiffs' claim for exemplary damages, I agreed with Mr. Suaran Singh that the plaintiffs' claim ought to be dismissed. This is because the 1<sup>st</sup> to the 3<sup>rd</sup> defendants do not fall within the prescribed categories for exemplary damages as they had not acted wrongly, vindictively, maliciously or with a contumelious disregard towards the rights of the plaintiffs (see *Yip Shou Shan v. Sin Heap Lee-Marubeni Sdn Bhd* [2002] 5 MLJ 113, referred to by Mr. Suaran Singh, BOA Tab 10 and *Sambaga Valli a/p KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784, referred to by Mr. Suaran Singh, BOA Tab 11).

### **Findings of Court for the 10 (ten) issues and 8 (eight) Subissues**

[593] I shall now deal with the findings of the Court for the 10 (ten) issues and 8 (eight) Subissues framed by the parties.

**Issue 1: Whether the terms as provided in paragraphs 3, 4, 4(b) and 4(d) of the said CJ were to prepare a TA or LA?**

**Issue 1 (a): Whether the 1<sup>st</sup> defendant was in breach of paragraph 3 of the said CJ when a LA was signed instead of a TA?**

**Issue 1 (b): Whether the plaintiffs' previous solicitors, Messrs. Mogan & Co., wanted the name of the TA to be changed to a LA?**

[594] I have dealt with Issue 1 and the 2 (two) Subissues 1 (a) and 1 (b) together as they are interrelated.

[595] Since the plaintiffs have conceded that the agreement envisaged by the said CJ is a LA due to the tenure of the new letting agreed upon by the parties, Issue 1 is no longer an issue for the decision of the Court.

[596] Be that as it may, bearing in mind the plaintiffs' clear averment in paragraph 27 of the SOD and the considerable amount of time and effort spent on this issue in the examination of witnesses for both parties by the respective learned counsels during the trial, it is only fair to the parties that I express my view on Issue 1 and the reasons for my view.

[597] In my view, based on the terms as provided in paragraphs 3, 4, 4(c) and 4(d) of the the said CJ, the intention of the parties at the time they entered into the said CJ was for the parties to enter into a Lease Agreement since the letting was for an initial term of 8 years followed by an automatic renewal for a term of 4 (four) years. Below are my reasons.

[598] Section 221 (1) of the NLC 1965 provides that every lease granted pursuant to this section shall be for a term exceeding 3 years.

[599] Section 221 (2) of the NLC 1965 provides that any term of rent which is more than 3 (three) years shall be considered as a lease.

[600] In *Luggage Distributors v. Tan Hor Teng* [1995] 1 MLJ 719, referred to by Mr. Nekoo, there was a TA dated 8 July 1993, which document, Gopal Sri Ram JCA (as he then was) described



as “... a poorly drafted document”. In his judgment, the learned Judge, having referred to the case of *Walsh v. Lonsdale* [1882] 21 Ch D 9, which said that equity looks on that as done which ought to be done held that in accordance with this maxim, equity treats an agreement to grant a lease on the same footing as a lease (which is a registrable interest under the NLC 1965).

[601] In *Jumbo King Ltd v. Faithful Properties Ltd & Ors* [1999] 2 HKC 507, referred to by Mr. Nekoo, Lord Hoffman said “... the construction of a document is not a game of words.”

[602] Hence, in the circumstances of the instant case and upon applying the ratio of *Luggage Distributors v. Tan Hor Teng* [1995] 1 MLJ 719 and Lord Hoffman’s words in *Jumbo King Ltd v. Faithful Properties Ltd & Ors* [1999] 2 HKC 507 to the facts of the instant case, I was of the view that the said LA is valid and binding on the parties despite the non-registration of the said LA under Section 221 of the NLC 1965.

[603] During the trial, evidence was given by Mr. Mogan (DW1) that at the time the plaintiffs entered into the said CJ with the 1<sup>st</sup> defendant, the plaintiffs were represented by the law firm of Messrs. S. Mogan, the plaintiffs’ first set of solicitors, and he was the solicitor in Messrs. S. Mogan, who was acting for the plaintiffs, whilst the 1<sup>st</sup> defendant was represented by the law firm of Messrs. Bas Vin Associates, the 6<sup>th</sup> defendant.

[604] Mr. Mogan (DW1) testified that he had asked the 5<sup>th</sup> defendant to change the label of the draft TA to a draft LA because it was for a period of more than 3 (three) years (see Notes of Evidence, Jilid 1, pg. 292, Lines 25-30).

[605] Following the emails dated 24.07.2015, at pg. 429, Bundle ‘D’, Exhibit D(D1-D3)23, 29.07.2015, at pg. 430, Bundle ‘D’,



Exhibit D(D4-D6)29, and 30.07.2015, at pg. 431, Bundle ‘D’, Exhibit D(D4-D6)10, sent by the 6<sup>th</sup> defendant through the 5<sup>th</sup> defendant to Mr. Mogan (DW1), the 5<sup>th</sup> defendant had confirmed *vide* an email dated 30.07.2015, at pg. 432, Bundle ‘D’, Exhibit D(D4-D6)4, that “Having considered the issues raised by you, ... I have converted the Tenancy Agreement into a Lease Agreement.”

[606] Further, Mr. Mogan (DW1) had responded to the 5<sup>th</sup> defendant’s email by way of his email dated 31.07.2015, at pg. 432, Bundle ‘D’, Exhibit D(D4-D6)11, in which he said “... We append below the duly amended draft Lease Agreement for your approval”.

[607] Hence, in my view, the defendants have established that it was Mr. Mogan (DW1) from Messrs. S. Mogan & Co, the plaintiffs’ first set of solicitors, who had asked Baskaran (DW3), the 5<sup>th</sup> defendant, from the 6<sup>th</sup> defendant to relabel the draft TA prepared by the 6<sup>th</sup> defendant as a draft LA due to the period of 8 (eight) years for the initial term of the new letting for the Ground Floor to the Third Floor of the building.

[608] Therefore, based on the testimony of Mr. Mogan (DW1), which was corroborated by the evidence of Baskaran (DW3), and the contemporaneous documentary evidence in the form of exchanges of emails between the parties’ solicitors, it was DW1 acting on behalf of the plaintiffs, who had requested Baskaran (DW3) to relabel the draft TA prepared by Baskaran (DW3), on Mr. Mogan’s request as the plaintiffs did not give him any instructions to prepare a draft TA for their approval to be sent over to the 6<sup>th</sup> defendant for the 1<sup>st</sup> defendant’s approval, and it was Baskaran (DW3) who then amended the caption of the draft TA by relabeling it as a draft LA.

[609] It follows that from 31.07.2015 onwards, the parties' solicitors were dealing with a LA for the letting of the building by the plaintiffs to the 1<sup>st</sup> defendant in the implementation of the relevant terms of the said CJ.

[610] I also noted that when Messrs. D. Prasad & Partners took over the tenancy matter from Messrs. S. Mogan, Mr. Prasad (PW2) of Messrs. D. Prasad & Partners did not at any time send or email a letter to the 6<sup>th</sup> defendant to object to the draft LA that was prepared by the 6<sup>th</sup> defendant and approved by Messrs. S. Mogan, the plaintiffs' first set of solicitors, on the ground that based on paragraph 3 of the said CJ, it should be a draft TA instead of a draft LA.

[611] Therefore, had the plaintiffs not conceded on Issue 1, I would have decided that it was the intention of the parties under paragraphs 3, 4, 4(b) and 4(d) of the said CJ to prepare a LA.

[612] Based on the above reasons, I have decided Subissue 1 (a) in the negative, *viz* that the 1<sup>st</sup> defendant was not in breach of paragraph 3 of the said CJ when a LA was signed instead of a TA.

[613] Based on the above reasons, I have decided Subissue 1 (b) in the affirmative, *viz* that it was the plaintiffs' previous solicitors, Messrs. Mogan & Co., who wanted the name of the TA to be changed to a LA.

**Issue 2: Whether the 1<sup>st</sup> defendant, in occupying the ground floor of the premises without any payment of the outstanding rent of RM 253,500.00 payable under paragraphs 1 and 2 of the said CJ, is continuously cheating the plaintiffs?**



**Issue 2 (a): Does paragraph 1 of the said CJ allow the 1<sup>st</sup> defendant to pay outstanding rent prospectively when the due dates have retrospective effect?**

**Issue 2 (b): Does paragraph 1 of the said CJ allow the 1<sup>st</sup> defendant to off-set the outstanding rent with the future rent?**

**Issue 2 (c): Whether the 1<sup>st</sup> defendant, in refusing to pay the Rental Deposit of RM 60,000.00 and Utility Deposit of RM 10,000.00 payable pursuant to paragraph 4 (b) of the said CJ, is continuously cheating the plaintiffs?**

**Issue 2 (d): Whether the conduct of the 1<sup>st</sup> defendant who entered into the said LA in order to acquire the said premises is deemed as cheating the plaintiffs when no consideration was given under the said LA?**

**Issue 2 (e): Whether the plaintiffs have consented to the occupation of the ground floor by the 1<sup>st</sup> defendant?**

[614] I have dealt with Issue 2 and the five (5) Subissues 2 (a), 2 (b), 2 (c), 2 (d) and 2 (e) together as they are interrelated.

[615] I decided Issue 2 and Subissues 2 (c) and 2 (d) in the negative and I decided Subissue 2 (e) in the affirmative based on the following reasons:

- (1) Paragraphs 1 and 2 of the said CJ are clearly worded and the time lines for the payment of the arrears of rent of RM 283,000.00 for the Ground Floor by the 1<sup>st</sup> defendant are clearly stated, *viz* the first instalment of the 5 instalments of RM 56,700.00 each for the arrears of rent of RM 283,000.00 for the Ground Floor less a sum of RM

30,000.00 for the first instalment, is to commence on 15.08.2015 and each of the remaining 4 instalments of RM 56,700.00 has to be made on the same date for the subsequent months;

- (2) Paragraph 3 of the said CJ clearly stipulates that a new agreement for the letting of the building by the plaintiffs to the 1<sup>st</sup> defendant is to be executed between the plaintiffs and the 1<sup>st</sup> defendant and is to take effect on 01.08.2015 and vacant possession of the First, Second and Third Floors is to be given to the 1<sup>st</sup> defendant on 01.08.2015 since vacant possession of the Ground Floor has already been given to the plaintiffs;
- (3) The plaintiffs were well aware at the time they entered into the said CJ that the commencement date for the payment by the 1<sup>st</sup> defendant of the arrears of rent of RM253,500.00 for the Ground Floor, *viz* 15.08.2015, was after the date of the commencement of a new agreement for the letting of the building by the plaintiffs to the 1<sup>st</sup> defendant to be executed between them and the 1<sup>st</sup> defendant, *viz* on 01.08.2015;
- (4) Had the plaintiffs intended for the commencement date for the payment by the 1<sup>st</sup> defendant of the arrears of rent of RM253,500.00 for the Ground Floor to be made before or on the date of the commencement of a new agreement for the letting of the building by the plaintiffs to the 1<sup>st</sup> defendant to be executed between them and the 1<sup>st</sup> defendant, the plaintiffs would have stated this clearly in the said CJ as the plaintiffs were represented by their first set of solicitors, Messrs. S. Mogan & Co.;

- (5) Based on Mr. Mogan's (DW1)'s evidence, in breach of paragraph 3 of the said CJ, the plaintiffs did not give him instructions to prepare a draft TA and he had to ask the 6<sup>th</sup> defendant, being the 1<sup>st</sup> defendant's solicitors at the material time, to prepare, for the approval of the plaintiffs, a draft TA, which was duly done by Baskaran (DW3) and Mr. Mogan (DW1), acting for the plaintiffs, agreed with the draft TA after making some amendments to the draft TA, and it was Mr. Mogan (DW1) who asked Baskaran (DW3) to relabel the draft TA as a draft LA due to the 8 years tenure of the initial term of the tenancy agreed between the plaintiffs and the 1<sup>st</sup> defendant and this was done by Baskaran (DW3);
- (6) Based on the evidence of the defendants' witnesses, the plaintiffs' first set of solicitors, *viz* Messrs. S. Mogan & Co., and the 1<sup>st</sup> defendant's solicitors at the material time, *viz* the 6<sup>th</sup> defendant, agreed that the 1<sup>st</sup> defendant would make payment of the arrears of rent of RM253,500.00 for the Ground Floor in the form of cheques issued in the name of the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant's solicitors, *viz* the 6<sup>th</sup> defendant, as stakeholder;
- (7) The plaintiffs could have insisted, through their solicitors, Messrs. S. Mogan & Co., on payment of the arrears of rent by the 1<sup>st</sup> defendant in the form of cash or a bank draft or bank drafts in which case the 1<sup>st</sup> defendant would have to pay to the plaintiffs, through the 6<sup>th</sup> defendant, either cash or a cash cheque or cheques issued in the name of the 6<sup>th</sup> defendant or a bank draft or bank drafts issued in the name of the 1<sup>st</sup> plaintiff but this was not done;



- (8) Based on the evidence of the defendants' witnesses, Alagar (DW4), Selvi (DW6), Ananthan (DW2) and Baskaran (DW3), the 1<sup>st</sup> defendant's cheques were prepared and signed by the 3<sup>rd</sup> defendant and given by the 1<sup>st</sup> defendant, through the 2<sup>nd</sup> defendant, to the 5<sup>th</sup> defendant of the 6<sup>th</sup> defendant, who were the 1<sup>st</sup> defendant's solicitors, as the stakeholder of the 1<sup>st</sup> defendant's cheques;
- (9) Had the plaintiffs really wanted the 1<sup>st</sup> defendant's cheques that were being held by the 6<sup>th</sup> defendant as the stakeholder of the 1<sup>st</sup> defendant's cheques, the plaintiffs could have done so by executing the final draft of the LA agreed upon by the parties through their respective solicitors to take effect on 01.08.2015 and giving vacant possession of the First, Second and Third Floors to the 1<sup>st</sup> defendant on 01.08.2015;
- (10) However, based on the evidence of the plaintiffs' key witness, Karpayah (PW4), the plaintiffs did not execute the LA with the 1<sup>st</sup> defendant to take effect on 01.08.2015 and the plaintiffs did not give vacant possession of the First, Second and Third Floors to the 1<sup>st</sup> defendant on 01.08.2015;
- (11) Karpayah (PW4) also agreed with the suggestion during cross-examination by the defendants, through their respective counsels, that the plaintiffs have never raised in any of the related proceedings that the reason why the plaintiffs did not execute the LA with the 1<sup>st</sup> defendant to take effect on 01.08.2015 was because the said CJ required the parties to sign a new TA and not a LA;
- (12) In order to overcome the obstacle caused by the date stated in the said CJ for the execution of a new agreement for the

letting of the building by the plaintiffs to the 1<sup>st</sup> defendant and the giving of vacant possession by the plaintiffs, *viz* 01.08.2015, Mr. Selvam contended that the 1<sup>st</sup> defendant had waived the date of the giving of vacant possession, *viz* 01.08.2015, as stated in paragraph 3 of the said CJ due to the ongoing negotiation between the plaintiffs and the 1<sup>st</sup> defendant to postpone the date of the giving of vacant possession of the First, Second and Third Floors by the plaintiffs to the 1<sup>st</sup> defendant from 01.08.2015 to 01.01.2016 because there are tenants occupying the First, Second and Third Floors and a notice has been given by the plaintiffs to the tenants to vacate the premises by 31.12.2015 and that this is evidenced by the letter dated 02.09.2015 sent by Mr. Mogan, at pg. 387, Bundle 'C', to the 6<sup>th</sup> defendant;

- (13) However, I noted that this issue of waiver was not pleaded by the plaintiffs in the SOC and in the course of the trial Mr. Suaran Singh, for the 1<sup>st</sup> to the 3<sup>rd</sup> defendants, have objected to this line of cross-examination by Mr. Selvam;
- (14) Be that as it may, I found that there was no such waiver on the 1<sup>st</sup> defendant's part;
- (15) I also found that based on the 1<sup>st</sup> to the 3<sup>rd</sup> defendant's proven case and the 4<sup>th</sup> to the 6<sup>th</sup> defendants' proven case, at all material times, the 1<sup>st</sup> defendant has insisted on the delivery of vacant possession by the plaintiffs on 01.08.2015 and there was no ongoing negotiation between the plaintiffs and the 1<sup>st</sup> defendant to postpone the date of the giving of vacant possession as contended by Mr. Selvam;





- (16) Be that as it may, it is undisputed that right until the date of the decision of this case, the plaintiffs did not give vacant possession of the First, Second and Third Floors to the 1<sup>st</sup> defendant;
- (17) Furthermore, based on the evidence of the plaintiffs' key witness, Karpayah (PW4), the plaintiffs did not give vacant possession of the First, Second and Third Floors to the 1<sup>st</sup> defendant because there are tenants occupying the First, Second and Third Floors;
- (18) Hence, the breach of paragraph 3 of the said CJ was on the part of the plaintiffs resulting in the inability of the 1<sup>st</sup> defendant to comply with paragraphs 1 and 2 of the said CJ;
- (19) The 1<sup>st</sup> defendant is not continuously cheating the plaintiffs in not paying the outstanding rent to the plaintiffs for the 1<sup>st</sup> defendant's continued occupation of the Ground Floor of the building because the plaintiffs, in entering into the said CJ, can be said to have given permission to the 1<sup>st</sup> defendant to continue to occupy the Ground Floor with the promise to the 1<sup>st</sup> defendant that the plaintiffs will give vacant possession of the First, Second and Third Floors to the 1<sup>st</sup> defendant on 01.08.2015 upon the execution of a new agreement for the letting of the Ground Floor, the First Floor, the Second Floor and the Third Floor of the building to take effect on 01.08.2015 and the promise by the 1<sup>st</sup> defendant to make payment on 15.08.2015 to the plaintiffs of the arrears of rent in accordance with the terms and conditions of the said CJ and to make payment on 01.08.2015 of the said deposits under the new agreement upon its execution by the

plaintiffs for the new letting of the Ground Floor, First Floor, Second Floor and Third Floor of the building;

- (20) The legal definition of “cheating” (in a criminal case) is provided in Section 415 of the Penal Code, referred to by Mr. Nekoo, and I agree with him that it requires there to be some form of fraudulent misrepresentation on the part of the person who is said to have committed the offence of “cheating” in that section;
- (21) The elements of the tort of deceit (in a civil case) is the same as for fraudulent misrepresentation (see *Teoh Peng Phe v. Dato’ Seri Dr. Ting Chew Peh (On Behalf of the Malaysian Chinese Association)* [2004] 5 MLJ 241, referred to by Mr. Nekoo);
- (22) Hence, I agreed with Mr. Nekoo that a case of “cheating” (in its criminal sense) or the tort of deceit (in its civil sense) is not made out merely when one party signs an agreement without giving “consideration” and that a case of “cheating” (in its criminal sense) or the tort of deceit (in its civil sense) is only made out when there is some form of fraudulent misrepresentation made by one party which had induced the other party to suffer losses;
- (23) I also agreed with Mr. Nekoo that it follows that in order to “cheat” the plaintiffs, the defendants must have made a fraudulent misrepresentation, which had induced the plaintiffs to sign the LA but the tenor of Subissue 2(d) suggested that there was “cheating” not because of any fraudulent misrepresentation but because the 1<sup>st</sup> defendant had entered into the LA without giving consideration (see Explanation 2 in Section 415 of the Penal Code, referred to by Mr. Nekoo);



- (24) Be that as it may, it is undisputed that from the very beginning, when the parties entered into the said CJ, the plaintiffs were aware that the 1<sup>st</sup> defendant wished to pay the outstanding rent for the Ground Floor in instalments, to operate a budget hotel in the building and, hence, the necessity for the 1<sup>st</sup> defendant to rent the building under a new agreement;
- (25) The plaintiffs were also aware that under the said CJ, the agreed consideration from the 1<sup>st</sup> defendant was in the form of financial payments by the 1<sup>st</sup> defendant of the outstanding rent for the Ground Floor in instalments, the said deposits and the monthly rent for the building to the plaintiffs;
- (26) The plaintiffs were also aware that the agreed consideration from the plaintiffs under the said CJ, was the execution of the new agreement and the giving of vacant possession of the First to the Third Floors to the 1<sup>st</sup> defendant on 01.08.2015;
- (27) Hence, in the Assessment of Damages, the learned Sessions Court Judge had allowed the arrears of rent under the said CJ and the said deposits and the monthly rent of the building under the said LA to be set-off against the amount of damages awarded by the Sessions Court Judge for the plaintiffs' breach of the said CJ and the said LA;
- (28) In my view, if the plaintiffs continue to refuse to give vacant possession of the First to the Third Floors of the building to the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant is entitled to commence proceedings against the plaintiffs for a writ of possession of the building, which the 1<sup>st</sup> defendant has already done so, and the the plaintiffs can raise in that

proceeding its claim for the monthly rent of the Ground Floor of the building which the 1<sup>st</sup> defendant is occupying; and

- (29) Therefore, Subissues 2 (a) and 2 (b) did not arise for the determination of the Court in the instant case.

**Issue 3: Whether the execution of the LA by the SAR was pursuant to the SP Judgment dated 08.12.2018?**

[616] I decided Issue 3 in the affirmative based on the following reasons:

- (1) In my view, the 2<sup>nd</sup> defendant acted properly, on behalf of the 1<sup>st</sup> defendant, when he instructed the 6<sup>th</sup> defendant to get the SAR to execute the LA on behalf of the plaintiffs under paragraph 4 of the SP Judgment due to the failure, refusal or neglect of the plaintiffs to execute the LA in accordance with the SP Judgment;
- (2) Had the plaintiffs executed the LA prepared by the 6<sup>th</sup> defendant upon the request and approval of the plaintiffs' first set of solicitors, Messrs. S. Mogan & Co., the 1<sup>st</sup> defendant would not have had to apply for SP of the said CJ;
- (3) Had the plaintiffs executed the LA in accordance with the SP Judgment upon being advised to do so by the 6<sup>th</sup> defendant, the 2<sup>nd</sup> defendant would not have had to instruct the 6<sup>th</sup> defendant to get the SAR to execute the LA on behalf of the plaintiffs under paragraph 4 of the SP Judgment; and

- (4) I have also given other reasons on this issue earlier under the caption “Findings of the Court”.

**Issue 4: Whether the plaintiffs’ solicitors were informed that the plaintiffs’ failure to execute the said LA would result in the SAR signing the said LA?**

[617]I decided Issue 4 in the affirmative based on the following reasons:

- (1) I agreed with Mr. Nekoo that the chronology of events showed that it was Mr. Prasad (PW2) from Messrs. D. Prasad & Partners, the plaintiffs’ second set of solicitors, who had acted for the plaintiffs after Mr. Mogan (DW1);
- (2) Mr. Prasad (PW2) admitted that he represented the plaintiffs in Court during the hearing of the 2015 Sessions Court OS case in which the 1<sup>st</sup> defendant applied to enforce the said CJ;
- (3) Mr. Prasad (PW2) testified that a copy of the LA was attached to the 1<sup>st</sup> defendant’s application for SP (see Notes of Evidence, Jilid 1, at pg. 269, Lines 22-31);
- (4) On 08.12.2015, the Sessions Court granted an Order in terms of the 1<sup>st</sup> defendant’s application to enforce the said CJ, *viz* the SP Judgment, at pg. 4, Bundle ‘B’;
- (5) After the 1<sup>st</sup> defendant obtained the SP Judgment, the 6<sup>th</sup> defendant had put Mr. Prasad (PW2) on notice by sending two letters to him stating that if the plaintiffs do not execute the LA, they will get the Court officials to execute the LA;



- (6) The first letter was dated 23.12.2015 and this letter was sent to Messrs. D. Prasad & Partners, the plaintiffs' second set of solicitors, asking them to advise their client to execute the LA (see Exhibit D(D4-D6)41) and the exact wordings in the letter are as follows:

“Kindly fix an appointment to execute the LA within fourteen days (14) days, failing which we shall instruct the Court officials to execute the agreement on behalf of your clients.”

- (7) However, Messrs. D. Prasad & Partners had, for reasons best known to themselves, responded to the 6<sup>th</sup> defendant's first letter by way of a letter dated 30.12.2015 stating only the reference no. of the 6<sup>th</sup> defendant's letter dated 23.12.2015, viz BV/BM/CIV/105/15/MYHOME-OS at the top left hand corner without making any reference whatsoever to the 6<sup>th</sup> defendant's letter dated 23.12.2015 in the body of the letter, and requesting for a copy of a TA to be forwarded to them and requesting for payment of the outstanding rent (see Exhibit P6);
- (8) Following this letter, the 6<sup>th</sup> defendant sent the second letter, which is dated 30.12.2015, enclosing a copy of the LA with the annexed Addendum containing the words “and vacant possession provided” in Sections 6 and 7 (see Exhibit P7);
- (9) In the second letter, the 6<sup>th</sup> defendant, acting through the 5<sup>th</sup> defendant, had specifically used the words “Lease Agreement” and the 6<sup>th</sup> defendant informed Mr. Prasad (PW2) that if the plaintiffs fail to execute LA, then they will “... execute the same with the Court Officials.”;



- (10) Mr. Prasad (PW2) initially denied receiving the 6<sup>th</sup> defendant's letter dated 30.12.2015, but later he was forced to admit that he had received the 6<sup>th</sup> defendant's letter dated 30.12.2015 when contemporaneous documentary proof of the receipt of the letter by him was produced by the 4<sup>th</sup> to the 6<sup>th</sup> defendants (see Mr. Prasad (PW2)'s testimony under the caption the "Plaintiffs' proven case");
- (11) Mr. Prasad (PW2) had responded to the 6<sup>th</sup> defendant's letter dated 30.12.2015 by sending an email to the 5<sup>th</sup> defendant in which he had specifically mentioned that, "... our client had perused through the Agreement...";
- (12) Furthermore, the 2<sup>nd</sup> plaintiff, at the hearing of the Assessment of Damages, had agreed that she is aware of the 6<sup>th</sup> defendant's letter dated 30.12.2015 sent by the 6<sup>th</sup> defendant to Messrs. D. Prasad & Partners (see the reference to the 2<sup>nd</sup> plaintiff's Witness Statement under the captions "1<sup>st</sup> to the 3<sup>rd</sup> defendants' proven case" and "4<sup>th</sup> to the 6<sup>th</sup> defendants' proven case");
- (13) The 6<sup>th</sup> defendant's letter dated 30.12.2015 was also exhibited in the plaintiffs' application for extension of time to file their notice of appeal out of time and during the cross-examination of the 1<sup>st</sup> plaintiff, Karpayah (PW4), PW4 agreed with the suggestion that he did not say that he had never seen the letter before (see Notes of Evidence, Jilid 1, at pg. 234, Lines 2-9);
- (14) Hence, I agreed with Mr. Nekoo that based on the above reasons, the plaintiffs' second set of solicitors, Messrs. D. Prasad & Partners, were informed and they were fully

aware that the plaintiffs' failure to execute the said LA would result in the SAR signing the said LA; and

- (15) Therefore, I agreed with Mr. Nekoo that in the circumstances, the principle of "ordinary estoppel", as pleaded in paragraph 11.xi of the 4<sup>th</sup> to the 6<sup>th</sup> defendants' SOD, at pg. 59, Bundle 'A', is applicable to the instant case in that the plaintiffs cannot challenge the validity of the LA in this proceeding as the plaintiffs and his solicitors knew of the existence of the LA (see *Boustead Trading Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, referred to by Mr. Nekoo).

**Issue 5: Whether the conduct of the 4<sup>th</sup> defendant who obtained the signature of the SAR on the said LA is deemed cheating?**

**Issue 6: Whether the 4<sup>th</sup> defendant acting on the instructions of the 5<sup>th</sup> defendant had perpetrated fraud/cheating/misrepresentation on the SAR in order to induce the SAR to sign the said LA?**

**Issue 7: Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as directors of the 1<sup>st</sup> defendant conspired with the 4<sup>th</sup> and 5<sup>th</sup> defendants to cheat the plaintiffs?**

**Issue (8): Whether the 6<sup>th</sup> defendant through the 4<sup>th</sup> defendant acting on the instructions of the 5<sup>th</sup> defendant conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to cheat and/or induce the SAR to execute the said LA on the plaintiffs' behalf in order to acquire the said premises without any consideration given under the said LA?**

[618] I dealt with Issues 5, 6, 7 and 8 together as they are interrelated.





[619] In the earlier part of my Grounds of Judgment I have set out in detail the plaintiffs pleaded case in the SOC against the defendants.

[620] For the purposes of dealing with Issues 5, 6, 7 and 8, I shall repeat here what I said about the plaintiffs' averments against the 1<sup>st</sup> to the 3<sup>rd</sup> defendants on fraud/misrepresentation and the plaintiffs' averments against the 4<sup>th</sup> to the 6<sup>th</sup> defendants on cheating/fraud, misrepresentation and/or conspiracy as follows:

(16) The 1<sup>st</sup> to the 3<sup>rd</sup> defendants committed fraud/misrepresentation as follows:

- (a) The 1<sup>st</sup> defendant had entered into the said CJ with the purpose of procuring the land together with the building ("the said property") by way of fraud/ misrepresentation to the extent of prejudicing the plaintiffs (paragraph 23 of the SOC);
- (b) The 1<sup>st</sup> defendant had breached the said CJ by failing to pay the arrears of rent of RM253,500.00 and the deposits under the LA (paragraph 24 of the SOC);
- (c) Until to date, the 1<sup>st</sup> to the 3<sup>rd</sup> defendants failed to make any payment despite reminders given to them by the plaintiffs (paragraph 25 of the SOC); and
- (d) At all material times, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have knowledge of the outstanding arrears of rent and the breaches of the said CJ and had, through the 4<sup>th</sup> to the 6<sup>th</sup> defendants, as the



solicitors committed fraud and/or misrepresentation and/or conspired to induce the SAR to execute the LA to the extent prejudicial to the plaintiffs even though the defendants knew payments were not made (paragraph 26 of the SOC);

(17) The 4<sup>th</sup> to the 6<sup>th</sup> defendants committed cheating/fraud, misrepresentation and/or conspiracy as follows:

(a) The 5<sup>th</sup> and 6<sup>th</sup> defendants with the intention to cheat/defraud the plaintiffs and/or conspired with the 1<sup>st</sup> to the 3<sup>rd</sup> defendants to cheat/defraud the plaintiffs, prepared a LA even though the said CJ only stated a TA (paragraph 27 of the SOC);

(b) The 5<sup>th</sup> and 6<sup>th</sup> defendants with the intention to cheat/defraud the plaintiffs prepared the said LA even though the 5<sup>th</sup> and 6<sup>th</sup> defendants at the time of preparing the said LA clearly knew and/or had the knowledge that the 1<sup>st</sup> to the 3<sup>rd</sup> defendants did not pay the outstanding (arrears of rent of) RM253,500.00 and/or the deposits payable under the said LA and/or would not pay the outstanding (*viz* the arrears of rent of) RM253,500.00 (paragraph 28 of the SOC);

(c) The 5<sup>th</sup> and 6<sup>th</sup> defendants directed the 4<sup>th</sup> defendant on 08.01.2016 with the intention to cheat had given the said LA to the SAR to execute (paragraph 29 of the SOC);



- (d) The 5<sup>th</sup> and 6<sup>th</sup> defendants knowingly authorized and permitted the 4<sup>th</sup> defendant to procure the signature of the SAR on the premise that the 1<sup>st</sup> defendant had complied with the terms of the said CJ even though in reality the sum of RM253,500.00 was not paid and/or would not be paid by the 1<sup>st</sup> defendant (paragraph 30 of the SOC);
- (e) The 4<sup>th</sup> defendant made the said representation and/or cheating/fraud against the SAR that the outstanding (*viz* the arrears of rent of RM 253,500.00) had been paid by the 1<sup>st</sup> defendant through cheques issued by the 1<sup>st</sup> defendant and had induced the SAR to sign the said LA on behalf of the plaintiffs by claiming that the 6<sup>th</sup> defendant was the stakeholder for those cheques (paragraph 31 of the SOC); and
- (f) The 4<sup>th</sup> defendant when making the said representation at all material times knew very well that the representation was false and not true and was made to induce the SAR by fraudulent and/or misrepresentation to the extent of prejudicing the plaintiffs (paragraph 32 of the SOC).
- (g) The particulars of cheating/ fraud, misrepresentation and/or conspiracy by the 4<sup>th</sup> to the 6<sup>th</sup> defendants are set out in paragraph 32 of the SOC as follows:
  - “a) The 4<sup>th</sup> Defendant had caused misrepresentation on the facts especially



- on the unpaid outstanding (sic) by confusing the Senior Assistant Registrar to the detriment of (sic) Plaintiffs;
- b) The 4<sup>th</sup> Defendant had caused false representations that the outstanding (sic) had been paid and/or will be paid even though it was not true and false;
  - c) The 4<sup>th</sup> Defendant made the representations as though (sic) the deposits had been paid and/or would be paid, were true even though in reality were not true and the 4<sup>th</sup> Defendant did not believe it (sic) to be true and/or had the knowledge that it (sic) were not true.
  - d) The 4<sup>th</sup> Defendant made false representation or mistake in facts that were fundamental to the said Lease Agreement ie, settlement of all outstanding (sic) and payment of deposits;
  - e) The 5<sup>th</sup> and the 6<sup>th</sup> Defendants allowed the 4<sup>th</sup> Defendant to in (sic) induce the Court on the premises that the Plaintiffs refused the (Sic) sign the said lease agreement even though (sic) knew it were (sic) not true and procured the signature of the Senior Assistant Registrar by cheating/fraud dan (sic)/or by misrepresentation to the detriment of the Plaintiffs.



- f) The 5<sup>th</sup> and the 6<sup>th</sup> Defendants allowed the 4<sup>th</sup> Defendant to make statements and/or promises that the 1<sup>st</sup> Defendant had paid all outstaying (sic) especially the sum of RM 253,500.00 even though he (sic) knew that it were (sic) not true;
- g) The 5<sup>th</sup> and the 6<sup>th</sup> Defendants held those cheques issued by the 1<sup>st</sup> Defendant with intention not to pay the Plaintiffs;
- h) The 5<sup>th</sup> and the 6<sup>th</sup> Defendant advised, directed and permitted the 4<sup>th</sup> Defendant to secure the signature of the Senior Assistant Registrar with intention to cheat the Plaintiffs to enter into the said Lease Agreement;
- i) the (sic) 5<sup>th</sup> and the 6<sup>th</sup> Defendant (sic) used the process of Court to cause fraud and misrepresentation on the Plaintiffs;
- j) the (sic) 5<sup>th</sup> and the 6<sup>th</sup> Defendants allowed the 4<sup>th</sup> Defendants (sic) to cause (sic) cheat (sic) /fraud and/or misrepresentation to the Senior Assistant Registrar;
- k) The 5<sup>th</sup> and the 6<sup>th</sup> Defendant conspired with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to secure the agreement by cheating/defrauding and/or misrepresentation even though (sic) knew in reality that the outstanding (sic) and

the deposits were not paid and/or would not be paid.”

[621] I decided Issues 5, 6, 7 and 8 in the negative. Below are my reasons.

[622] As I have stated earlier when I dealt with Issue 2, Subissue 2(c) and Subissue 2(d), the law requires the existence of fraudulent misrepresentation for the criminal offence of cheating or for the tort of deceit.

[623] As for conspiracy, the law requires there to be an agreement between parties to injure another person and to cause loss and damage (see *Teoh Peng Phe v. Dato' Seri Dr. Ting Chew Peh (On Behalf of the Malaysian Chinese Association)* [2004] 5 MLJ 241, referred to by Mr. Nekoo).

[624] I agreed with Mr. Suaran Singh that the plaintiffs failed to show that there is any agreement between the groups of defendants to cheat/defraud/misrepresent the SAR into signing the LA and to cause loss and damage to the plaintiffs.

[625] In my view, the actions of the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants in getting the LA executed by the SAR on behalf of the plaintiffs did not amount to cheating as the plaintiffs failed to prove that the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, either individually or jointly, had made any fraudulent misrepresentation to the SAR to induce the SAR to execute the said LA on the plaintiffs' behalf.

[626] In my view, the actions of the 3<sup>rd</sup> defendant in preparing and signing the cheques on the instructions of the 2<sup>nd</sup> defendant did not amount to cheating as the plaintiffs failed to prove that the 3<sup>rd</sup> defendant had made any fraudulent misrepresentation to the



SAR to induce the SAR to execute the said LA on the plaintiffs' behalf.

[627] I took into consideration the following matters:

- (1) PW1 could not recall the date that she signed the said LA;
- (2) PW1 did not read the said LA, before she signed the said LA on behalf of the plaintiffs, at pg. 112, Bundle 'C', Exhibit P1;
- (3) PW1 identified her 2 (two) signatures for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, at pg. 112, Bundle 'C', Exhibits P1A and P1B, respectively;
- (4) PW1 read the Order of the Court as stated in paragraph 4 of the SP Judgment, Exhibit P2, which authorized her to sign the agreement, Exhibit P1, at pg. 112, Bundle 'C', if one party refuses to sign it despite being served with the Court Order, so that the plaintiff (in the 2015 Sessions Court OS case, *viz* the 1<sup>st</sup> defendant in this case) could rent the premises;
- (5) Having satisfied herself that she has the authority to sign the LA she signed the LA on behalf of the plaintiffs on her own accord;
- (6) In signing the said LA on behalf of the plaintiffs, PW1 also relied on what was informed to her by DW2, in particular, that the plaintiffs refused to sign the agreement, Exhibit P1, despite being served with a sealed copy of the SP Judgment of the Sessions Court ordering the plaintiffs to do so; and



(7) PW1 did not testify that she was misrepresented/cheated/defrauded into executing the LA by the 4<sup>th</sup> defendant, the 5<sup>th</sup> defendant or the 6<sup>th</sup> defendant into signing the LA.

[628] I noted that Mr. Selvam, the plaintiffs' learned lead counsel, has cross-examined the 4<sup>th</sup> defendant (DW2) and the 5<sup>th</sup> defendant (DW3) extensively on his suggestions to them that the 5<sup>th</sup> defendant (DW3) had instructed the 4<sup>th</sup> defendant (DW2) to show to Puan Zura (PW1), in addition to the SP Judgment, the 1<sup>st</sup> defendant's cheques without informing Puan Zura (PW1) that the cheques were postdated cheques in order to induce Puan Zura (PW1) to execute the LA.

[629] I also noted that Mr. Selvam had cross-examined the 4<sup>th</sup> defendant (DW2) and the 5<sup>th</sup> defendant (DW3) extensively on his suggestions to them that both of them had suppressed evidence of the addition by the 5<sup>th</sup> defendant of the phrase "and vacant possession provided" in the Addendum of the First Schedule of the LA from the SAR.

[630] However, I noted that the plaintiffs did not pose any question to the SAR to ask her whether she would have signed the LA on 18.01.2016 had she known, firstly, that the phrase "and vacant possession provided" that was present in the LA that the 4<sup>th</sup> defendant had produced to her were absent in the said CJ and, secondly, that there was no provision in the said CJ for payment of the arrears of rent and the said deposits by way of postdated cheques.

[631] Be that as it may, since there was no evidence from Puan Zura (PW1) that, firstly, she had asked to see the cheques and, secondly, that the 4<sup>th</sup> defendant had showed her the cheques, I agreed with Mr. Nekoo that the issues raised by Mr. Selvam in





regard to the cheques and that some of the cheques were postdated cheques were non-issues.

[632] I also agreed with Mr. Suaran Singh that since the plaintiffs did not refer the cheques to Puan Zura (PW1) or question her during her examination-in-chief whether she had sighted the cheques or whether she was induced by the cheques into signing the document produced to her by the 4<sup>th</sup> defendant, the plaintiffs must be taken to have accepted that she had executed the LA based solely on the terms of the SP Judgment.

[633] I also agreed with Mr. Suaran Singh that the SP judgment as it stands is a valid and binding Court Order.

[634] I also did not find any evidence of fraud and/or misrepresentation on the part of the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. I have given my reasons earlier in this Grounds of Judgment under the caption “Findings of the Court”.

[635] As I have stated earlier, Puan Zura (PW1) had executed the LA in the signature part of the LA, at pg. 112, Bundle ‘C’, on her own accord after she had satisfied herself that she had the authority under paragraph 4 of the SP Judgment to sign an agreement for the letting of the building to the 1<sup>st</sup> defendant by plaintiffs.

[636] Since the plaintiffs have conceded that the agreement for the new letting of the building ought to be a LA, and I have found that the intention of both parties at the time they entered into the said CJ was for the plaintiffs to grant a lease of the building to the 1<sup>st</sup> defendant, the fact that Puan Zura testified that she might not have noticed the caption “Lease Agreement” on the front of the LA has become a non-issue.



[637] The plaintiffs failed to adduce evidence that the 6<sup>th</sup> defendant, acting through the 4<sup>th</sup> defendant (DW2), acting under the instructions of the 5<sup>th</sup> defendant (DW3), conspired with the 2<sup>nd</sup> defendant (DW4) and the 3<sup>rd</sup> defendant (DW6) to cheat Puan Zura (PW1) in order to obtain her signature on the LA on behalf of the plaintiffs in order to obtain vacant possession of the First, Second and Third Floors without any consideration.

[638] In addition to the reasons that I have already given, I wish to add that the plaintiffs did not at any point of time give vacant possession of the First, Second and Third Floors to the 1<sup>st</sup> defendant. So how can it be said that the 6<sup>th</sup> defendant, acting through the 4<sup>th</sup> defendant (DW2), acting under the instructions of the 5<sup>th</sup> defendant (DW3), conspired with the 2<sup>nd</sup> defendant (DW4) and the 3<sup>rd</sup> defendant (DW6) to cheat Puan Zura (PW1) in order to obtain her signature on the LA on behalf of the plaintiffs in order to obtain vacant possession of the First, Second and Third Floors without any consideration?

[639] In regard to the plaintiffs' prayer for the said LA to be declared null and void due to no consideration flowing from the 1<sup>st</sup> defendant in the form of financial payments as stipulated in the said CJ and in the said LA, I have already expressed my views earlier, that the said LA is valid and binding on the plaintiffs.

[640] It is trite law that a CJ is a contract with reciprocal promises or obligations to be fulfilled by the contracting parties. The plaintiffs cannot pick and choose which obligation to fulfil and which obligation to disregard.

[641] On this issue, I noted that the plaintiffs attempted to divide the said CJ into 2 (two) mutually exclusive parts, *viz* the continued occupation by the 1<sup>st</sup> defendant of the Ground Floor and the intended and agreed occupation of the First, Second and Third

Floors, and the payment into 2 (two) mutually exclusive parts, *viz* the payment of the arrears of rent for the 1<sup>st</sup> defendant's occupation of the Ground Floor under the previous tenancy agreement, *viz* the TA entered into in 2013, and the payment of the said deposits under the LA for the new letting of the Ground Floor, First Floor, Second Floor and Third Floor.

[642] However, in my view, the intention of the parties as reflected in the wording used in the said CJ is for the terms and conditions of the said CJ to be construed as a whole and for the parties to fulfil their respective contractual obligations as a whole, *viz* for the granting by the plaintiffs, as landlords, to the 1<sup>st</sup> defendant, as tenant, of a lease of the Ground Floor, the First Floor, the Second Floor and the Third Floor of the building by the execution of a LA to take effect on 01.08.2015 together with the giving of vacant possession of the First Floor, the Second Floor and the Third Floor of the building to the 1<sup>st</sup> defendant since the 1<sup>st</sup> defendant was already in possession of the Ground Floor of the building and for the 1<sup>st</sup> defendant to pay to the plaintiffs on 15.08.2015, the arrears of rent for the Ground Floor of the building under the TA entered into in 2013.

[643] In my view, the plaintiffs failed to prove that the 1<sup>st</sup> defendant's act of entering into the LA with the plaintiffs and the 1<sup>st</sup> defendant's failure in not instructing the 6<sup>th</sup> defendant, as stakeholder, to hand over the cheques for the arrears of rent under the said CJ and the said deposits under the said LA can be construed as an act that was done and an act that was not done with the intention to cheat the plaintiffs.

[644] In my view, the plaintiffs failed to prove that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, in their respective capacities as the 1<sup>st</sup> defendant's directors, have conspired with the 4<sup>th</sup> and 5<sup>th</sup> defendants to cheat

the plaintiffs. The reason is because the plaintiffs never gave vacant possession of the First, Second and Third Floors of the building to the 1<sup>st</sup> defendant.

[645] Based on the evidence of the witnesses, I found that the plaintiffs consistently and persistently refused to execute the final draft of the LA that was prepared by the 1<sup>st</sup> defendant's solicitors and approved by the plaintiffs' first set of solicitors after making some amendments and after converting the title of the draft TA to a draft LA.

[646] Based on the evidence of the plaintiffs' key witness, Karpayah (PW4), I found that the refusal of the plaintiffs to execute the final draft of the LA was due to reasons best known to the plaintiffs themselves, *viz* the First, Second and Third Floors were tenanted and hence, they were unable to give vacant possession of the First, Second and Third Floors to the 1<sup>st</sup> defendant on 01.08.2015 and right until the date of the commencement of the trial despite having entered into the said CJ with the 1<sup>st</sup> defendant on 03.07.2015.

[647] On the other hand, based on the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' proven case, I found as follows:

- (1) That the 1<sup>st</sup> defendant's cheques, which were prepared and signed by the 3<sup>rd</sup> defendant on the instructions of the 2<sup>nd</sup> defendant, were deposited by the 2<sup>nd</sup> defendant with the 6<sup>th</sup> defendant acting through the 5<sup>th</sup> defendant in anticipation of the plaintiffs' performance of their obligations to deliver vacant possession of the premises to the 1<sup>st</sup> defendant and the plaintiffs were aware of the same (see NOP, *Jilid* 1, dated 03.12.2018, at pg. 528, Lines 7 to 11);



- (2) That when the plaintiff s failed to comply with the said CJ, the 6<sup>th</sup> defendant notified the plaintiff s that the 1<sup>st</sup> defendant would proceed to obtain the Court official's signature for the LA pursuant to the SP Judgment;
- (3) That despite being notified, the plaintiffs failed to respond (see the 6<sup>th</sup> defendant's letter, at pg. 393, Bundle 'C', Exhibit D(D4-D6)41);
- (4) Due to the continuous failure by the plaintiffs to comply with the said CJ, the 4<sup>th</sup> defendant attended Court to obtain the SAR's signature to the agreement as per the terms of the SP Judgment;
- (5) There are no conditions precedents for the SAR's execution of the agreement other than to demonstrate that the plaintiffs were blatantly refusing to abide by the terms of the SP Judgment (see NOP, Jilid 1, dated 02.10.2018, at pg. 33, Line 14 and at pg. 37, Lines 25-32); and
- (6) The SAR signed the LA on her own accord based solely on the terms of the SP Judgment after she had satisfied herself that she had the authority to do so under paragraph 4 of the SP Judgment.

[648] Hence, I agreed with Mr. Suaran Singh that the incontrovertible evidence lends credence to the 1<sup>st</sup> to the 3<sup>rd</sup> defendants' pleaded case that the conspiracy/fraud as alleged by the plaintiffs was never committed.

**Issue 9: Whether the 6<sup>th</sup> defendant as stakeholder of the cheques conspired through the 4<sup>th</sup> defendant acting on the 5<sup>th</sup> defendant's instructions with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for not paying the outstanding rent to the plaintiffs?**

[649] I decided Issue 9 in the negative. Below are my reasons.

[650] In my view, the plaintiffs failed to prove that the 6<sup>th</sup> defendant, as stakeholder of the 1<sup>st</sup> defendant's cheques, conspired through the 4<sup>th</sup> defendant acting on the 5<sup>th</sup> defendant's instructions, with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, not to pay the outstanding rent to the plaintiffs.

[651] I agreed with Mr. Suaran Singh that the obligation to pay via the cheques will only arise upon the delivery of vacant possession of the premises to the 1<sup>st</sup> defendant. Based on the clear evidence, even though the LA was later executed by the SAR, the plaintiffs did not deliver vacant possession of the premises to the 1<sup>st</sup> defendant.

[652] Hence, the 1<sup>st</sup> defendant's cheques were not released by the 6<sup>th</sup> defendant to the plaintiffs as the 1<sup>st</sup> defendant had no contractual obligation to do so.

[653] On the issue of the cheques, I agreed with Mr. Suaran Singh that the allegation made by Mr. Selvam to the cheques as "worthless pieces of paper" has no legal basis and is premature and speculative because such an allegation can only be made if the cheques were presented to the bank and were dishonoured by the bank.

[654] Hence, I agreed with Mr. Suaran Singh that since the plaintiffs were never given the cheques, it lies ill for them to assert that the cheques were "worthless". This same principle was applied in the case of **Wan Rawi bin Wan Muda v. Mohd Muhili bin A Bakar** [2002] 2 MLJ 344, at pg. 348 (referred to by Mr. Suaran Singh, BOA Tab 1) (see also s. 47 Bills of Exchange Act 1949, BOA Tab 5).

[655] Therefore, I found that there was no conspiracy between the defendants because at all material times, the 1<sup>st</sup> defendant was prepared to make the payments on the terms as stated in the said CJ and the said LA.

**Issue 10: Whether the validity of the said LA has been decided in proceedings before the Subordinate Court, the High Court and the Court of Appeal and therefore caught by the principle of *res judicata*?**

[656] I decided Issue 10 in the affirmative. Below are my reasons.

[657] I agreed with Mr. Suaran Singh that based on the principle of *res judicata* and issue estoppel, the plaintiffs are now barred from challenging the validity of the said LA because the plaintiffs are bound by the High Court Judgment dated 25.04.2016 and the Sessions Court Judgment dated 31.03.2017 on the Assessment of Damages (which was affirmed by the High Court in the Judgment dated 16.10.2017) and both these judgments are still valid and binding (see *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, at pg. 197, paragraph H, pg. 200, paragraph A, referred to by Mr. Suaran Singh, BOA Tab 7).

**Issue 10 (a): Whether all the outstanding rent payable by the 1<sup>st</sup> defendant have been set-off by the Sessions Court Order dated 31.03.2017, the High Court Order dated 16.10.2017 and the Court of Appeal Order dated 14.02.2018?**

[658] I decided Issue 10 (a) in the affirmative. Below are my reasons.

[659] On this issue, I accepted the evidence of Baskaran (DW3) which was corroborated by the decision of the Sessions Court Judge

and the Grounds of Judgment of the Sessions Court Judge for the Assessment of Damages. DW3 had testified as follows:

- (1) In regard to the assessment of damages arrived at by the learned Sessions Court Judge, the learned Sessions Court Judge had assessed the 1<sup>st</sup> defendant's loss of use of the First to the Third Floors and loss of income from the use of the First to the Third Floors at RM425,000.00 from 01.08.2015 for a period of 17 months at a sum of RM 25,000.00 per month as the plaintiffs had failed to give vacant possession for a period of 17 months from 01.08.2015 until the date of the 1<sup>st</sup> defendant's Assessment Application;
- (2) The learned Sessions Court Judge then deducted a sum of RM283,500.00 being the outstanding rentals for the Ground Floor on the date of the said CJ and a sum of RM178,500.00 being the unpaid rentals for the Ground Floor for the 17 months from 01.08.2015 until the date of the 1<sup>st</sup> defendant's Assessment Application thereby leaving a balance of RM37,000.00 due to the plaintiffs;
- (3) The learned Sessions Court Judge failed to take into account the RM30,000.00 deposit which has been paid by the 1<sup>st</sup> defendant;
- (4) So after deducting the deposit of RM30,000.00, there is a balance of RM7,000.00 and the Sessions Court awarded costs of RM5,000.00;
- (5) Hence, there is only a balance of RM2,000.00 actually owing to the plaintiffs;



- (6) The plaintiffs appealed to the High Court against the Assessment of Damages by the learned Sessions Court Judge but the High Court dismissed the plaintiffs' appeal; and
- (7) The plaintiffs appealed to the Court of Appeal against the High Court's dismissal of the plaintiffs' appeal but the Court of Appeal dismissed the plaintiffs' appeal.

[660] Hence, I agreed with the 1<sup>st</sup> defendant's contention that the deposit of RM 30,000.00 expressly stated in paragraph 2 of the said CJ to have been paid by the 1<sup>st</sup> defendant must be deducted from the balance of RM37,000.00 ordered by the learned Sessions Court Judge.

[661] Furthermore, since the plaintiffs have not paid the costs of RM5,000.00 awarded to the 1<sup>st</sup> defendant for the Assessment of Damages and also the costs in related proceedings, which in total exceeds a sum of RM2,000.00 actually owing to the plaintiffs by the 1<sup>st</sup> defendant, I agreed with the 1<sup>st</sup> defendant's contention that a sum of RM7,000.00 ought to be deducted from the balance of RM37,000.00 ordered by the learned Sessions Court Judge.

[662] Therefore, there is no more outstanding rent due and owing to the plaintiffs.

## **Conclusion**

[663] In the premises, based on the reasons as stated above, in summary, I decided as follows:

- (1) Since the plaintiffs have relied on the said LA in related court proceedings without raising the issue that the new

agreement for the letting of the building as provided in the said CJ ought to have been a TA, the plaintiffs are estopped from raising and relying on this issue to challenge the validity of the said LA in the instant case;

- (2) Since the plaintiffs were aware at the time they entered into the said CJ that they had agreed to execute a new agreement for the letting of the building to the 1<sup>st</sup> defendant for an initial term of 8 (eight) years with an option to renew for a term of 4 (four) years, and the plaintiffs also knew the difference between a tenancy and a lease, the said LA is valid as a lease despite its non-registration under Section 221 of the NLC 1965;
- (3) Since the outstanding rent, the said deposits and the rent payable by the 1<sup>st</sup> defendant under the said LA have been set-off from the damages assessed and awarded by the Sessions Court to the 1<sup>st</sup> defendant in the Assessment of Damages application filed by the 1<sup>st</sup> defendant against the plaintiffs, the plaintiffs' appeal against the decision of the Sessions Court was dismissed by the High Court, the plaintiffs' appeal against the decision of the High Court was dismissed by the Court of Appeal and the plaintiffs did not appeal to the Federal Court against the decision of the Court of Appeal, the plaintiffs cannot challenge the validity of the payment by way of set-off of the outstanding rent, the said deposits and the rent payable by the 1<sup>st</sup> defendant under the said LA in the instant case based on the doctrine of res judicata and issue estoppel;
- (4) Since the deposit of RM30,000.00 is expressly stated in paragraph 2 of the said CJ to have been paid by the 1<sup>st</sup> defendant and the parties have agreed for this amount to be



deducted from the first instalment payment of the outstanding rent and the plaintiffs still owe the 1<sup>st</sup> defendant costs exceeding the sum of RM7,000.00, the deposit of RM30,000.00 and the costs of RM7,000.00 must be deducted from the balance sum of RM37,000.00 ordered by the Sessions Court in the Assessment of Damages;

- (5) Since the plaintiffs failed to prove, on the balance of probabilities, the elements of fraudulent misrepresentation and inducement which are essential elements for cheating or the tort of deceit, the plaintiffs' Writ and SOC against the defendants based on cheating the SAR and cheating/defrauding the plaintiffs must fail; and
- (6) Since the plaintiffs failed to prove, on the balance of probabilities, that there was an agreement between the 1<sup>st</sup> defendant, acting through the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, and the 6<sup>th</sup> defendant, acting through the 4<sup>th</sup> and 5<sup>th</sup> defendants, to injure the plaintiffs and to cause harm and loss to the plaintiffs, the plaintiffs' Writ and SOC against the defendants based on conspiracy to cheat the SAR and to cheat/defraud the plaintiffs must fail.

[664] Consequently, I dismissed the plaintiffs' claim with costs of RM 40,000.00 to the 1<sup>st</sup> to the 3<sup>rd</sup> defendants and costs of RM 40,000.00 to the 4<sup>th</sup> to the 6<sup>th</sup> defendants.

**Dated:** 1 AUGUST 2019

**(SU GEOK YIAM)**

Judge

High Court Civil NCvC 11

Kuala Lumpur



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