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Maybank Islamic Bhd v Mattan Engineering Sdn Bhd & Ors [2024] MLJU 2841

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

YUSRIN FAIDZ YUSOFF JC

SUIT NO WA-22M-1853-12 OF 2023

5 November 2024

Yeap Cheng Hoe (CH Yeap Maluda Cheh) for the plaintiff.
Daphne Ngo Jun Yan (with Lee Jing Min) (Josephine, LK Chow & Co) for the defendants.

Yusrin Faidz Yusoff JC:

GROUNDS OF JUDGMENT

INTRODUCTION

[1] This judgment addresses two interlocutory applications arising from the ongoing dispute between the parties. First, it examines the defendants' application to strike out the plaintiffs claim under Order 18 rule 19 (b) and/or (d) of the Rules of Court 2012 **("the Rules").** Second, it considers the plaintiffs application for summary judgment against the defendants under Order 14 rule 1 of the Rules. Both applications necessitate a careful evaluation of the evidence and arguments presented to determine whether the plaintiffs claim is unassailable or whether there exist triable issues warranting a full hearing.

BACKGROUND FACTS

[2] The plaintiff had granted the first defendant **("D1")** with 4 banking facilities based on the following:

(a) a Letter of Offer dated 4 October 2018 and a Supplementary Offer Letter dated 26 October 2018, regarding the Cash Line-i 1 Facility with account number 562973-015322 amounting to RM3,000,000.00 for working capital requirements **("CL-i 1");**

(b) a Letter of Offer dated 8 May 2020 regarding the Cash Line-i 2 Facility with account number 562973-018154 amounting to RM1,500,000.00 for working capital requirements **("CL-i 2");**

(c) a Letter of Offer dated 21 June 2017 regarding the Commodity Murabahah Term Financing-i Facility with account number 462973-200127 amounting to RM700,000.00 for working capital requirements **("CMTF-i 1");** and

(d) a Letter of Offer dated 1 July 2022 and Supplementary Letter of Offer dated 18 July 2022 regarding the Commodity Murabahah Term Financing-i Facility with account number 462973-470208 amounting to RM1,750,000.00 for the purpose of partial conversion of outstanding trade bills **("CMTF-i 2").**

(All of the above facilities are hereinafter collectively referred to as **"the said Facilities').**

[3] In consideration of the plaintiff providing these Facilities to D1, the second and third defendants **("D2"** and **"D3")** agreed to jointly and severally guarantee to the plaintiff the payment, upon demand, of all amounts due and payable by D1 to the plaintiff under the said Facilities through the following four (4) guarantees:

a) Guarantee and indemnity letter dated 28 November 2018 pertaining to Account No. 562973-015322 (CL-i 1);

b) Guarantee and indemnity letter dated 2 July 2020 pertaining to Account No. 562973-018154 (CL-i 2);

c) Guarantee and indemnity letter dated 22 June 2017 pertaining to Account No. 462973-200127 (CMTF-i 1); and

d) Guarantee and indemnity letter dated 29 September 2022 pertaining to Account No. 462973-470208 (CMTF-i 2).

(hereinafter referred to as **"the said Letters of Guarantee").**

[4] The plaintiff has accordingly disbursed the said Facilities to D1, and D1 has utilized the same. However, D1 subsequently failed, neglected, and/or refused to make the overdue monthly payments. Consequently, the plaintiff, through its solicitors, Messrs CH Yeap Maluda Cheh issued a demand and termination dated 17 October 2023 claiming the aggregate amount of RM5,710,199.00 as at 30 September 2023 (See Exhibit A-4 of Enclosure 16). The said sum comprises the following:

No.	Facility	Amount due as at 30 September 2023
i)	CL-i 1	RM2,135,423.71
"i)	CL-i 2	RM1,022,377.41
iii)	CMFT-i 1	RM570.131.93
iv)	CMFT-i 2	RM1,982,185.95
TOTAL:		RM5,710,119.00

[5] A certificate of indebtedness was issued by the plaintiff pursuant to the relevant clauses under the Facilities and Guarantees (See Exhibit A-5 of Enclosure 15 and 17).

[6] On 8 December 2023, the plaintiff initiated proceedings against the defendants by filing a Writ and Statement of Claim. Subsequently, two interlocutory applications were filed, namely:

a) Defendants' application dated 2 February 2024 to strike out the Writ and Statement of Claim (Enclosure 10); and

b) Plaintiffs application dated 19 February 2024 to obtain summary judgment (Enclosure 16).

[7] I considered both applications concurrently and, on 31 May 2024, reached the following decisions:

a) As to the defendants' application to strike out the plaintiffs writ and statement of claim, I dismissed it with costs of RM3,000.00; and

b) As to the plaintiffs summary judgment application, I allowed final judgment to be entered with costs of RM5,000.00.

ISSUES

[8] The application in **Enclosure 10** addresses the following issues:

a) Whether the plaintiff failed to plead material facts **('Sufficiency of Pleadings**); and

b) Whether the plaintiff's claim is time barred **(Time Bar Defence').**

[9] Whilst the application in **Enclosure 16** addresses the following issues:

a) Whether the plaintiff has complied with the procedural requirement of summary judgment application **('Procedural Requirement');** and

b) Whether the defendants have successfully raised genuine disputes of material fact that require a trial. **('Defendants Showing Cause).**

1) ENCLOSURE 10 - Defendants' Application to Strike Out the Plaintiff's Claim

A) Sufficiency of Pleadings

[10] The learned counsel for the defendants, Daphne Ngo Jun Yan, contends that the plaintiffs Statement of Claim is deficient in particulars and lacks the necessary material facts to substantiate its cause of action. Specifically, counsel highlights that, given the involvement of 4 distinct facilities, the plaintiff ought to specify the respective dates of default for each facility. Additionally, the defendants emphasize the absence of crucial particulars regarding the calculation of profit charges, late payment charges *(ta'widh),* and rebate *(ibra).* Since the plaintiff invokes the conclusive evidence clause, it is further argued that the detailed calculations within the certificate of indebtedness should be explicitly set out within the Statement of Claim.

[11] The defendants rely on the cases of *Wong See Leng v Saraswathy Ammal* [1954] 1 LNS 133 (CA) and *Nasri v Mesah* *[1971] 1 MLJ 32* (FC) to argue that it is crucial for the plaintiff to specify the date of breach in order to support the plaintiff's cause of action under breach of contract. The case of *Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam* *[2011] 6 MLJ 70* (CA) is cited to argue that a statement of claim can be struck out on the basis of failure to plead a concise statement of material facts.

[12] The learned counsel of the plaintiff, Yeap Cheng Hoe, posits that what the defendants argue for in Enclosure 10 is the disclosure of evidence and not just the material facts. Cases of *Public Bank Berhad v Pan Pacific Asia Berhad* [2005] 45 MLJ 693 (HC) and *Sundaram v Chew Choo Khoon* *[1968] 2 MLJ 153* (HC) are relied upon to argue that the plaintiff has sufficiently pleaded the material facts namely the particulars of the facilities as per the letter of offer and the eventual default which is the issuance of the letter of demand and termination. The case of *Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Sdn Bhd* *[1993] 3 MLJ 36* (SC) is relied upon to argue that the plaintiff's claim is not a plain and obvious case to be struck out as it contains an arguable claim and reasonable cause of action against the defendants.

[13] The provisions on striking out of pleadings are provided in Order 18 rule 19(1) of the Rules which is reproduced below:

> "19. Striking out pleadings and endorsements (O. 18 r. 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-
>
> a) it discloses no reasonable cause of action or defence, as the case may be;
>
> b) it is scandalous, frivolous or vexatious;
>
> c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> d) it is otherwise an abuse of the process of the Court and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[14] Ramly Ali FCJ in *Tan Wei Hong (A Minor Suing Through Guardian Ad Litem and Next Friend Chuang Yin E) & Ors v. Malaysia Airlines Bhd and Other Appeals* [2018] 9 CLJ 425 (FC) laid out the test for the striking out of pleadings; wherein his lordship referred to the case of **Bandar Builder Sdn Bhd. v United Malayan Banking Corporation Bhd** *(supra)* and held as follows:

> "The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in Bandar Builders are, inter alia, as follows:
>
> (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;
>
> (c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;
>
> (d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable."

[15] The Court of Appeal, in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473 (CA) adopted the well-settled principle of striking out in the following passage: -

> "A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial (see: *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; ; [1997] 2 MLJ 565 (Federal Court))."

[16] Having reviewed the Statement of Claim, I concur with learned counsel for the plaintiff that the particulars sought by the defendants pertain to matters of evidence rather than essential facts necessary to sustain the claim. I am of the view that should the defendants require further elaboration of facts, they may pursue an application for further and better particulars or perhaps apply discovery of the required documents, rather than resorting to an application for striking out.

[17] The plaintiff's case, as articulated within the 18-paragraph Statement of Claim, is, in my view, sufficiently particularized to establish the foundation of the claim. In essence, I am of the considered opinion that the plaintiff has met the requisite standard by adequately pleading the four essential elements of a contractual claim: namely, the existence of a valid contract, the plaintiffs performance, the defendants' breach and the resulting damages incurred. The details of the alleged deficiencies in particulars will be addressed in greater detail in the latter part of this judgment.

B) Time Bar Defence

[18] As a result of the alleged insufficiency in particulars regarding the breach, learned counsel for the defendants contends that the only discernible date of an actual breach would be that of the initial letter of offer for CMTF-i 1, signed on 21 June 2017. By this reasoning, counsel submits that the six-year period stipulated by *Section 6(1)(a)* of the *Limitation Act 1953* has elapsed, rendering the plaintiff's claim time-barred. The cases of *Regal Elite Letrik Sdn Bhd v Country Garden Danga Bay Sdn Bhd* [2022] 1 LNS 551 (HC) and *Parkson Corp Sdn Bhd v Fazaruddin bin Ibrahim (t/a Perniagaan Fatama) and another appeal* [2011] 2 MLJ 46 (CA) are relied upon where it was established that a statement of claim based on a time-barred action may indeed be struck out under Order 18 rule 19(1)(b) and (d) of the Rules as framed by the defendants in Enclosure 10.

[19] Learned counsel for the plaintiff contends that the 6-year limitation period does not commence from the date of the letter of offer or the date of disbursement of funds, but rather from the date on which the defendants breached their obligation to make payment. It is submitted that, for each defendant, this critical date is the date of demand and termination, namely 17 October 2023. Furthermore, counsel argues that the defendants, by issuing letters dated 21 February 2023 and 28 July 2023, have acknowledged the debt, thereby negating any reliance on a time-bar defence.

[20] To determine when time begins to run, it is essential to establish the occurrence of breach according to the contractual terms agreed upon by the parties. Clause 19(a) of the General Terms and Conditions to the Offer Letters defines an event of default in the following terms:

> "19. Events of Default: Notwithstanding any other provision herein relating to any payment of Facility, the Facility or any part thereof may be terminated whereupon all indebtedness being outstanding and unpaid thereon and all other moneys owing to the Bank **shall be payable on demand** in the event:-
>
> a) You and/or Security Party (i) **defaults or fails to pay any amount due in respect of the Facility,** or (ii) fails to pay on due date any monies payable by you, and/or Security Party under any agreement or arrangement to any other financier;"

[21] A careful examination of the terms within the Letters of Guarantee reveals that each instrument constitutes a demand guarantee, whereby liability arises upon issuance of a demand. I am also persuaded by the plaintiffs counsel's submission regarding the fresh accrual of a cause of action, which is triggered by the letters dated 21 February 2023 and 28 July 2023. These letters, by its terms, amounts to an admission under *Section 26(2)* of the *Limitation Act 1953*. The implications of this admission will be discussed in greater detail later in this judgment.

[22] Given these considerations, the defendant's reliance on a time-bar defense is rendered ineffective, and their arguments for insufficiency of particulars do not justify a striking out at this stage. Accordingly, **I** find that the defendant's application to strike out the plaintiffs Statement of Claim should be dismissed.

2) ENCLOSURE 16 - Plaintiffs Application for Summary Judgment

A) Procedural Requirement

[23] With respect to the application for summary judgment, the first issue before the Court is whether the necessary pre-conditions for its grant have been satisfied. In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 (FC), the Federal Court held that:

> "For the purpose of an application under Order 14 the preliminary requirements are:
>
> a) the defendant must have entered an appearance;
>
> b) the statement of claim must have been served on the defendant; and
>
> c) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
>
> ... If the Plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him..."

[24] The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 3 CLJ 544 (FC) held that:

> "[5] Quite clearly, the Court of Appeal has put the burden on the plaintiff to prove his case in an 014 application. With respect, that cannot be the correct proposition of law. In an application under O 14, the burden is on the plaintiff to establish the following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r 2 of O 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim (see *Supreme Leasing Sdn Bhd v Dior Enterprise & Ors* [1990] 2 MLJ 36). **Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite."**
>
> [Emphasis added]

[25] This is in line with the preconditions set out in Order 14 rule 1 of the Rules which read as follows:

(1) Where in an action to which this rule applies a **statement of claim has been served on a defendant** and that **defendant has entered an appearance** in the action, **the plaintiff may,** on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, **apply to the court for judgment against that defendant.**

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than one which includes —

(a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

(b) a claim by the plaintiff based on an allegation of fraud.

(3) This order shall not apply to an action to which O 81 applies.

[Emphasis added]

[26] The fundamental principle of summary judgment is to streamline litigation by resolving cases without the need for a full trial when no genuine disputes of material fact exist. Although summary judgment can greatly reduce time and costs, its improper use could jeopardize a party's constitutional right to due process and a fair trial. To prevent such potential prejudice, the Rules require strict compliance with notice requirements, ensuring the opposing party is given adequate opportunity to respond. Hashim Yeop Sani SCJ (as he then was) in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (SC) at page 183 state as follows:

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

[27] Based on the facts of the case, I am of the view that the plaintiff has fulfilled all the requirements for Order 14 of the Rules i.e. where the defendants have entered appearance on 20 December 2023, and the deponent to the plaintiff's Affidavit in Support dated 19 February 2024 has affirmed and verily believe that there is no defence to the plaintiffs claim. As to the requirement of service of Writ and Statement of Claim, based on the Affidavit of Service, the same was posted on 12 December 2023, and deemed served 5 days thereafter i.e. on 17 December 2023. The burden therefore shifts to the defendants to satisfy the Court why judgment should not have been given against them.

B) Defendants Showing Cause

[28] Upon shifting of this burden, Order 14 rule 3 of the Rules requires the defendant satisfy the following:

(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that **there is an issue or question in dispute which ought to be tried** or that **there ought for some other reason to be a trial** of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

(2) The Court may by order, and subject to such conditions, if any, as may be just, stay the execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.

(Emphasis added)

[29] The burden which is shifted to the defendant is a tactical one. This is succinctly described in the Singapore High Court case of *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* *[2014] 2 SLR 1342* (HC) at paras [45] to [47], wherein Vinodh Coomaraswamy J held as follows:

"[45] I should point out, however, that **the burden which shifts to the defendant upon a prima facie case being shown is the burden on the application or a tactical burden, not the legal or even an evidential burden of proof.** It would be anomalous for a defendant to bear the legal burden of proof on a summary judgment application when at trial, that burden explicitly rests on the plaintiff. And **the fact that it is for the plaintiff first to show a prima facie case with knowledge of and in light of the defences raised makes clear that no evidential burden rests on the plaintiff. It is no part of the policy underlying summary judgment to reverse a plaintiff's burden of proof.**

[46] The policy underlying summary judgment is twofold and comprises a private and a public element. First, summary judgment enables a plaintiff with a strong claim to secure a judgment in a period of time and at an expense which is proportionate to the dispute. Second, summary judgment proceedings enables the court to conserve scarce public resources where there is no reasonable or fair probability that deploying those resources in a full trial would make a difference to the just determination of the dispute.

[47] Thus, **although it is useful shorthand to speak in terms of the burden of proof shifting to the defendant, the fact remains that the court will grant summary judgment if the plaintiff shows after all the evidence is in that the there is no fair or reasonable probability that the defendant has a real or bona fide defence and (only if the defendant raises this point) that there is no other reason why there ought to be a trial."**

[Emphasis added]

[30] In *Bank Negara Malaysia v Mohd Ismail & Ors* *[1992] 1 MLJ 400* (FC), the Federal Court held that where an assertion, denial or dispute is equivocal, or lacking precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then such assertion or denial will be rejected, thereby rendering the issue not triable. In other words, leave to defend will not be granted based upon "mere assertions" by defendant; instead, the

Court will look at the whole situation critically to examine whether the defence is credible.

[31] In the Privy Council case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (PC), at page 217, Lord Diplock explained it as thus:

> "Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as 'he may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth".

[32] It is trite that the affidavit in opposition to the summary judgment must condescend upon particulars and directly address the claimant's claims and supporting affidavit. In short, it should clearly outline what the defendant's defence is as well as the factual basis for it. The affidavit must contain sufficient information to demonstrate a genuine dispute requiring a trial. A general denial of the plaintiffs claims will not suffice.

[33] Based on the above, we shall now examine the issues raised by the defendants in their opposition to the plaintiff's summary judgment application:

i) Whether the Plaintiff has Failed to Plead Material Facts

[34] The issue presented here mirrors that raised in Enclosure 10, wherein counsel for the defendants asserts a lack of essential particulars necessary to substantiate the Plaintiffs claim. In response, plaintiff's counsel contends that the material facts have been adequately set out, and that the particulars sought by the defendant pertain to evidence, which need not be pleaded.

[35] In Enclosure 10, I found that the plaintiff had fulfilled the requisite standard of pleading, leading to the dismissal of the defendant's application to strike out. Nevertheless, to further elucidate the matter as it arises in Enclosure 16, we shall first examine the relevant contractual provisions, pleadings, and underlying factual matrix of the case.

[36] Regarding the pleading of profit charges, I am of the considered view that profit charges for CL-i 1, CL-i 2, CMTF-i 1, and CMTF-i 2 have indeed been adequately set out in paragraphs 6.1, 6.2, 6.5, 6.6, 6.9, 6.10, 6.13, and 6.14 of the Statement of Claim. These paragraphs illustrate the process of fund generation through Commodity Murabahah, aligned with Shariah principles. I find it unnecessary to plead the calculation of these figures, as the bank's purchase and selling prices form part of the agreed terms between the parties, which amounts to evidence and not material facts. In support of their application for summary judgment, the plaintiff has produced the required evidence i.e. the relevant offer letters (See: Exhibit A-1 of Enclosure 17); as well as the e-certificates issued to prove the acquisition and sale of the commodity namely crude palm oil which were issued by Bursa Malaysia Islamic Services Sdn Bhd **("BMIS"),** a Commodity Murabahah House authorized by Bank Negara Malaysia (See: Exhibit A-7 of Enclosure 23). The plaintiff has also shown proof of disbursement and/or availability of funds of the respective Facilities in Exhibit A-8 of Enclosure 23.

[37] On the matter of *ta'widh,* it is evident that the applicable percentage for each facility has been duly pleaded in paragraph 13 of the Statement of Claim, indicating a rate of 1.00% per annum on the outstanding sum up to the earlier of maturity or judgment date, followed by an additional rate based on the IIMM rate from maturity until realization. I find no necessity to plead the detailed workings of Murabahah transaction, or monthly imposition of such charges along with the applicable rates; these matters have been substantiated by presenting the requisite evidence, i.e. through a statement of account or and the certificate of indebtedness.

[38] Turning to the matter of rebate, or *ibra',* the agreements make it abundantly clear that the obligation to grant *ibra'* only arises upon full settlement of the outstanding sum (See Clause 7 of the General Terms and Conditions to the CL-i 1, CL-i 2 and CMTF-i 2 Offer Letters, and Clause 8 of the General Terms and Conditions for the CMTF-i 1 Offer Letter). Given that the sum remains overdue, the plaintiff is under no obligation to specify the amount of *ibra'* that would apply to the defendants. Nevertheless, the requirement to mention this undertaking to grant *ibra'* in the Statement of Claim as set out by the Shariah Advisory Council (Clause 7.4 of the **Guidelines on Ibra' (Rebate) for Sale-Based Financing,** Bank Negara Malaysia, 2011) is well observed as the plaintiff has indeed satisfied this obligation in paragraph 9 of the Statement of Claim.

[39] Regarding the contention that the particulars of the debt outlined in the certificate of indebtedness should be

explicitly detailed within the body of the Statement of Claim, I find that there is nothing in the relevant clauses within the agreement to necessitate the advance disclosure or mandatory mention of the detail calculation within such certificate within the Statement of Claim. In general, such certificate amounts to evidence and not facts and therefore need not to be pleaded. In the case of *AMMB International (L) Ltd v Penas Holdings Sdn Bhd & Anor* [2005] 2 MLJ 509 (HC) Abdul Malik Ishak J (as His Lordship then was), dismissed the proposition as articulated in *Malayan Banking Bhd v Yeo Sun Tong* [1999] 4 CLJ 425 (HC) that details of a certificate of indebtedness has to be fully pleaded and favoured the to adhere to the Federal Court's decision in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC) which outlines the evidentiary purpose of such certificate. I am equally bound by the doctrine of *stare decisis* on this issue.

[40] In light of the preceding analysis, it is clear that the defendants' objection to the plaintiff's pleadings, whether regarding profit charges, *ta'widh,* or *ibra',* do not give rise to a triable issue. The particulars sought by the defendants pertain to matters of evidence rather than essential facts, and as such, are not required to be pleaded in detail. As the same has been proven by documentary evidence in Enclosure 16 application, I find that this issue is not triable.

ii) Whether the Plaintiffs Claim is Time Barred

[41] The issue presented here reflects that raised in Enclosure 10, in which learned counsel for the defendants contends that the plaintiff's claim is time-barred as the breach occurred in 2017. Conversely, learned counsel for the plaintiff argues that the limitation period only began to run from the date of demand on 17 October 2023.

[42] As a general principle, a contractual action becomes time-barred upon the expiration of 6 years from the date of breach. This is set forth in *Section 6(1)(a)* of the *Limitation Act 1953*, which provides as follows:

> "6. Limitation of actions of contract and tort and certain other actions.
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say -
>
> (a) actions founded on a contract or on tort;"

[43] In banking cases, determining the date of breach is a nuanced exercise. Typically, the date of breach can be identified in several ways depending on the nature of the facility and the specific terms of the agreement. Below are common scenarios relevant to banking disputes:

(a) **Non-Payment on Due Date:** In most cases, the date of breach occurs when the borrower fails to make a scheduled repayment by the due date specified in the loan agreement. Each missed payment may constitute a separate breach, particularly where the agreement allows the lender to call the full balance due on any default.

(b) **Demand Facilities:** For demand loans or facilities, a breach may only arise upon formal demand by the bank. Here, the limitation period generally starts from the date of the demand. It is important to note that demand must be properly issued in accordance with the terms of the facility, as courts often interpret this as a condition precedent to the cause of action.

(c) **Acceleration Clause:** Where an acceleration clause exists— allowing the bank to declare the entire outstanding balance due upon a borrower's default—the date of breach may be triggered upon the bank's exercise of this clause. An actual demand for payment of the accelerated balance is normally required, which would then set the limitation period in motion.

(d) **Continuing Breach:** In certain banking cases, especially involving complex credit facilities or revolving loans, breaches can be argued as continuous in nature. This might apply when periodic defaults occur under a line of credit. Although each missed payment may trigger its own limitation period, a bank may argue for a rolling or cumulative limitation period based on continuous breach principles.

(e) **Guarantee Claims:** In cases involving guarantees, the date of breach against the guarantor may differ, often aligning with the demand made upon the guarantor after the principal borrower's default. Generally, the limitation period against a guarantor runs from the date they are notified and fail to satisfy the demand in accordance with the guarantee's terms.

(f) **Acknowledgement and Payments Made:** Banks may also rely on *Section 26(2)* of the *Limitation Act 1953*, which resets the limitation period when a borrower acknowledges the debt or makes a partial

payment. In such cases, the date of breach may effectively reset, allowing banks a fresh limitation period based on these new actions.

[44] I am of the considered view that the defendants' contention that the date of breach should be fixed as the date of the first offer letter signed in 2017 for CMFT-i 1 lacks foundation when examined against well-established principles in banking law. In typical banking arrangements, the limitation period is calculated from the point at which the borrower actually defaults on an obligation or fails to comply with a demand, rather than the initial signing of the offer letter. The execution of an offer letter alone does not give rise to a breach, as it merely establishes the terms of the contractual relationship.

[45] For the purposes of determining breach, clauses governing default, demand, and payment obligations—such as Clause 19 and Clause 30 of the General Terms and Conditions in this case—are essential. In light of these principles and the evidence presented, I find that the date of breach for D1 is the date on which the demand was issued, consistent with Clause 19(a) of the General Terms and Conditions in the Offer Letters. For the guarantors, D2 and D3, the date of breach aligns with Clause 1 of each guarantee, requiring formal demand as stipulated in Clause 22. The demand was duly issued against the defendants on 17 October 2023 and deemed served in accordance with the applicable terms, thus rendering any contention for a 2017 breach date unsustainable.

iii) Whether the Defendants Admitted Liability

[46] The learned counsel for the defendants contend that their letters dated 21 February 2023 and 28 July 2023, now seemingly adverse to their position, was issued as part of a "without prejudice" exchange and is thus privileged. They argue that this correspondence should be excluded from consideration as evidence. Conversely, the learned counsel for the plaintiff submits that the letters contain an acknowledgment of the debt, constituting an admission relevant to the claim. Furthermore, the plaintiff asserts that this acknowledgment could serve as a basis for an enlargement of time should the argument regarding the limitation period be upheld.

[47] The pertinent letters forming acknowledgment and admission are reproduced as follows:

(a) Letter dated 21 February 2023:

"Our ref: MBB/Repayment/2023/003 Date: 21 February 2023

WITHOUT PREJUDICE

Maybank Islamic Berhad

Menara Maybank,

100 Jalan Tun Perak,

50050 Kuala Lumpur,

Dear Sir,

OUTSTANDING FINANCING FACILITIES:

(1) Cash Line-i 1 of RM1,500,000.00

(2) Cash Line-i 2 of RM1,725,605.88

(3) Commodity Murabahah Term Financing-i 1 ('CMTF-M') of RM700,000

(4) Commodity Murabahah Term Financing-i 2 ('CMTF-i2') of RM1,750,000

We refer to the above matter and to your letter dated 15th February 2023 and we respond to it on a without prejudice basis.

For both of our on-going solar projects BGMC and Idiwan, we have achieved 99% for BGMC (Kedah) and 98% for Idiwan (Kelantan) and we are pushing for amicable settlement with the client on the plant that has achieved operation which is BGMC (Kedah) and Idiwan (Kelantan) which is targeted to be completed by June 2023. And based on our calculations, after finalization of accounts, we are able to collect approximately RM5,336,525.00 and RM5,297,287.00 respectively. **This sum will be used to settle the outstanding sum.**

We have been pushing the client to have our amicable solution to be done by March 2023 for BGMC as the plant now operational and we are in the midst of resolving the defect works and also the system performance issue prior to the commencement of Operation & Maintenance works.

At the mean time, on a strictly without prejudice basis **we propose to submit a repayment schedule for your consideration due to our current position at our best efforts as our best estimates are the settlement with the clients will complete by August 2023. We are also trying to make some arrangements from other sources, so that we are able to pay the outstanding sum.**

Thank you.

Yours faithfully

For and on behalf of

MATTAN ENGINEERING SDN BHD

signed

....

Director

Matt Tan”

(See: Page 259, Exhibit A-6 of Enclosure 17)

(b) Letter dated 28 July 2023:

“Ourref: MBB/Repayment/2023/003

Date: 28 July 2023

Maybank Islamic Berhad

Menara Maybank,

100 Jalan Tun Perak,

50050 Kuala Lumpur,

Dear Sir,

Re: Outstanding Financing Facilities with Maybank Islamic Berhad

(5) Cash Line-i 1 of RM1,725,605.88 (Limit Reduced from RM1,939,891.88)

(6) Cash Line-i 2 of RM921,471.67 (Limit Reduced from RM1,500,000)

(7) Commodity Murabahah Term Financing-i 1 ('CMTF-i1') of RM700,000

(8) Commodity Murabahah Term Financing-i 2 ('CMTF-i2ᴶ) of RM1,750,000

Reference is made to the subject matter and letter from Maybank Islamic Berhad dated 18 July 2023.

We would like to reiterate that **Mattan Engineering Sdn Bhd has every intention of settling the Outstanding Sum,** as we are working towards all collections from the project awarder. However, due to unforeseen circumstances, the collection from project awarder does not materialize as we planned for it. Hence, resulting in operating cashflow issues.

We are responding to you in good faith to demonstrate our intentions of paying the Outstanding Sum and hope for your consideration. We noted that the amount is long overdue, and we have agreed on the repayment arrangement, yet we are still waiting for collection from the respective project awarder.

Therefore, would like to appeal for your kind understanding and consideration **to grant us some time to resolve these unforeseen circumstances.** We look forward to keeping an open line communication until the Outstanding Sum is settled in full.

Should you require further information or clarification, please do not hesitate to contact us. Kindly acknowledge the duplicate copy of this letter and return it for our record.

Thank you.

Yours faithfully

For and on behalf of

MATTAN ENGINEERING SDN BHD

Signed signed

....

(Levin Tim Eu Sheng) (Tan Tiong Kiat)

Director Director

(See: Page 271, Exhibit A-6 of Enclosure 17)

[48] The first letter was issued pursuant to the plaintiff's "without prejudice" letter dated 15 February 2023 wherein which the plaintiff insisted on the payment of the arrears of RM1,278,673.39 not later than 21 February 2023 (See

pages 260-261, Exhibit A-6 of Enclosure 17). Whilst the second letter was issue pursuant to the plaintiff's letter dated 18 July 2023 wherein the plaintiff highlighted D1's failure to abide to the repayment method as agreed in plaintiff's letter of offer dated 2 June 2023. D1 was required to pay the sum of RM150,000.00 for May to July 2023 installments and to forward the agreed post-dated cheques for subsequent monthly installments not later than 28 July 2023, failing which the plaintiff would be entitled to terminate the repayment arrangement (See page 269, Exhibit A-6 of Enclosure 17).

[49] The principle that "without prejudice" communications are inadmissible in court is firmly grounded in public policy and has been codified in our statutory framework through _Section 23_ of the *Evidence Act 1950*. This provision reflects the common law position, reinforcing the protection afforded to settlement discussions and ensuring that parties can negotiate freely without fear that any concessions or offers made in such discussions may later be used against them in legal proceedings. This protection, however, is not absolute. It is trite that it only applies when two essential features are present:

(a) there must be a genuine dispute between the parties that has led them to enter into negotiations; and

(b) the communication must contain suggested terms aimed at resolving that dispute.

[50] The House of Lords in the English case of *Bradford & Bingiey v Rashid* [2006] 4 All ER 705 (HL) held that a letter offering to pay a lower sum than the amount claimed in a debt claim was held not to be without prejudice, even though it bore the label "without prejudice".

[51] In the present matter, D1 have, expressly acknowledged their obligation to settle the outstanding debt and have conveyed their intention to keep lines of communication open in pursuit of a mutually agreeable repayment arrangement. This exchange ultimately resulted in an agreed repayment schedule as per plaintiff's letter of offer dated 2 June 2023, designed to alleviate D1's financial strain pending receipt of payments from their clients. Notably, the overdue sum is not contested. These correspondences were thus issued in an effort to negotiate additional time and a feasible method of repayment. In my considered view, this scenario does not attract the protection of the "without prejudice" rule, as the purpose here was not to compromise liability but to facilitate the terms of payment.

[52] The next question is whether these letters amount to admission of liability. In the case of *Malaysia Airports Sdn Bhd v APFT Land Sdn Bhd* _[2018] 10 MLJ 257_ (HC) Mohd Shariff JC, in finding that there was an admission which secures the plaintiff's claim for summary judgment referred to the decision of Abdul Malik Ishak J (as His Lordship then was) in *Malayan Banking Berhad v Red Box (Malaysia) Berhad* _[2000] MLJU 108_ (HC) which states as follow:

> **"..An admission of a particular fact may either be express or implied. In whatever form it takes, the admission must be clear and unequivocal** (*Ellis v Allen* _[1914] 1 CH 904_ at p 909; *Ash v Hutchinson & Co (Publishers) Ltd* _[1936] Ch 489_ at p 503; and *Technistudy Ltd v Kelland* _[1976] 1 WLR 1042_; ; [1976] 3 All ER 632 (CA)). **Thus, if a defendant admits a document but does not admit its full contents, the plaintiff may still succeed by obtaining judgment if the document, on production, clearly establishes and supports the plaintiffs claim** (*Barnard v Wieland* (1882) 30 WR 947; *Rutter v Tregent* _(1879) 12 Ch D 758_;; _(1884) 28 Ch D 650_). There was clear admission on the part of the respondent to the whole debt and the petitioner must not be restrained from advertising the petition. This was my judgment and I so hold accordingly. Lest I be accused of an oversight, the judgment of that brilliant judge — Hashim Yeop A Sani CJ (Malaya) (as he then was) in *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* _[1991] 1 MLJ 95_ should be put to the fore. In that case, that brilliant judge held that prima facie a creditor is entitled to petition for a winding-up against a company which fails to pay its debt. His Lordship further held that the creditor should not be prevented from pursuing its petition so that the court would be able to consider all the evidence and determine whether it should exercise its discretion to order a winding-up or not..."
>
> (Emphasis added)

[53] Here, D1 's letters dated 21 February 2023 and 28 July 2023 reveal an unequivocal admission of indebtedness, as it directly references their intention to adhere to the repayment of outstanding amount owed to the plaintiff. This acknowledgment undermines D1's current objections and supports the plaintiffs claim for summary judgment.

[54] Furthermore, under Clause 11 of the Letters of Guarantee, the admission made by D1, as outlined above, is binding upon D2 and D3. Clause 11 expressly provides that *"Any admission acknowledgment in writing by the Customer or any person authorized by the Customer of the amount of indebtedness of the Customer to you and*

any judgment recovered by you against the Customer in respect of such indebtedness shall be binding and conclusive against me/us ..." This language leaves no ambiguity in extending the effect of D1's admission to D2 and D3.

[55] I am further of the view that these letter amount to acknowledgement of debt pursuant to *Sections 26(2)*, *27(1)* and *28(4)* of the *Limitation Act 1953* which stipulates as follows:

> 26. Fresh accrual of action on acknowledgment.
>
> ...
>
> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the **person liable or accountable therefor acknowledges the claim** or **makes any payment** in respect thereof, **the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment...**
>
> 27. Formal provisions as to acknowledgments and part payments.
>
> (1) Every such acknowledgment as is referred to in *section 26* or in the proviso to *section 16* of this Act **shall be in writing and signed by the person making the acknowledgment.**
>
> ...
>
> 28. Effect of acknowledgment or part payment on persons other than the maker or recipient.
>
> ...
>
> (4) An acknowledgment of any debt or other liquidated pecuniary claim shall bind the acknowledgor and his successors but not any other person:
>
> Provided that an acknowledgment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any successor on whom the liability devolves on the determination of a proceeding estate or interest in property under a settlement taking effect before the date of the acknowledgment.
>
> [Emphasis added]

[56] A perusal of the above sections within the Limitation Act 1953 would go to show that the acknowledgment of the debt should be made in writing. Secondly it should be made by the party against whom the liability is claimed or by persons through whom he derives title or liability. Lastly the acknowledgment if made after the expiration of the prescribed period for a suit shall not bind any person other than the person making the payment and his successors. If these conditions are satisfied, then period of limitation begins to run only from the time when the acknowledgment was so signed. In this case I have given my considerations to the submissions made by the learned counsel for the plaintiff and I am of the view that all these ingredients are satisfied.

[57] In addition, I observe that the defendants' last payment, made in accordance with a settlement letter dated 2 June 2023, involved a sum of RM50,000 to fulfill the installment due for April 2023. This payment would likewise constitute a fresh accrual of the cause of action, pursuant to *Section 26(2)* of the *Limitation Act 1953*. Thus, even if I were mistaken in holding that time begins to run from the date of demand, the defendants' admission and subsequent payment clearly serve to extend this timeline.

iv) Whether the Plaintiffs Claim is Substantiated by the Certificate of Indebtedness.

[58] On the issue of the correctness of the amount claimed, the defendants have argued here as well as in Enclosure 10 that the details of the certificate were not pleaded. Dilating on this aspect the learned counsel for the defendants contends that the plaintiff cannot rely on the same as conclusive proof of amount due and payable by the defendants.

[59] The learned counsel for the plaintiff on the other hand argues for the application of conclusive evidence clauses within the Facilities. Proof of quantum has been agreed to be based on a certificate of indebtedness as at

30 September 2023 which in absence of manifest error would be deemed conclusive evidence of the amount stated to be due. (See Exhibit A-5 of Enclosure 15 and 17).

[60] On this issue of quantum, I find that the Offer Letters and the Letters of Guarantee contain conclusive evidence clause. This can be seen in Clause 18 of the General Terms and Conditions of the Offer Letters in CL-i 1 & CMTF-i 1, as well as Clause 19 in the General Terms and Conditions of the Offer Letters in CL-i 2 & CMTF-i 2 which states as follows:

> Evidence of indebtedness: In any legal action or proceedings relating to the Facility, a certificate of thee Bank as to any amount due to it under the Facility shall, in absence of manifest error, be conclusive evidence that such amount is in fact due and payable.

[61] Whereas clause 11 of the Letters of Guarantee each stipulates as follows:

> "..A statement signed by your manager, secretary or any one of your officers as to the moneys and liabilities for the time being due or incurred to you from or by the Customer shall be final and conclusive evidence against me/us for all purposes including legal proceedings."

[62] Conclusive evidence clauses operate to establish that a determination of the amount owed by a debtor is, for all intents and purposes, final and binding as to the sum payable. Such provisions effectively preclude the need for protracted inquiries into the precise calculation of outstanding debts, sparing the parties the necessity of combing through financial records in search of potential discrepancies.

[63] In **Citibank N.A. v Ooi Boon Leong & Ors** *(supra)* at page 284, the Federal Court held that the indebtedness of the borrower may be ascertained conclusively by such certificate:

> "In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus "A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives." **It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate:** see *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643; *Bache & Co v Banque Vernes* [1973] 2 LLLR 437.
>
> **In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for."**
>
> (Emphasis added)

[64] Lord Denning MR in *Bache & Co (London) Ltd v Banque Vernes Et Commerciale De Paris SA* [1973] 2 Lloyd's Rep 437 (CA) had this to say at page 440:

> "[t]hat, as a matter of principle, the conclusive evidence clause was binding according to its terms and, if notice of default was given in pursuance of the conclusive evidence clause it was binding according to its terms, the clause was not contrary to public policy."

[65] The Federal Court in **Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor** *(supra)* through the judgment of Steve Shim CJSS quoted with approval of the case of *Dobbs v National Bank of Australasia* [1953] 53 CLR 643 (HC), where the High Court of Australia made the following observation:

> "... The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate.... But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness".

[66] Steve Shim CJSS in **Cempaka Finance Bhd** case also held that "a *certificate of indebtedness operates in the field of adjective law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disapprove the amount claimed",* (at paragraph 11).

[67] Regarding the alleged requirement to plead the details of the certificate, I have ruled that applying **AMMB International (L) Ltd v Penas Holdings Sdn Bhd & Anor** *(supra)* there is no such requirement as such certificate forms evidence of the case and need not be pleaded. Consequently, the defendants' argument that they are being kept in the dark due to lack of formal pleading holds no merit.

[68] The reference to "manifest error" nevertheless would allow a comeback if there is a material mistake in the calculations. In the case of *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 (CA), the English Court of Appeal held as follows:

> "83. Is this a case of manifest error? There are two helpful recent authorities on this issue, namely *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542; ; [2008] 2 All ER (Comm) 1173 and *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230; ; *[2012] Ch 31*.
>
> 84. IIG was a claim for payment against guarantors. The defendants had bound themselves to pay on demand, absent manifest error Lewison J, the trial judge, rejected the suggestion that there was manifest error. He said that a manifest error was **"one that is obvious or easily demonstrable without extensive investigation".** The Court of Appeal approved the judge's approach to that issue and upheld his decision: see the judgment of Waller LJ at [33] to [35]. Lawrence Collins and Rimer LJJ agreed.
>
> 85. North Shore was an action by a lender against the two guarantors of the loan. Clause 3.4 of the guarantee stated that a certificate signed by the claimant for the amount of the indebtedness was conclusive evidence against the guarantors, unless manifestly incorrect. The Court of Appeal approved the test for manifest error formulated by Lewison J in IIG. The court held that the certificate was invalidated by manifest error, because it did not take into account an agreed variation in the rate of interest.
>
> 86. At [61] Smith LJ said:
>
>> "On reflection I have come to the conclusion that for a party to rely on a manifest error in a certificate does not depend upon his ability to demonstrate the error immediately and conclusively. **In the present case, the guarantors were able to recognise immediately that the certificate was based upon the interest rates as set out in the original loan agreement and not as varied in November 2004. They could see that it was manifestly incorrect. They could not immediately demonstrate that conclusively; they could not do so until the court had determined the issue of variation. But they were right, as this court has now held. I would hold that the certificate was manifestly incorrect and was of no effect."**
>
> 87. Finally, in relation to the law, I should refer to *IG Index v Colley* [2013] EWHC 748 (QB). In a very thorough judgment Stadlen J reviewed the authorities on manifest error. At [813] to [814] he held that **the court could have regard to extrinsic evidence."**

[69] This principle is reaffirmed in the recent judgment of *Flowgroup Pic v Co-Operative Energy Ltd* [2021] EWHC 344 (Comm) (HC), wherein the English High Court held that for a challenge based on a manifest error clause to succeed, there must be a plain and obvious mistake. However, whether such an error has indeed occurred is a matter of fact, and need not be glaringly apparent from the face of the certificates themselves. In the **Flowgroup** case, the error in issuing the certificates only came to light once the underlying contractual obligation was properly scrutinized.

[70] In applying these authorities, it is clear that in determining the existence of a manifest error, consideration must be given to the fact that certain errors may only come to light upon the court reaching a specific legal conclusion. Although it may not be feasible to demonstrate the errors as "immediately and conclusively" incorrect at first glance, they may nevertheless still amount to manifest errors.

[71] In the present case, neither the principal borrower nor the guarantors raised objections to the quantification. Nevertheless, in view of the authorities cited above, I have to examine the certificates issued with care, ensuring not only the absence of manifest errors but also that the charges strictly adhere to the terms and conditions stipulated in the facility agreements.

[72] From the affidavit evidence presented, I am of the considered view that there is no error in the face of the certificate. To substantiate the certificate, the plaintiff has issued corroborative evidence in the form of a statement of account for each of the Facilities. Such additional evidence is made pursuant to the application of Clauses 25 & 26 of the General Terms and Conditions of the Offer Letters. It is therefore my view that the certificate of indebtedness does not contain any apparent mistake or error. As it is uncontested by the defendants, it is therefore deemed conclusive. Accordingly, I find that this issue does not warrant a trial.

v) Whether the Settlement Between Parties Supersedes the Offer Letters

[73] Here the learned counsel for the defendants argues that there was a settlement between parties as evidenced by plaintiffs letter dated 2 June 2023 wherein the plaintiff has deliberately failed to plead and disclose this fact. In particular, it is alleged that the defendants were given extension till December 2023 to regularize the repayment by complying to the agreed terms. The termination which was issued on 17 October 2023 is thus considered premature. On the other hand, the learned counsel for the defendant argues that such settlement is secondary and conditional wherein it leaves the terms of the Offer Letters intact.

[74] It is, to put it mildly, rather perplexing to see the defendants attempting to both uphold and discard the same set of correspondence. They cannot, on the one hand, shield this “without prejudice” communication from the Court’s scrutiny, while, on the other hand, wield it to bolster their own case. This is a classic attempt to probate and reprobate, a tactic that simply does not stand—particularly when it was the defendants themselves who breached the settlement by failing to adhere to its terms.

[75] In order to better understand the factual matrix, there is a need to refer to all correspondence despite being made “without prejudice”. Further to the earlier discussed “without prejudice” correspondences, I reproduce the content of the plaintiff’s letter dated 2 June 2023 (See pages 265-267, Exhibit A-6 of Enclosure 17):

“Our ref: CRM/RAR3AA/R/NA/ZW/Mattan Engineering Sdn Bhd

2 June 2023

Mattan Engineering Sdn Bhd

D-7-13A, Capital 4,

Oasis Square, Jalan PJU 1A/7A, Ara Damansara,

47301, Petaling Jaya, Selangor Darul Ehsan

Attn: Mr. Matt Tan Tiong Kiat

RE: YOUR OUTSTANDING FINANCING FACILITIES WITH MAYBANK ISLAMIC BERHAD

(1) Cash Line-i 1 of RM1,725,605.88 (Limit Reduced from RM1,939,891.88)

(2) Cash Line-i 2 of RM921.471.67 (Limit Reduced from RM1,500,000)

(3) Commodity Murabahah Term Financing-i 1 (ˡCMTF-iT) of RM700.000

(4) Commodity Murabahah Term Financing-i 2 (‘CMTF-i2’) of RM1,750,000

1. We refer to your letter dated 21 February 2023 and your email to the Bank dated 10 March 2023 in respect of your payment proposal.

2. We are pleased to inform you that the on a Without Prejudice basis, the Bank is agreeable to allow you time indulgence until December 2023 to fully settle your entire outstanding financing subject to the following:

(a) To pay monthly interim payment as follows:

Month	Amount (RM)
April 2023	50,000

May 2023	50,000
June 2023	50,000
July 2023	50,000
Aug 2023	100,000
Sept 2023	500,000
Oct 2023	1,000,000
Nov 2023	2,000,000
Dec 2023	The remaining outstanding balance

(b) Each payment shall be received by the Bank not later than 28th day of each calendar month. (RM50,000 has been received from you being payment for the month of April 2023). The above payment is inclusive of the monthly profit and subject to further charge thereon until full settlement of the entire financings facilities;

(c) The Bank is at liberty to apportion the said payment towards your financing accounts;

(d) **You are to submit to the bank the post-dated cheques reflecting the above monthly interim payments for the month of June 2023 until Nov 2023, not later than 13 June 2023;**and

(e) You are to update the Bank your status of legal action/negotiation with BGMC Brass Power Sdn Bhd and Idiwan Solar Sdn Bhd by 31 August 2023.

3. **Save for the above changes, all other existing terms and conditions as stated in the Bank's previous Letters of Offer shall remain unchanged.**
4. **The Bank will be at liberty to terminate the time indulgence arrangement in the event you failed to adhere to any of the terms and conditions under para 2(a) above, in such instance, the Bank shall commence with whatever actions it deems fit against you and all the security parties for the remaining outstanding financings without further reference to you or the security parties.**
5. If you are agreeable to the above arrangement, kindly signify your acceptance and agreement by signing and returning the duplicate of this letter to reach us latest by 13 June 2023 together with the post dated cheques stipulated under para 2(d) above failing which, we shall assume that you are not accepting and the Bank's conditional agreement as above shall be deemed lapsed/withdrawn and be of no further effect and the Bank shall continue to proceed with whatever actions it deems fit to recover all monies still owing by you to the Bank, including profit and costs without further reference to you or the security parties.

Thank you.

Your faithfully

For Maybank Islamic Berhad

Signed Signed

WAN ROSMAWATI WAN IBRAHIM

ZAILI WAGIO

Head Account Manager

Remedial /Asset Reconstruction 3 Remedial /Asset Reconstruction 3

Corporate Remedial Management Corporate Remedial Management

Maybank Maybank

To: Maybank Islamic Berhad

We, Mattan Engineering Sdn Bhd hereby confirm our agreement and acceptance of all the aforesaid terms and conditions as set out in this letter.

Signed Signed

Name: Tan Tiong Kiat Name: Levin Tan Eu Cheng

IC No.: 760714-14-6039 IC No.: 800680-14-5817

Date: 16/6/2023 Date: 16/6/2023

[Emphasis added]

[76] As discussed earlier in this judgment, the defendants' failure to adhere to the terms of settlement precipitated the issuance of the plaintiff's letter dated 18 July 2023 (See page 269, Exhibit A-6 of Enclosure 17). In that letter, the plaintiff explicitly underscored D1's non-compliance with the agreed repayment terms: namely, the requirement to pay RM150,000.00 for the installments due from May to July 2023 and to submit the agreed post-dated cheques for subsequent monthly installments by 28 July 2023.

[77] In *Reebok (M) Sdn Bhd v CIMB Bank Berhad* [2019] MLJU 725 (CA), the Court of Appeal held at para [45] that *"[a] party who wishes to revive his original claim in the event of the other party's inability to comply with his obligation under the terms of the settlement should incorporate such term in the settlement agreement to give effect".* This principle underscores the necessity of clarity and foresight in drafting any settlement, ensuring that any potential default is appropriately addressed.

[78] In the present case, I am satisfied that the default clause is explicitly and unambiguously outlined in paragraph 4 of the settlement letter dated 2 June 2023. This clause specifically grants the plaintiff the right to terminate the settlement terms—which the plaintiff did by their letter dated 7 August 2023—thereby restoring the parties to their original positions under the Offer Letters. This, therefore, negates any argument by the plaintiff that the Offer Letters were superseded by the settlement letter dated 2 June 2023.

DECISION

[79] After considering the facts and circumstances presented in the affidavit evidence, the defendants' application to strike out the plaintiff's Writ and Statement of Claim in Enclosure 10 is dismissed with costs of RM3,000.00. Whereas the plaintiff's claim for summary judgment against the defendants in Enclosure 16 is allowed with costs of RM5,000.00.

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