Glove Kendall Limited & Anor v Maple Challenge Sdn Bhd & Ors and other suits [2016] MLJU 1452

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

SU GEOK YIAM J

CIVIL SUIT NOS S-22–2256 OF 2008, S-22-1123 OF 2008 AND S-22-246 OF 2009

30 April 2016

Brendan Navin Siva (Calvin Khoo with him) (Brendan Siva) in Civil Suit No S-22–2256 of 2008 for the plaintiffs.
Krishna Dallumah (Krishna Dallumah, Manian & Indran) in Civil Suit No S-22–2256 of 2008 for the second and third defendants.
Brendan Navin Siva (Calvin Khoo with him) (Brendan Siva) in Civil Suit No S-22–1123 of 2008 for the plaintiff.
Krishna Dallumah (Krishna Dallumah, Manian & Indran) in Civil Suit No S-22–1123 of 2008 for the second, third, fifth and sixth defendants.
Soo Fen Fen (HY Lee & Co) in Civil Suit No S-22–1123 of 2008 for the second, third, fifth and sixth defendants.
Soo Fen Fen (HY Lee & Co) in Civil Suit No S-22–246 of 2009 for the second and second plaintiffs.
Krishna Dallumah (Krishna Dallumah, Manian & Indran) in Civil Suit No S-22–246 of 2009 for the second and second plaintiffs.
Brendan Navin Siva (Calvin Khoo with him) (Brendan Siva) in Civil Suit No S-22–246 of 2009 for the first, second and third defendants.
HW Yip (CL Loh with him) (Richard Wee and Yip) in Civil Suit No S-22–246 of 2009 for the 4th to 11th defendants.

Su Geok Yiam J:

GROUNDS OF JUDGMENTThe 3 (three) suits

[1]There are three related suits. They are as follows:

(1) High Court Kuala Lumpur Civil Suit No.: D6-22-2256-2008 (“Suit 2256”) was filed on 10 December 2008 *vide* a writ of summons dated the same date, enclosure (1) together with a statement of claim;

(2) High Court Kuala Lumpur Civil Suit No.: S-22-1123-2008 (“Suit 1123”) was filed on 10 December 2008 *vide* a writ of summons dated the same date, enclosure (1), together with the statement of claim; and

(3) High Court Kuala Lumpur Civil Suit No.: S-22-246-2009 (“Suit 246”) was filed on 13 April 2009 *vide* a writ of summons dated the same date, enclosure (1), and the statement of claim dated 14 May 2009 was filed on 22 May 2009, enclosure (2).

Parties in Suit 2256

[2]Glove Kendall Limited (“Glove Kendall”), the 1st plaintiff, is a private limited company incorporated in the Cayman Islands with a business address at P. O. Box 709 GT, 122 Mary Street, Zephyr House, Grand Cayman, Cayman Islands.

[3]Kendall Court Mezzanine (Asia) Investment Manager Limited (“Kendall Court”), the 2nd plaintiff, is a private limited company incorporated in the Cayman Islands with a business address at P. O. Box 709 GT, 122 Mary Street, Zephyr House, Grand Cayman, Cayman Islands.

[4]Maple Challenge Sdn. Bhd. (“Maple Challenge”), the 1st defendant, is a private limited company incorporated

under the Companies Act, 1965 having its registered address at Megan Corporate Park, B9-5-1A, Jalan 1/125E, Taman Desa Petaling, 57100 Kuala Lumpur and its business address at No. 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor, Malaysia.

[5]Lim Wan Soon, the 2nd defendant, and Leng Khuan Yow (F), the 3rd defendant, are individuals, with a last known correspondence address at No. 17, Jalan SG 8/12, Taman Sri Gombak, 68100 Batu Caves, Selangor, Malaysia. They are also husband and wife.

[6]Impulse Talent Sdn. Bhd. ("Impulse Talent"), the 4th defendant, is a private limited company incorporated under the Companies Act, 1965 having its registered address at Megan Corporate Park, B9-5-1A, Jalan 1/125E, Taman Desa Petaling, 57100 Kuala Lumpur and its business address at No. 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor, Malaysia.

[7]Maple Strategies Sdn. Bhd. ("Maple Strategies"), the 5th defendant is a private limited company incorporated under the Companies Act, 1965 having its registered address at Megan Corporate Park, B9-5-1A, Jalan 1/125E, Taman Desa Petaling, 57100 Kuala Lumpur and its business address at No. 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor, Malaysia.

[8]At all material times, the 2nd and 3rd defendants were directors and shareholders in Maple Challenge, the 1st defendant, Impulse Talent, the 4th defendant and Maple Strategies, the 5th defendant.

[9]The 1st, 4th and 5th defendants are companies in the group of companies known as the "Maple Challenge Group of Companies" which consist of the following companies:

(1) The 1st defendant;

(2) EPC Technology (M) Sdn Bhd (Company No.: 288122-T) ("EPCM");

(3) EPC Technology (Bangi) Sdn Bhd (Company No.: 612715-P) ("EPCB");

(4) E-Circle Technology Sdn Bhd (Company No.:6347-M) ("E-Circle");

(5) The 4th defendant;

(6) The 5th defendant; and

(7) KJD Glove (L) Limited (Company No.: LL 05655), a private company incorporated in Labuan under the Offshore Companies Act 1990, having its registered address at Level 1, Lot 7, Block F, Saguking Commercial Building, Jalan Patau-Patau, 87000 Labuan, Wilayah Persekutuan, Malaysia ("KJD Glove")

("the Group of Companies").

Decision of the Court in Suit 2256

[10]In paragraph 41(2)(a) to (d) of the plaintiffs' statement of claim, the 1st and 2nd plaintiffs pray for the following reliefs against the 2nd and 3rd defendants jointly and severally for:

"

(a) the Redemption Amount of Tranche I amounting to USD 4,777,777.78 (RM 17,128,333.34);

(b) Interest on the principal amount of USD 4,300,000.00 (RM 15,415,500.00) at the rate of 17% per annum as at 22nd November 2007 amounting to USD 124,510.99 (RM 446,371.90);

(c) Facility Fee at the rate of 3% per annum on the Tranche II amount not released (amounting to USD 4,300,000.00) from 21st September 2007 until 22nd November 2007 amounting to USD 22,216.67 (RM 79,646.76);

(d) late payment charge as at 22nd November 2008 amounting to USD 1,320,958.18 (RM 4,735,635.08) and continuing at the rate of 2% per month on the total outstanding amount of USD 4,924,505.44 (RM 17,654,352.00) calculated on a daily basis based on 360 day per year until full and final settlement thereof;"

(See pages 93 and 94 Bundle A).

[11]On 2 July 2015, after the conclusion of the full trial and after the Court had considered the written and oral submissions of the learned counsels for the parties in the three suits, the Court allowed the claims of Glove Kendall and Kendall Court, the 1st and 2nd plaintiffs, respectively, against Lim Wan Soon and Leng Khuan Yow (F), the 2nd and 3rd defendants, respectively, in paragraph 41(2)(a) to (d) of the plaintiffs' statement of claim less the sums of USD 567,397.57 (RM 1,807,281.80), USD 1,211.87 (RM 3,982.78) and RM 111,518.73, respectively, which the plaintiffs have recovered pursuant to a third party claim made in the Criminal Sessions Court *vide* Criminal Case No. 62-(49-52)-2009 by Maple Challenge and Impulse Talent, the 1st and 4th defendants, respectively, in this suit, with cost ("the decision of the Court").

Reasons for the decision of the Court in Suit 2256

[12]The reasons for the decision of the Court in Suit 2256 are as follows:

Background of Suit 2256

[13]The background of Suit 2256 is contained partly in the Statement of Agreed Facts that has been filed by the parties and marked as 'J' by the Court, partly in the parties' pleadings and partly in the witness statements of the witnesses. It is as follows:

(1) By a Subscription Agreement dated 15 March 2007 ("the Subscription Agreement") executed between the 2nd plaintiff and KJD Glove (L) Limited ("KJD Glove"), Wira International Limited (Company No.: 116579) ("Wira International"), and the 2nd and 3rd defendants, the 2nd plaintiff agreed to subscribe to Bonds of KJD Glove in the form of USD Convertible Bonds up to the amount of USD 8,600,000.00 ("the Investment Amount") which was to be drawn down in two (2) tranches of USD 4,300,000.00 each, subject to the terms and conditions of the Subscription Agreement.

(2) Wira International is a private company incorporated in the British Virgin Islands, having its registered address at Trident Chambers, P.O. Box 146, Road Town, Tortola, British Virgin Islands.

(3) In accordance with the terms and conditions of the Subscription Agreement, KJD Glove had opened/caused the opening of the US Dollar Account No. 7141 5000 1809 with Malayan Banking Berhad ("the USD Account").

(4) As security for the Investment Amount, the following security documents were executed in favour of Kendall Court, the 2nd plaintiff, in accordance with the terms and conditions of the Subscription Agreement:

  (a) A Deed of Charges dated 15 March 2007, over all of the 1st defendant's assets, was executed between the 1st defendant and the 2nd plaintiff;

  (b) A Deed of Charges dated 15 March 2007, over all of the 4th defendant's assets, was executed between the 4th defendant and the 2nd plaintiff;

  (c) A Deed of Charges dated 15 March 2007, over all of the 5th defendant's assets, was executed between the 5th defendant and the 2nd plaintiff;

  (d) A charge dated 15 March 2007, over all shares owned by the 2nd defendant in the 1st defendant, the 4th defendant, the 5th defendant, EPC Technology (Bangi) Sdn Bhd ("EPCB"), EPC Technology (M) Sdn Bhd ("EPCM") and all other shares owned by the 2nd defendant in any of the companies in the Group of Companies (except E-Circle Technology Sdn Bhd), was executed between the 2nd defendant and the 2nd plaintiff; and

  (e) A charge dated 15 March 2007, over all shares owned by the 3rd defendant in the 1st defendant, 4th defendant, the 5th defendant, EPCB, EPCM and all other shares owned by the 3rd defendant in any of the companies in the Group of Companies (except E-Circle Technology Sdn Bhd), was executed between the 3rd defendant and the 2nd plaintiff; and

  (f) A charge dated 15 March 2007, over all shares owned by the 4th defendant in the 1st defendant and all other shares owned by the 4th defendant in any of the companies in the Group of Companies (except E-Circle Technology Sdn Bhd), was executed between the 4th defendant and the 2nd plaintiff.

(5) The 2nd and 3rd defendants did not retain solicitors to act for them and to advise them before they executed the Subscription Agreement with the parties mentioned earlier.

(6) The 1st and 2nd plaintiffs retained a firm of solicitors, namely, Messrs. Zaid & Co. ("ZICO"), to act for them and to advise them before they executed the Subscription Agreement with the parties mentioned earlier

and the fees and disbursements were borne by the 2nd and 3rd defendants in accordance with the terms of the Subscription Agreement.

(7) According to the plaintiffs, the parties to the Subscription Agreement have expressly and unequivocally, agreed and undertaken to use and apply the Investment Amount for the following 2 (two) purposes only:

(a) That KJD Glove uses the Investment Amount to grant a loan to Maple Challenge, the 1st defendant, to enable Maple Challenge, the 1st defendant, to purchase plant machinery; and

(b) That KJD Glove uses the Investment Amount to grant a loan to Maple Challenge, the 1st defendant, to enable Maple Challenge, the 1st defendant, to extend loans to Maple Strategies, the 5th defendant, ONLY FOR THE SPECIFIC PURPOSE of supporting/assisting the business of EPCB and Maple Strategies, the 5th defendant, which is the production of "keypad" and "LCD window" components for mobile phones.

(8) According to the plaintiffs, the parties to the Subscription Agreement have, expressly and unequivocally, agreed that it is Maple Challenge, the 1st defendant, and not KJD Glove who is to determine the extending of the loans to Maple Strategies, the 5th defendant.

(9) According to the plaintiffs, the 2nd and 3rd defendants, who are parties to the Subscription Agreement, and who are the directors of the 1st defendant have, expressly and unequivocally, agreed to abide by the terms and conditions of any loan agreements which are valid and binding on the 1st defendant.

(10) However, according to the 2nd defendant, before he executed the Subscription Agreement, he was given to understand that he could use the loan monies to give intercompany loans to any/or all of the companies (including EPCB) that are within the Group of Companies, that belong to him and his wife, Leng Khuan Yow (F), the 3rd defendant, and also to repay personal loans that he himself and/or other individuals have given to any of the companies in the Group of Companies.

(11) According to the plaintiffs, under the terms and conditions of the Subscription Agreement, KJD Glove is required to open and maintain 1 (one) bank account with a bank/financial institution on terms which are deemed reasonable and acceptable to the 2nd plaintiff known as the "Cash Collateral Account" ("CCA") which is defined as the Account into which the Investment Amount is to be disbursed by the 2nd plaintiff.

(12) According to the plaintiffs, it is expressly agreed between the 2nd plaintiff and the 1st defendant that the CCA is to be managed, used and/or operated in the manner as provided in the Subscription Agreement, which, *inter alia*, provided as follows:

(a) That the CCA is to be managed, used and/or operated in accordance with the instructions/requirements of the 2nd plaintiff;

(b) That KJD Glove will appoint/cause the appointment of a representative from the the 2nd plaintiff to be a co-signatory of the CCA. The 2nd plaintiff had appointed as its representative, Yeo Kar Peng (F) ("YEO") as the co-signatory of the CCA; and

(c) All payments from the CCA exceeding the amount of USD 50,000.00 has to be expressly approved in writing by the 2nd plaintiff's representative and has to be signed by the 2nd plaintiff's representative as a co-signatory of the CCA;

(13) According to the plaintiffs, it is also expressly agreed between the 2nd plaintiff and the 1st defendant as follows:

(a) that interest at the rate of 17% per annum would be imposed on the Investment Amount from the date of the draw down of the Investment Amount or such part thereof until the date of full and final payment (inclusive of the date of payment). This interest shall be payable every 6 (six) months from the date of the draw down of the Investment Amount;

(b) that in the event KJD Glove, the 2nd defendant and the 3rd defendant and/or Wira International fail to pay back the Investment Amount or any part thereof which remains due and owing at the time the 2nd plaintiff redeems the Bonds, a late payment charge at the rate of 2% per month shall be imposed on the Investment Amount or part thereof which remains due and payable until full and final settlement thereof;

(c) all interest and/or charges as detailed in the foregoing paragraphs shall be calculated on a daily basis based on the calculation of 360 days a year;

(d) subject to the terms of the Subscription Agreement, in particular, the fulfillment of the conditions precedent of the Subscription Agreement (as detailed below), the 2nd plaintiff is entitled to apply and

subscribe for the Bonds under Tranche II up to the amount of USD 4,300,000.00 within a time period not exceeding 6 (six) months from the date of the completion of Tranche I; and

(e) that a Redemption Amount shall be chargeable on the Bonds pursuant to Schedule 4C of the Subscription Agreement;

(14) According to the plaintiffs, the Subscription Agreement has also provided for a number of conditions precedent to be fulfilled prior to the completion of the subscription of the Bonds by the 2nd plaintiff and the full details are within the knowledge of the defendants.

(15) According to the plaintiffs, the Subscription Agreement had also provided for a number of conditions subsequent to be fulfilled following the release of Tranche I by the 2nd plaintiff pursuant to the terms of the Subscription Agreement and the full details of the conditions subsequent are within the knowledge of the defendants.

(16) As security for the Investment Amount and to ensure that KJD Glove, Maple Challenge, the 1st defendant, and Maple Strategies, the 5th defendant, will meet all their, respective, obligations under the Subscription Agreement, a number of security documents i.e. 3 Deeds of Charge, each dated 15 March 2007, and 3 Charges, each dated 15 March 2007, were executed in favour of the 2nd plaintiff, in accordance with the Subscription Agreement, by the 1st defendant, the 4th defendant and the 5th defendant, as principal debtors and not as sureties.

(17) In each of the security documents, it was expressly provided that in the event of a breach of/default in any of the terms of the Subscription Agreement and/or the Deeds of Charge, the 2nd plaintiff shall be entitled to immediately enforce its rights under the Deeds of Charge and the Charges.

(18) Pursuant to the terms and conditions of a Deed of Accession dated 16 March 2007, that was executed between the 1st plaintiff and the 2nd plaintiff with KJD Glove, Wira International, the 2nd defendant and the 3rd defendant, the 1st plaintiff had stepped into the shoes of the 2nd plaintiff i.e. assumed all the rights and liabilities of the 2nd plaintiff under the Subscription Agreement.

(19) The 1st plaintiff, the 2nd plaintiff and KJD Glove then proceeded to execute the Trustee Securities Agreement dated 16 March 2007 (“the Trustee Agreement”).

(20) Pursuant to the Trustee Agreement, the 2nd plaintiff was appointed as the trustee of all “the Transaction Documents” (including the Subscription Agreement, the 3 Deeds of Charge and the 3 Charges) (“the Transaction Documents”).

(21) On 15 March 2007, KJD Glove executed the Loan Agreement (“the Loan Agreement”) with Maple Challenge, the 1st defendant.

(22) According to the plaintiffs, KJD Glove then proceeded to open/cause the opening of Account No. 71415001809 with Malayan Banking Berhad (“MBB”) which was, subsequently, used as the Account in accordance with the terms of the Subscription Agreement.

(23) On or about 20 March 2007, the 1st plaintiff and/or the 2nd plaintiff had, in accordance with the terms of the Subscription Agreement, deposited/caused to be deposited the Tranche I monies amounting to USD 4,189,033.00, the details which are as follows:

“

Details	**Amount USD ($)**
Tranche I Amount	4,300,000.00
Less: Withholding of further expenses	(50,000.00)
First month cash collateral	(60,917.00)
Bank charges	(50.00)
	……

Details	Amount USD ($)
Amount deposited in the Account	4,189,033.00”

(24) According to the plaintiffs, the Tranche I amount had been deposited, after deducting the transaction expenses and the collateral requirements of the 2nd plaintiff as set out above, the full details of which are within the knowledge of the defendants.

(25) According to the plaintiffs, the 1st plaintiff and/or the 2nd plaintiff, subsequently, discovered that KJD Glove and/or the defendants had committed the following breaches of/defaults in the terms of the Subscription Agreement:

(1) The following unauthorised withdrawals of monies from the Account without the knowledge/consent of the 1st plaintiff and/or the 2nd plaintiff and also in breach of the Subscription Agreement, as the monies were not used for the specific purpose as provided in clause 3.1 of the Subscription Agreement:

(a) A sum of RM 3,000,000.00 for payments to the following parties:

“

Date	Party Receiving Payment	Amount
2/4/2007	EPCM	1,250,000.00
2/4/2007	Freshing Industrial Co Ltd	287,500.00
14/4/2007	EPCM	1,250,000.00
3/8/2007	EPCB	215,000.00”

(b) The Account had been opened without the appointment of YEO, the 2nd plaintiff’s representative, as co-signatory;

(c) Monies had been withdrawn from the Account exceeding USD 50,000.00 without the knowledge/consent of the 2nd plaintiff;

(d) The defendants had refused, neglected and/or refused to provide information and/or documentation to the 1st plaintiff and/or the 2nd plaintiff concerning the unauthorized withdrawals of the monies;

(e) KJD Glove and/or the defendants had refused, neglected and/or failed to ensure a minimum balance in the Account at all relevant times;

(f) KJD Glove and/or the defendants had refused, neglected and/or failed to fulfil the conditions subsequent;

(26) The plaintiffs were, until the breach of the Subscription Agreement by the KDJ Glove and/or the defendants, at all times willing, able and ready to fulfill their obligations under the Subscriptions Agreement.

(27) Pursuant to the alleged breaches of the terms of the Subscription Agreement by KJD Glove and/or the defendants, the 2nd and 3rd defendants had, on 12 November 2007, executed a Guarantee and Indemnity in favour of the 2nd plaintiff (“the Guarantee”) to, *inter alia*, jointly and severally guarantee to the 2nd plaintiff that:

“

(i) KJD Glove and/or the defendants would remedy all breaches of the Subscription Agreement; and

(ii) the 1st defendant, the 2nd defendant and the 3rd defendant would, as covenantors and/or guarantors under the Subscription Agreement, ensure the punctual payment of all outstanding amounts and the performance of all obligations pursuant to the terms and conditions of the Subscription Agreement."

(28) However, KJD Glove and/or the defendants did not remedy the breaches of the Subscription Agreement.

(29) Hence, on 3 December 2007, KJD Glove lodged a police report i.e. DANG WANGI Report No.: 036688/07, against the 1st defendant for criminal breach of trust.

(30) Apart from 1 (one) payment made by KJD Glove for the total amount of USD 365,500.00, KJD Glove and/or the defendants have failed, neglected and/or refused to make re-payments of the Investment Amount and any or all interest accrued thereon in breach of the Subscription Agreement.

(31) As at 22 November 2007, the 2nd and 3rd defendants still owe the plaintiffs the amount of USD 4,924,505.44 pursuant to the Subscription Agreement and/or the Guarantee ("the Amount Owed") the full details of which are within the knowledge of the 2nd and 3rd defendants.

(32) The brief details of the Amount Owed are as follows:

"

Item	Amount (USD)
Redemption Amount of Tranche I	4,777,777.78
Add: Interest at the rate of 17% per annum as at 22nd November 2007	124,510.99
Add: Facility Fee at the rate of 3% per annum on the Tranche II amount not released rrom 21st September 2007 until 22nd November 2007	22,216.67
	……
Amount Outstanding as at 22/11/2007	4,924,505.44

**The Interest Amount only accrued after the total payments of USD 365,500.00 made by KJD Glove on 5/11/2007 and 28/1/2008."*

(33) Based on the facts and details as set out above, the plaintiffs had, *vide* their previous solicitors, Messrs. Syed Alwi Ng & Co., issued a letter of demand dated 22 November 2007, *inter alia*, to give the 2nd defendant and the 3rd defendant, notice that KJD Glove was in breach of the terms of the Subscription Agreement and to demand from the 2nd defendant and the 3rd defendant, as covenantors/guarantors under the Subscription Agreement and/or the Guarantee, the Amount Owed including all charges and/or fees on the Amount Owed as well as cost on a solicitor-client basis.

(34) Although the plaintiffs have, thereafter, given numerous notices and made numerous demands against the 2nd defendant and the 3rd defendant for the payment of the Amount Owed, personally or through their solicitors, the 2nd defendant and the 3rd defendant still obstinately refuse, fail and/or neglect to pay the Amount Owed or any part thereof.

(35) Hence, on or about 24 December 2007, the plaintiffs commenced Kuala Lumpur High Court Civil Suit No.: D3-22-1728-2007 ("Suit 1728") against, *inter alia*, the 1st, 2nd, and 3rd defendants, amongst others, for the recovery of the outstanding amount under the Subscription Agreement (see A14.2 at page 89 of PW2's witness statement – Exhibit P53).

(36) Pursuant to Suit 1728, KJD Glove and the plaintiffs obtained an *ex-parte* Injunction dated 3 January 2008, which, *inter alia*, allowed the plaintiffs to enter the premises of Maple Challenge, the 1st defendant, and

EPCB, located at No. 2, 4, 14 and 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor Darul Ehsan and to seize the accounts of Maple Challenge, the 1st defendant, as well as to carry out a detailed inquiry on the said accounts ("the *ex-parte* Injunction") (see pages 4 to 8 of Bundle B for the said *ex-parte* Injunction dated 3 January 2008).

(37) Pursuant to the *ex-parte* Injunction, the 2nd plaintiff engaged the consultants known as Hicks-Woode Consultants Sdn Bhd ("Hicks-Woode") to conduct an Inquiry of Operational Conduct on the EPC Group of Companies ("the Inquiry of Operational Conduct").

(38) The Inquiry of Operational Conduct was, *inter alia*, to look into the accounts of the EPC Group of Companies and to identify all the breaches of and/or defaults in the terms of the Agreements committed by the 1st defendant and/or the 2nd and 3rd defendants.

(39) According to the plaintiffs, on 28 February 2008, the plaintiffs withdrew Suit 1728 with hopes of settling the matter amicably with the defendants.

(40) A formal report was then produced by Hicks-Woode ("the Hicks-Woode Report") and the same was forwarded to the 2nd defendant on 9 April 2008 (see pages 1 to 54 Bundle G for the Hicks-Woode Report – Exhibit P32 and page 3 of Bundle G for the covering letter dated 9 April 2008 – Exhibit P55).

(41) The breaches of and/or defaults in the terms and conditions of the Agreements, which were allegedly committed by KJD Glove, the 2nd and 3rd defendants and/or the 1st defendant (as covenantors), as identified by the Hicks-Woode Report were, *inter alia*, as set out in paragraph 40 of the 1st to 3rd defendants' written submissions – Suit 246.

(42) On 19 August 2008, the 2nd and 3rd defendants were charged for criminal breach of trust.

(43) As a result of these alleged breaches, the plaintiffs had proceeded on/about 28 November 2008 to enforce the Charges and the Deeds of Charge provided by the 1st to the 4th defendants, as securities to guarantee the Investment Amount under the Subscription Agreement (see A15.1 at page 103 of PW2's witness statement – Exhibit P53).

(44) As a result of the enforcement of the Charges and Deeds of Charge, the following had occurred:

(a) The entire shareholdings of the 4th defendant had been transferred from the 2nd and 3rd defendants to AS Nominees Sdn Bhd ("AS Nominees") (see pages 92 to 101 of Bundle I – Exhibits P41 to P50 for the Share Transfer Forms and Directors' Circular Resolution of the 4th defendant);

(b) The entire shareholdings of the 1st defendant, was at all material times, held by the 4th defendant (see page 706 of Bundle F);

(c) Chris Chia Woon Liat (PW1), YEO (PW2) and Dennis Alexander Wuishan (PW4) were appointed (by the plaintiffs) as nominee directors of the 1st defendant (see pages 60 to 62 Bundle G – Exhibit P35 for the Form 49 of the 1st defendant);

(d) Chris Chia Woon Liat (PW1) and Dennis Alexander Wuishan (PW4) were appointed (by the plaintiffs) as nominee directors of the 4th defendant (see page 114 of Bundle I – Exhibit P51 for the 4th defendant's Shareholders' Circular Resolution dated 28 November 2008);

(e) Lee Wai Ngan and Chan Toye Ying were appointed (by the plaintiffs) as the nominee company secretary(ies) of both the 1st and 4th defendants replacing the previous company secretary, who is an individual known as "Low Paik Yoke" (see page 57 of Bundle G – Exhibit P33 and page 58 of Bundle G – Exhibit P34 for the 1st defendant's Directors' Circular Resolution dated 28 November 2008 and pages 109 to 112 of Bundle I for the 4th defendant's Directors' Circular Resolution dated 28 November 2008);

(f) The 2nd and 3rd defendants' letters of resignation dated 28 November 2008, from the 1st and 4th defendants were duly accepted (see page 115 – Exhibit P39 for the 2nd and 3rd defendants' letters of resignation from the 4th defendant and page 119 – Exhibit P40 for the 2nd and 3rd defendants' letters of resignation from the 1st defendant).

(45) The plaintiffs had, on 6 August 2008, filed Civil Suit No: D1-22-1458-2008 ("Suit 1458") against KJD Glove, at the High Court of Malaya in Kuala Lumpur, based on the breach of the terms of the Subscription Agreement by KJD Glove. On 11 November 2008, the plaintiffs obtained Judgment-in-Default against KJD Glove in Suit 1458.

(46) The plaintiffs had only proceeded to enforce the securities under the Subscription Agreement, namely, the Charges and Deeds of Charge, upon obtaining the Judgment-in-Default against KJD Glove in Suit 1458 on 11 November 2008 (see A15.3 (i) at page 105 of PW2's witness statement – Exhibit P53).

(47) Prior to the plaintiffs enforcing the securities under the Subscription Agreement, the plaintiffs had obtained a legal opinion from a firm of solicitors, namely, ZICO, on the legality of such action.

(48) This legal opinion, however, remains a privileged document by virtue of the solicitor-client privilege which exists between ZICO and the plaintiffs.

(49) Since, no settlement was reached between the parties in Suit 1728, the plaintiffs have filed this action ("Suit 2256") to claim for the reliefs in paragraph 41 of the plaintiffs' statement of claim.

(50) As of the date of the full trial of Suit 2256, KJD Glove and/or the defendants still remain in breach of the terms of the Subscription Agreement.

1st and 2nd plaintiffs' pleaded case in Suit 2256

[14]In their statement of claim, that was filed together with their writ of summons dated 10 December 2008, enclosure (1), the 1st and 2nd plaintiffs plead, *inter alia*, as follows:

[15]In paragraph 9, that Kendall Court, the 2nd plaintiff, executed the Subscription Agreement with four parties, namely, KJD Glove, Wira International, and Lim Wan Soon and Leng Khuan Yow (F), the 2nd and 3rd defendants, respectively, whereby the 2nd plaintiff agreed to invest in KJD Glove by applying for and subscribing to the bonds of KJD Glove up to the Investment Amount i.e. USD 8,600,000.00, subject to the terms and conditions as set out in the Subscription Agreement (see pages 429-527 Bundle E).

[16]In paragraph 11, that the Subscription Agreement had also provided for a number of conditions precedent to be fulfilled prior to the completion of the subscription of the Bonds by the 2nd plaintiff, the full details of which are within the knowledge of the defendants and the brief details of which are, *inter alia*, as follows:

(i) that the 2nd plaintiff shall receive the following security documents as security for the Investment Amount:

  (a) a Deed of Charges over all of KJD Glove's assets;

  (b) a Deed of Charges over all of the 1st defendant's assets;

  (c) a Deed of Charges over all of the 4th defendant's assets;

  (d) a Deed of Charges over all of the 5th defendant's assets;

  (e) a charge over all shares owned/to be owned by the 2nd defendant and the 3rd defendant in the 1st defendant, the 4th defendant, the 5th defendant, EPCM and EPCB;

  (f) a charge over all shares owned/to be owned by the 4th defendant in the 1st defendant, the 5th defendant and EPCB;

(ii) That all approvals and consents from the relevant authorities for the relevant transactions as provided in the Subscription Agreement and all relevant and related documents and for the intended business of the companies in the Group of Companies, including but not limited to Bank Negara Malaysia ("BNM") and LOFSA, have been obtained by the relevant parties; and

(iii) The directors of Impulse Talent, the 4th defendant, approved the required directors' resolution for the appointment of the 2nd plaintiff's representative, namely, YEO, as a director in the 4th defendant.

[17]In paragraph 12, that the Subscription Agreement had also provided for a number of conditions subsequent to be fulfilled following the release of Tranche I by the 2nd plaintiff pursuant to the terms of the Subscription Agreement, the full details of which, are within the knowledge of the defendants, and the brief details of which, are, *inter alia*, as follows:

"

(i) That a 2nd ranking legal charge in favour of the 2nd Plaintiff be perfected over the following properties within a period not exceeding 3 (three) months after the release of Tranche I:

  (a) HSD 27778, PT 34020, Mukim of Batu, District of Gombak, State of Selangor registered in the name of the 3rd defendant; and

  (b) HSD 14734, PT 12008, Mukim of Batu, District of Gombak, State of Selangor registered in the names of the 2nd Defendant and the 3rd Defendant

(hereinafter the above properties as detailed above shall collectively be referred to as "the Properties");

(ii) that the 5th Defendant becomes a subsidiary company of the 4th Defendant within a period not exceeding 6 (six) months after the release of Tranche I; and

(iii) that the approval of the Foreign Committee [hereinafter referred to as "FIC"] is obtained for the 2nd Plaintiff's charge over the Properties and the 2nd Plaintiff's charge over the shares of the companies in the Group of Companies within a period not exceeding three (3) months after the release of Tranche I."

[18]In paragraph 13, that in consideration of the 2nd plaintiff executing the Subscription Agreement, the 2nd defendant and the 3rd defendant had (as contained in the Subscription Agreement), irrevocably and unconditionally, guaranteed and covenanted as principal debtors and not merely as sureties, jointly and severally, with the 2nd plaintiff as follows:

"

(i) that the 2nd Defendant and the 3rd Defendant shall ensure that all the companies in the Group of Companies shall fulfill their respective obligations properly and within the time frame(s) as provided; and

(ii) that the 2nd Defendant and the 3rd Defendany shall indemnify and keep indemnified all losses and liabilities incurred as a result from or relating to the breach of any obligations, undertakings, representations, warranties, indemnities and/or confirmations provided by any of the companies in the Group of Companies including all costs and expenses which may be incurred by the 2nd Plaintiff as a result thereof."

[19]In paragraph 17, that Glove Kendall, the 1st plaintiff, and Kendall Court, the 2nd plaintiff, then executed a Deed of Accession dated 16 March 2007 ("the Deed of Accession") with KJD Glove, Wira International, and Lim Wan Soon and Leng Khuan Yow (F), the 2nd and 3rd defendants, respectively, (see Exhibit ID-7 at pages 152-155 Bundle G) whereby Glove Kendall, the 1st plaintiff had, *inter alia*:

"

(i) acceded to and ratified the Subscription Agreement;

(ii) covenanted and agreed to be bound by the terms of the Subscription Agreement as if the 1st plaintiff was a party/signatory to the Subscription Agreement;

(iii) replace, execute and/or the complete all liabilities and obligations of the 2nd plaintiff under the Subscription Agreement as if the 1st plaintiff was a party/signatory to the Subscription Agreement."

1st and 2nd plaintiffs' claims in Suit 2256

[20]Hence, in Suit 2256, the 1st and 2nd plaintiffs claim for the following reliefs from the Court against the 1st to the 5th defendants, in paragraph 41 of their statement of claim, dated 10 December 2008, in the Bundle of Pleadings, that has been marked as Bundle 'A' by the Court:

" 41. WHEREFORE:-

(1) The plaintiffs claim against the 1st Defendant:-

(a) the Specific Performance of the Deeds of Charge dated 15/3/2007 executed between the 1st Defendant and the 2nd plaintiff on all the assets of the 1st Defendant including but not limited to the execution and/or provision of all relevant and required documents by the 1st Defendant;

(b) that in the event the 1st Defendant refuses, fails and/or neglects to execute and/or provide all relevant and required documents for the specific performance of the Deeds of Charge dated 15/3/2007 within fourteen (14) days from the date such documents are forwarded to the 1st Defendant, the Deputy Registrar of the High Court of Malaysia be empowered and authorized to execute such documents for and on behalf of and in the name of the 1st Defendant;

(2) The plaintiffs claim from the 2nd Defendant and 3rd Defendant jointly and severally for:

(a) the Redemption Amount of Tranche I amounting to USD 4,777,777.78 (RM 17,128,333.34);

(b) Interest on the principal amount of USD 4,300,000.00 (RM 15,415,500.00) at the rate of 17% per annum as at 22nd November 2007 amounting to USD 124,510.99 (RM 446,371.90);

(c) Facility Fee at the rate of 3% per annum on the Tranche II amount not released (amounting to USD 4,300,000.00) from 21st September 2007 until 22nd November 2007 amounting to USD 22,216.67 (RM 79,646.76);

(d) late payment charge as at 22nd November 2008 amounting to USD 1,320,958.18 (RM 4,735,635.08) and continuing at the rate of 2% per month on the total outstanding amount of USD 4,924,505.44 (RM 17,654,352.00) calculated on a daily basis based on 360 days per year until full and final settlement thereof;

(e) Specific performance of the Charge dated 15/3/2007 executed between the 2nd Defendant and the 2nd plaintiff on all the shares held by the 2nd Defendant in the 1st Defendant, the 4th Defendant, the 5th Defendant, EPC Technology (Bangi) Sdn Bhd ("EPCB") and EPC Technology (M) Sdn Bhd. ("EPCM") including but not limited to the execution and/or provision of all relevant and required documents by the 2nd Defendant;

(f) that in the event the 2nd Defendant refuses, fails and/or neglects to execute and/or provide all relevant and required documents for the specific performance of the Charge dated 15/3/2007 within fourteen (14) days from the day such documents are forwarded to the 2nd Defendant, the Deputy Registrar of the High Court of Malaysia be empowered and authorized to execute such documents for and on behalf of and in the name of the 2nd Defendant:

(g) Specific performance of the Charge dated 15/3/2007 executed between the 3rd Defendant and the 2nd plaintiff on all the shares held by the 3rd Defendant in the 1st Defendant, 4th Defendant, the 5th Defendant, EPCB and EPCM including but not limited to the execution and/or provision of all relevant and required documents by the 3rd Defendant;

(h) that in the event the 3rd Defendant refuses, fails and/or neglects to execute and/or provide all the relevant and required documents for the specific performance of the Charge dated 15/3/2007 within fourteen (14) days from the date such documents are forwarded to the 3rd Defendant, the Deputy Registrar of the High Court of Malaysia be empowered and authorized to execute such documents for and on behalf of and in the name of the 3rd Defendant;

(3) The plaintiffs claim against the 4th Defendant:-

(a) the Specific Performance of the Deeds of Charge dated 15/3/2007 executed between the 4th Defendant and the 2nd plaintiff on all assets of the 4th Defendant including but not limited to the to execution and/or provision of all relevant and required documents by the 4th Defendant;

(b) that in the event the 4th Defendant refuses, fails and/or neglects to execute and/or provide all relevant and required documents for the specific performance of the Deeds of Charge dated 15/3/2007 within fourteen (14) days from the date such documents are forwarded to the 4th Defendant, the Deputy Registrar of the High Court of Malaysia be empowered and authorized to execute such documents for and on behalf of and in the name of the 4th Defendant;

(4) The plaintiffs claim against the 5th Defendant:-

(a) the Specific Performance of the Deeds of Charge dated 15/3/2007 executed between the 5th Defendant and the 2nd plaintiff on all assets of the 5th Defendant including but not limited to the to execution and/or provision of all relevant and required documents by the 5th Defendant;

(b) that in the event the 5th Defendant refuses, fails and/or neglects to execute and/or provide all relevant and required documents for the specific performance of the Deeds of Charge dated 15/3/2007 within fourteen (14) days from the date such documents are forwarded to the 5th Defendant, the Deputy Registrar of the High Court of Malaysia be empowered and authorized to execute such documents for and on behalf of and in the name of the 5th Defendant;

(5) Cost of this action including but not limited to cost on solicitor-client basis; and

(6) Any other or further relief this Honourable Court deems fair and reasonable based on the facts of this action."

Events after the filing of the plaintiffs' writ of summons and statement of claim in Suit 2256

[21]On 2 March 2009, the 2nd and 3rd defendants entered their appearance by filing their memorandum of appearance, enclosure (4), through their solicitors, Messrs. Krishna Dallumah, Manian & Indran.

[22]On 16 March 2009, Maple Challenge, the 1st defendant, and Impulse Talent, the 4th defendant, entered their appearance by filing its memorandum of appearance, enclosure (5), through their solicitors, Messrs. Wong, Gowry & Yip.

[23]On 24 March 2009, Maple Strategies, the 5th defendant, filed its memorandum of appearance, enclosure (5), through its solicitors, Messrs. H. Y. Lee & Co.

[24]On 30 March 2009, the 2nd and 3rd defendants filed their statement of defence, enclosure (7), through their solicitors, Messrs. Krishna Dallumah, Manian & Indran.

[25]On 2 April 2009, Maple Strategies, the 5th defendant filed its statement of defence, enclosure (8), through its solicitors, Messrs. H. Y. Lee & Co.

2nd and 3rd defendants' pleaded case in Suit 2256

[26]In their statement of defence that was filed on 30 March 2009, enclosure (7), the 2nd and 3rd defendants deny the plaintiffs' claim. The 2nd and 3rd defendants plead, *inter alia*, as follows:

(1) Clause 3.1 of the Subscription Agreement expressly allows the proceeds of the loan to be used by Maple Challenge, the 1st defendant, to purchase plant machinery and to extend inter-company loans for the purposes of the business of the Group;

(2) Clause 3.1 provides as follows:

> "
>
> 3. USE OF PROCEEDS AND SUBSCRIPTION OF BONDS
>
> 3.1 Use Of Proceeds: The Company hereby agrees with and undertakes to the Investor that it will, and the Covenantors and the Existing Shareholder hereby agree with and undertake to the Investor that they will procure that the **Company will, use the subscription monies received from the Inventor pursuant to the subscription of the Bonds to extend a loan to Maple Challenge Sdn. Bhd., to enable Maple Challenge Sdn. Bhd. to purchase plant machinery and extend inter-company loans for the purposes of the business of the Group."**
>
> (Emphasis added).

(3) Clause 21 of the Subscription Agreement that deals with dispute resolution expressly provides for the settlement of any dispute in the first instance by mutual discussion between the parties failing which for the submission of the dispute between the parties to arbitration;

(4) The Subscription Agreement, the Loan Agreement and the security documents i.e. the Deeds of Charge and the Charges are one singular transaction for the loan of a sum of USD 8.6 million to Maple Challenge, the 1st defendant;

(5) The plaintiffs are bound by the terms and conditions of the two Agreements;

(6) The loan is clearly illegal, null and void because there has been a breach of the terms and conditions of the approval that was given by BNM in its letter of approval dated 23 February 2007;

(7) This is because the interest rate that is charged in the Subscription Agreement is 17% instead of 8% and the lender is not the person, who is stated in the letter of approval of BNM;

(8) Apart from the above, the plaintiffs and/or KJD Glove had knowledge that the conditions precedent were not fulfilled but Tranche I of the loan monies was, nonetheless, released to Maple Challenge, the 1st defendant;

(9) Hence, the plaintiffs and/or KJD Glove is estopped from raising the non-fulfillment of the conditions precedent in this action;

(10) Pursuant to the terms and conditions of the Subscription Agreement, the 1st defendant had opened the USD Account and the RM Account;

(11) The plaintiffs' representative, namely, Teo Hun Theng, who was appointed as the financial manager in EPCB, had certified that the utilization of the loan monies for the various payments and/or repayments by Maple Challenge, the 1st defendant, was proper;

(12) YEO and Chris Chia had falsely accused the 1st, 2nd, 3rd, 4th and 5th defendants of misusing the loan monies in the month of November 2007 when they already knew of the withdrawal of the monies in March 2007;

(13) Hence, the plaintiffs are estopped from raising this issue in this action;

(14) The 2nd and 3rd defendants were threatened into signing the Guarantee in the month of November 2007 otherwise Tranche II of the loan would not be released;

(15) The allegations of the plaintiffs that the 2nd and 3rd defendants had misused the loan proceeds were made *mala fide* in order to forcefully take over the the defendants' assets as evidenced by the plaintiffs' simultaneous claim for the return of the loan monies and the enforcement of the plaintiffs' rights under the Charges;

(16) The plaintiffs have wrongfully entered the premises of EPCM and E-Circle;

(17) The plaintiffs had oppressed the defendants by lodging the police reports in order to force the defendants to return the loan monies together with interest in breach of the agreed terms and conditions of the Subscription Agreement;

(18) The plaintiffs also falsely accused the 2nd and 3rd defendants of breach of trust and money laundering and this has resulted in the freezing of the defendants' bank accounts and also criminal charges were preferred against the 2nd and 3rd defendants in the Criminal Sessions Court;

(19) The plaintiffs then commenced Suit 1728 and obtained an injunction order dated 3 January 2008 that resulted in the freezing of the bank accounts of the defendants;

(20) However, subsequently, the plaintiffs withdrew Suit 1728 with cost to the defendants but the defendants have suffered loss and damage due to the freezing of the defendants' bank accounts;

(21) The plaintiffs knew about the withdrawals of the loan monies and the manner of their utilization but did not raise any objection until November 2007;

(22) The plaintiffs knew at all material times that the companies in the 2nd and 3rd defendants' Group of Companies had taken loans which had to be repaid;

(23) The repayment of these loans by the 1st defendant to the creditors, including the companies in the Group of Companies, was validly and lawfully done and the plaintiffs had full knowledge of the details of these repayments;

(24) The acts of the plaintiffs in refusing to release Tranche II of the loan and in the lodging of the police reports that caused the freezing of the bank accounts of the defendants and the 2nd and 3rd defendants to be charged for criminal breach of trust and money laundering were done *mala fide* and these acts have resulted in severe injury to the 2nd and 3rd defendants' good name and image;

(25) The plaintiffs have also failed to take the necessary steps to mitigate their loss, which is denied; and

(26) Hence, the 2nd and 3rd defendants pray that the plaintiffs' claim be dismissed with cost.

[27]The Court noted that the 2nd and 3rd defendants did not plead the defence of *non est fact um* in their statement of defence.

1st and 2nd plaintiffs' reply in Suit 2256

[28]In their reply to the 2nd and 3rd defendants' statement of defence dated 30 March 2009, that was filed through their previous solicitors, Messrs. Syed Alwi Ng & Co., the plaintiffs join issue with the 2nd and 3rd defendants' defence. The plaintiffs also repeat and adopt parts of their statement of claim.

[29]The plaintiffs also plead, *inter alia*, as follows:

"

(1) That the Subscription Agreement, which is secured by the Deeds of Charge and Charges, remains an independent agreement;

(2) That the purpose and intent of the Subscription Agreement is as provided in the terms and conditions of the Subscription Agreement;

(3) That the Loan Agreement has a differing and separate purpose from the Subscription Agreement;

(4) That the Loan Agreement represents a separate and independent agreement and/or contract from the Subscription Agreement as the 2 (two) agreements:-

(a) Have different purposes;

(b) Have different terms and conditions;

(c) Are secured by separate and independent securities/guarantees;

(d) Are executed by different parties; and

(e) Are the subject of different suits, namely, Kuala Lumpur High Court Civil Suit No.: Civil Suit No.: S3-22-1123-2008 and this action respectively;"

(5) In addition:

"

(i) that the Subscription Agreement and all relevant documents relating directly to the Subscription Agreement, in particular, but not limited to the Deeds of Charge and Charges, were prepared on the understanding that the defendants had expressly chosen not to be represented by any solicitor(s) despite having the option to do so at all material times;

(ii) the defendants appear to have understood and appreciated the contents of the Subscription Agreement and all relevant documents relating directly to the Subscription Agreement at all material times and had never raised any queries and/or disputes against the same;

(iii) that at all material times, the defendants had negotiated and dealt with the plaintiffs at an arm's length and on the basis/understanding that the defendants had chosen not to be represented in all negotiations and dealings pertaining to the Subscription Agreement (and all relevant documents directly relating thereto);

(iv) that the defendants are now estopped from raising the fact that the defendants were unrepresented during the preparation of the Subscription Agreement (and all relevant documents directly relating thereto);

(v) that a clear and obvious case exists and remains enforceable against the defendants for breach of their obligations under the Subscription Agreement and the Guarantee and Indemnity dated 12/11/2007 (hereinafter referred to as "the Guarantee") which the defendants had executed to guarantee, *inter alia*, the remedying of KJD Glove and/or the defendants' breach of their respective obligations under the Subscription Agreement (and all relevant documents directly relating thereto);

(vi) that KJD Glove had breached the terms and conditions of the Subscription Agreement (the details of which are contained in paragraph 25 of the statement of claim); and

(vii) the plaintiffs had on 11/11/2008 obtained Judment-in-Default against KJD Glove for breach of the terms and conditions of the Subscription Agreement *vide* civil suit no: D1-22-1458-2008."

The full trial for Suit 2256

[30]The full trial for Suit 2256 commenced on 15 April 2013. It was continued on 16 April 2013, 17 April 2013, 30 April 2013, 2 August 2013, 14 August 2013, 7 September 2013, 20 January 2014, 21 January 2014, 25 March 2014, 26 March 2014, 27 March 2014, 8 May 2014, 17 July 2014, 4 August 2014 and 13 September 2014.

[31]The trial concluded on 13 September 2014.

[32]The trial did not proceed against Maple Challenge, the 1st defendant, Impulse Talent, the 4th defendant and Maple Strategies, the 5th defendant.

[33]This is because Judgment-in-default of defence was entered against Maple Challenge, the 1st defendant, on 2 February 2012.

[34]Judgment-in-default was entered against Impulse Talent, the 4th defendant, and Maple Strategies, the 5th defendant, on 9 August 2012.

[35]Hence, the plaintiffs only proceeded against Lim Wan Soon and Leng Khuan Yow (F), the 2nd and 3rd defendants, respectively, for the prayers in paragraph 41(2) (a) to (d) of the plaintiffs' statement of claim.

The 7 (seven) witnesses in Suit 2256

[36]The parties in Suit 2256 called 7 (seven) witnesses altogether in the full trial.

Plaintiffs' proven case

[37]Glove Kendall and Kendall Court, the 1st and 2nd plaintiffs, respectively, called 6 (six) witnesses. They are as follows:

(1) Mr. Chris Chia Woon Liat ("Chris Chia"), as PW1;

(2) YEO, as PW2;

(3) Mr. Onn Kien Hoe ("Mr. Onn"), as PW3;

(4) Mr. Dennis Alexander Wuisan ("Dennis Wuisan"), as PW4;

(5) Mr. Loo Tatt King ("Loo Tatt King"), as PW5; and

(6) Mdm. Chin Mee Shang ("Mdm. Chin"), as PW6.

[38]Chris Chia (PW1) is a fund manager. He is a director of the 2nd plaintiff. He was aged 40 years old at the time he testified in the full trial on 15 April 2013.

[39]PW1 was educated in Australia where he obtained a Bachelor of Commerce degree and a Master in Accounting. Thereafter, he worked as a business consultant at Arthur Andersen for over a year before he furthered his studies in the USA where he earned a Master in Business Administration and a Master in Liberal Arts in 1998. After that he worked at Goldman Sachs and Salomon Smith Barney as an investment banker. Since 1998, he has been based in Singapore. In 2004, he began his employment with the Kendall Court Group of Companies.

[40]In his examination-in-chief, that was given in the form of a witness statement (P1), he stated that the 2nd plaintiff is in the business of advising a fund called "Kendall Court Mezzanine (Asia) Fund I L. P." ("the Fund") and that YEO, Dennis Wuisan and he, himself, are the founding and general partners of the Fund.

[41]PW1's evidence on the object and *modus operandi* of the Fund is important and is reproduced below:

> "A1.7 … Basically, the Fund seeks to invest into small to medium sized businesses across the Southest Asia region to earn returns for its individual/institutional investors known as Limited Partners (LPs). In doing so, the Fund provides capital to growing companies to expand their businesses.
>
> The Fund is basically where monies invested by these LPs are pooled together. The 2nd plaintiff would then advise the

Fund on possible investment opportunities in the South East Asian region. My duties as a director in the 2nd plaintiff would be to advise and recommend to the Fund on potential investment opportunities in the South Eash Asian region and thereafter monitor all investments made by the Fund.

The investments are not directly made through the 2nd plaintiff, which is to maintain an independent advisory role in all investment transactions, but rather through a 'Special Purpose Vehicle' (hereinafter referred to as "SPV") which would established or set up by the 2nd plaintiff for the purpose of the investment. Each investment opportunity advised by the 2nd plaintiff would normally be invested through an independent and separate SPV for each of portfolio and risk management.

Among one of the ways which the Fund proceeds to invest the monies would be by investing into businesses with potential is identified, the Fund would invest into that business' model to assist the business to expand and/or to increase its productivity and consequently, the earnings of the business, an amount of which would be channeled back to the investors as their returns for their investments in the form of interest, dividend and/or capital gain.

This creates a 'win-win' situation for both the investors and the business(es) as the LPs will obtain a healthy return on their investments from the Fund while the businesses will be able to expand their operations with the investments made by the Fund as advised by the 2nd plaintiff."

[42]PW1 gave evidence that he was introduced to the 2nd and 3rd defendants by YEO (PW2). He also gave the following evidence on all the Agreements which are relevant to this suit i.e. the Subscription Agreement, the Loan Agreement, the Guarantee and the Charges:

(1) The Subscription Agreement and the Loan Agreement are separate and independent from one another;

(2) He explained the differences between the two Agreements as follows:

(a) The two Agreements are for different purposes;

(b) The two Agreements are secured by separate and independent securities/guarantees; and

(c) The two Agreements were entered into by different parties.

[43]PW1 also gave evidence on the 2nd and 3rd defendants' roles and participation in relation to the two Agreements. He also explained the sequence of events which have caused the plaintiffs to enforce the Charges on 28 November 2008.

[44]YEO (PW2) has a Bachelor's degree in Economics majoring in Accounting and Finance from Monash University, Australia. She was aged 51 years at the time she testified in the full trial. She is a director of the 1st defendant since 28 November 2008. She was appointed as a director of the 4th defendant since May 2007. She is also a director of the 2nd plaintiff.

[45]PW2 is an asset manager. Prior to the date she testified in Court on 16 April 2013, she has been working in the field of asset management for approximately 9 (nine) years. Prior to focusing on asset management, she was involved in investment banking with the group known as Solomon Smith Barney since 1991. Solomon Smith Barney was later known as the Citigroup.

[46]PW2 gave evidence on the 2nd and 3rd defendants' acts and conduct in breaching the Subscription Agreement and/or the Loan Agreement i.e. by not complying with the terms and conditions in the Subscription Agreement, especially in the opening of the Account.

[47]She gave, *inter alia*, the following evidence in her examination-in-chief:

(1) That she is familiar with the 2nd and 3rd defendants as she has personally met with and dealt with them before, in particular, the 2nd defendant;

(2) Sometime in September/October 2006, she met the 2nd defendant through an individual who had introduced himself to her as 'Chan Chin Chye ("Chan");

(3) Chan had informed her that he was a lawyer, who was at that time practicing in the legal firm known as 'C. C.Chan & Co.' of Lot 25-3-5, 3rd Floor, Plaza Prima, Batu ½, Jalan Klang Lama, 58200 Kuala Lumpur;

(4) Chan had contacted her with a view to introducing her to the 2nd defendant;

(5) Chan informed her that the 2nd defendant was his client;

(6) Chan also informed her that the 2nd defendant was in the business of plastic product manufacturing and was looking for funding to expand his business;

(7) Chan asked if she was interested to learn more about his client's business and she answered in the affirmative;

(8) Chan then arranged for her to meet with the 2nd defendant, sometime in September/October 2006, at the 2nd defendant's office at No.: 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor ("the said address");

(9) She was able to recall this meeting ("the first meeting") with the 2nd defendant at his office at the said address because it was before she had left for a trip to London;

(10) At the first meeting with the 2nd defendant with Chan in attendance, the 2nd defendant had given a presentation to her in which he highlighted to her the following matters:

(a) That the 2nd defendant ran a plastic injection moulding business that manufactured plastic products for hand set and camera companies and has plans to expand into the manufacturing of Liquid Crystal Display ("LED") lens windows and keypads for mobile phones;

(b) That the 2nd defendant was previously working in a Japanese camera company named Minolta, if her memory serves her correctly, before coming out to start his own business;

(c) That the 2nd defendant had developed his business from one which began with just 2 (two) machines to its status in 2006 which consisted of over 100 machines and he was employing over 100 employees;

(d) That the 2nd defendant had his own premises to run his business and he had secured contracts to build high precision parts for mobile phones and plastic products for multinational companies such as Sony Ericsson, Flextronics and Minolta;

(e) The 2nd defendant had also claimed as follows:

(i) that his business(es) were ISO certified;

(ii) that he was intending to expand his business further to meet his vision/goal to be the leading Original Equipment Manufacturer ("OEM") in South East Asia; and

(iii) that he was initially planning and/or considering an initial public offering ("IPO") of his business to raise funds to grow their LCD lens and window and keypad business as well as to enable him to buy more machinery to be used for the purposes of his business;

(11) After giving his presentation, the 2nd defendant took PW2 on a visit to his 2 (two) factories and showed her the operations of his 2 (two) companies, namely, EPCM and EPCB;

(12) The 2nd defendant also showed her the products (the LCD screens) which he wanted the 2nd plaintiff to invest into;

(13) The 2nd defendant also introduced PW2 to the 3rd defendant and the 2nd defendant informed PW2 that he and the 3rd defendant were married to each other;

(14) At the end of the first meeting/presentation, the 2nd defendant then asked her how the parties were to move forward concerning the investment by the 2nd plaintiff into his business;

(15) PW2 then informed him as follows:

(a) That the 2nd defendant would have to prepare a 'business plan' for the 2nd plaintiff to study;

(b) That the 2nd plaintiff would have to conduct a due diligence on his businesses and/or companies, the cost/fees of which would have to be borne by the party the 2nd plaintiff was investing into; and

(c) That the 'business plan' to be prepared by him had to outline the parameters of the investment required by the 2nd defendant's business(es) ("the Business Plan") as well as a request for the 2nd plaintiff to invest into the 2nd defendant's business(es);

(16) The 2nd defendant informed PW2 as follows:

(a) The 2nd defendant would be assisted and advised by a personal friend named Foong Pek San ("Foong") in the preparation of the Business Plan;

(b) That Foong was assisting the 2nd defendant as a 'friend' and he was not an employee or a part of the 2nd defendant's business;

(c) That he had met Foong when Foong was still employed as a bank officer in 'Alliance Bank Malaysia Berhad' as an officer in the Corporate Finance Department;

(d) That Foong had advised the 2nd defendant on the latter's proposed IPO plans for his business (as mentioned above); and

(e) That Foong was, at that time, an employee of the Malaysian national car producer 'Proton' (although the 2nd defendant did not specifically mention which of the 'Proton' companies);

(17) Foong had, subsequently, contacted PW2, introduced himself to her as a friend of the 2nd defendant, requested PW2 for her email address so that he could email to her the Business Plan, and on 15 October 2006, he emailed to her the 2nd defendant's Business plan;

(18) PW2 believed that Chan had also assisted the 2nd and 3rd defendants in the discussion of the 'Term Sheet' with the 2nd plaintiff because Chan had referred to the 2nd defendant as his 'client' and Chan had been paid in his personal name, as he had informed the parties that his firm had closed down at the time the Term Sheet was executed, by the 2nd defendant (via the 1st defendant) for introducing the 2nd defendant to the 2nd plaintiff;

(19) After PW2 received the email from Foong with the Business Plan attached, she forwarded it to Chris Chia and Dennis Wuisan (see a copy of the Business Plan at pages 520 to 527 of the Common Bundle of Documents (Part B), Volume 3);

(20) The Business Plan was, subsequently, annexed as 'Appendix A' of the Subscription Agreement;

(21) In all her business dealings with the 2nd and 3rd defendants, Foong and Chan, the four of them had communicated with each other in the English language and she did not recall the 2nd defendant and/or the 3rd defendant ever having problems speaking in English;

(22) Although she did engage in some casual/social conversation with the 2nd defendant in the Mandarin language, all business dealings between PW2 and the 2nd defendant were conducted in English;

(23) Based on the Business Plan, PW2 then held further discussions with Chris Chia and Dennis Wuishan on the Business Plan;

(24) At that time, the 3 (three) of them were of the view that the Business Plan presented a good investment opportunity for the 2nd plaintiff to look into bearing in mind that the 2nd defendant's business(es), track record, potential business growth and opportunities in EPCB;

(25) After the 2nd plaintiff had decided to further evaluate the potential investment into the 2nd defendnt's business(es), the 3 of them held further discussions/negotiations with the 2nd defendant (who was at all times assisted by the 3rd defendant, Foong and Chan) on various occasions at his office, in the Club House of Sierramas Resorts Home where PW2 resides and over the telephone, to discuss the 2nd and 3rd defendants' businesses and growth prospect, terms of the potential investment and to come up with a term sheet to determine the manner in which the investment into the 2nd and 3rd defendants' business(es) was to be carried out ("the Investment Plan");

(26) After much discussion between the 2nd plaintiff and the 2nd and 3rd defendants, the Term Sheet was finalized and it was dated 30 October 2006;

(27) The Term Sheet contained the following major commercial terms and conditions:

(a) The amount of investment is RM 30 million;

(b) The use of the proceeds for the purchase of machineries to grow the business;

(c) The need for a joint account;

(d) The due diligence expenses which were to be borne by the investee (the 2nd and 3rd defendants); and

(e) All customary representations, warranties and undertakings (see pages 192 to 195 of the plaintiffs' Additional Bundle of Documents);

(28) In the meantime, the 2nd plaintiff made a determination on the entities into which the 2nd plaintiff would advise the Fund to invest into;

(29) The 2nd plaintiff decided that the entitites would be as follows:

(a) A Machine Company ("Machine Co") which would own all the equipment and assets to be purchased for the purpose of the business as stated in the Business Plan (later identified in the Agreements as the 1st defendant, which was subsequently finalized pursuant to the Fund's investment);

(b) A holding company of the Machine Co (the 1st defendant) and all other businesses relevant to the Business Plan (later identified as the 4th defendant which was subsequently finalized pursuant to the Fund's investment;

(c) EPCB; and

(d) Maple Stragies, the 5th defendant.

(e) (All the four entities are collectively referred to as the "Relevant Investee Group of Companies") ("RIGC")

(30) The above structure is clearly reflected in Schedule 3 of the Subscription Agreement on Corporate Structure (see pages 457 to 459 of the Common Bundle of Documents, Part B, Volume 3);

(31) The intention of the 2nd plaintiff was to ensure that only those businesses that would be utilizing the investment proceeds from the 2nd plaintiff would become part of the RIGC under which the 2nd plaintiff would partake in the equity stake of 10% in the 4th defendant;

(32) However, the 3 of them noted that the 2nd and 3rd defendants had 2 (two) other wholly owned companies, namely, EPCM and E-Circle which are not part of the RIGC but have to be included under the EPC Group of Companies for purposes of credit monitoring and, hence, were to be included in the representations, warranties and undertakings of the 2nd and 3rd defendants;

(33) Hence, for the purposes of the Investment Plan, the companies owned and managed by the 2nd and 3rd defendants which the 2nd plaintiff referred to as the "EPC Group of Companies" consisted of the RIGC together with EPCM and E-Circle (all these 6 companies are collectively referred to as "the EPC Group of Companies") (see the company searches which have been done on the 6 companies);

(34) The distinction between the EPC Group of Companies and the RIGC was important for purposes of the Investment Plan as the objective of the Fund's investment in the (new) business of the 2nd and 3rd defendants was to support the EPC Group of Companies with the exception of EPCM and E-Circle, which were not considered as part of the scope of the investment, although they were defined as being part of the EPC Group of Companies in the Agreements, and these 2 (two) excluded companies were still required to be defined in the Agreements for purposes of the securities which these 2 (two) excluded companies would be making representations and warranties to the Fund, in consideration of the proposed investment by the 2nd plaintiff;

(35) Upon signing the Term Sheet and the payment of a sum of USD 50,000.00 being the due diligence expenses, the 2nd plaintiff proceeded, between November 2006 to March 2007, to conduct due diligence on the 2nd and 3rd defendants' business concurrent with the structuring and the documentation of the investment;

(36) The Investment Plan was developed by the 2nd plaintiff, with the assistance and advice of ZICO, the 2nd plaintiff's solicitors and corporate advisers, as well as the 2nd and 3rd defendants;

(37) The 2nd plaintiff and the 2nd and 3rd defendants dealt with the partner of ZICO by the name of Loo Tatt King (PW5);

(38) The 2nd plaintiff had consulted ZICO at the material time as the 2nd plaintiff wanted to ensure that the proposed Investment Plan was at all times legal, valid and enforceable;

(39) Chris Chia and PW2 were the 2 (two) individuals from the 2nd plaintiff, who had mainly liaised with Loo Tatt King (PW5) of ZICO;

(40) It was proposed that the investment into the RIGC would be done *via* a Special Purpose Vehicle ("SPV") company to ensure that the 2nd plaintiff maintained a form of control over how the monies would be distributed and/or used by the RIGC;

(41) The structure was done to ensure that it was tax efficient, valid and legally enforceable as well as being able to preserve the commercial aspects of the investment by the 2nd plaintiff;

(42) After extensive discussions with the 2nd and 3rd defendants and the relevant advisers, the parties were required to set up the SPV company and it was decided that KJD Glove would act as the SPV company for purposes of this Investment Plan to raise and govern the use of proceeds from the Fund;

(43) The SPV company i.e. KJD Glove, would be incorporated in Labuan, so as to constitute an "offshore investment" which, the 2nd plaintiff was advised, would be more tax efficient than if the monies were transferred directly from the Fund (which was based overseas) into the RIGC;

(44) Apart from ZICO, the 2nd plaintiff had also taken professional advice from the accountancy firm known as KPMG who had advised principally on taxation issues as well as issues pertaining to the investment structure;

(45) PW2 believes that KPMG is known as one of the "big four" accounting firms in the world, the other (3) three being Ernst & Young, Price Waterhouse Coopers and Deloitte;

(46) It was planned for the SPV company (to be incorporated as KJD Glove) to channel the Investment Amount to the RIGC in the form of an on-lending agreement with Machine Co (to be incorporated as the 1st defendant);

(47) Hence, it was proposed for 2 (two) agreements to be executed to give effect to the Investment Plan, namely, the Subscription Agreement, for the 2nd plaintiff to subscribe to the bonds of the SPV company (to be incorporated as KJD Glove) and, secondly, the Loan Agreement between the SPV company (to be incorporated as KJD Glove) and Machine Co (to be incorporated as the 1st defendant) to effect the investment itself;

(48) The 2nd plaintiff intended for the SPV company to be the main entity that would raise the funds and to then on lend to other companies within the RIGC pursuant to where the funds would be required;

(49) At all times, the decision of how the bond proceeds is to be utilized or on-lent would be determined solely by KJD Glove;

(50) This Investment Plan was discussed in various meetings over a period of time from November 2006 until sometime in early 2007 between the 2nd and 3rd defendants, ZICO, KPMG and the representatives of the 2nd plaintiff, namely, Chris Chia (PW1), Dennis Wuisan (PW4) and PW2;

(51) It was Chris Chia (PW1) (together with Loo Tatt King and also Foong, who had joined the 2nd plaintiff as an employee, sometime in January 2007), who had spearheaded the negotiations of the Investment Plan with the 2nd and 3rd defendants;

(52) PW2 was not directly invovled in the due diligence process for this transaction as she was travelling in and out of the country to work on another project for the 2nd plaintiff but she was copied on most emails which allowed her to follow the developments of the transaction closely;

(53) Once the drafts of the Subscription Agreement, the Loan Agreement, the Deeds of Charge, the Charges and all other relevant documents, including but not limited to the share transfer forms, letters of resignation of directors, etc. (all documents giving effect to the Investment Plan are collectively referred to as "the Agreements") were prepared by ZICO, the drafts were forwarded to all the relevant parties for their study and comments;

(54) PW2 left it to Chris Chia (PW1) and Loo Tatt King (PW5) to sort out the drafts of the Agreements with the 2nd and 3rd defendants as she was travelling in and out of Malaysia on another project for the 2nd plaintiff;

(55) Once the drafts were vetted by the parties, ZICO then proceeded to have the fair copies of the Agreements and documents forwarded to all the relevant parties for their respective execution(s);

(56) The 2nd and 3rd defendants had executed the Subscription Agreement as covenantors and only the 2nd defendant had executed the Loan Agreement for and on behalf of the 1st defendant;

(57) Loo Tatt King (PW5) had witnessed the 2nd and 3rd defendants' execution of the Subscription Agreement and the 2nd defendant's execution of the Loan Agreement;

(58) An individual by the name of Chin Chee Kee in Labuan executed the Subscription Agreement on behalf of Wira International and it was witnessed by one "Lim Sok Kim";

(59) Chris Chia (PW1) executed the Agreements on behalf of the 2nd plaintiff;

(60) Dennis Wuisan (PW4) executed the Agreements on behalf of KJD Glove;

(61) PW2's knowledge of all the Agreements is based on the documents in the 1st plaintiff and/or the 2nd plaintiff's possession which she has access to;

(62) After the Agreements and the relevant security documents were executed on 15 March 2007, the 2nd plaintiff opted out of the picture and it was replaced by the 1st plaintiff;

(63) Hence, on 16 March, the parties executed the Deed of Accession between the 1st plaintiff and the 2nd plaintiff with KJD Glove, Wira International and the 2nd and 3rd defendants ("the Deed of Accession");

(64) By the Deed of Accession, the 1st plaintiff acceded to and ratified the Subscription Agreement and covenanted and agreed to be bound by the terms of the Subscription Agreement as if the 1st plaintiff was a party/signatory to the Subscription Agreement;

(65) Based on the Deed of Accession, KJD Glove , the 1st and 2nd plaintiffs then proceeded to execute the Trustee Securities Agreement dated 16 March 2007 ("the Trustee Agreement") which provided and appointed the 2nd plaintiff as the trustee of all "the Transaction Documents" as defined in the Subscription Agreement, for and on behalf of the 1st plaintiff;

(66) The requirements of the Deed of Accession and the Trustee Agreement were, at all material times, made known to all the parties to the Investment Plan;

(67) PW2 witnessed the 2nd and 3rd defendants executing the Deed of Accession and the Trustee Agreement without any protest or complaint;

(68) The main effect of the Deed of Accession and the Trustee Agreement was that the 1st plaintiff had stepped 'into the shoes' of the 2nd plaintiff in respect of the Investment Plan (as formalized by the Agreements);

(69) While the Agreements, the Deed of Accession and the Trustee Agreement were being finalized and executed, the parties had proceeded to give effect to the terms and conditions therein;

(70) The 1st defendant proceeded to open/cause the opening of Account No.: 7142 5000 1809 with MBB, that was, subsequently, used as the USD Account;

(71) At/about the same time, the RM Account bearing Account No.: 5141 5033 2181 ("RM Account") was also opened with MBB by the 1st defendant;

(72) The opening of the USD Account and the RM Account was entrusted to the 2nd and 3rd defendants, who were the only two directors in the 1st defendant;

(73) Foong, who was employed by the 2nd plaintiff from January 2007 until April 2007, liaised with PW2, the 2nd and 3rd defendants and ZICO, to ensure that PW2 was appointed as a joint signatory of the USD Account, as provided under the Agreements, and Foong had assisted, *inter alia*, by delivering the specimen signature cards that were duly executed by PW2, to the 2nd and 3rd defendants, to enable the 2nd defendant, as covenantor under the Subscription Agreement, and the director of the 1st defendant under the Loan Agreement, to open the USD Account and the RM Account;

(74) The 2nd defendant (DW1) pretended that PW2 was a co-signatory of the USD Account;

(75) However, PW2 later discovered that she was never made a co-signatory to the USD Account, even though she had signed on the specimen signature cards, that were handed to her by Foong, together with the set of bank account opening documents for the opening of the USD Account and the RM Account in MBB, and copies of the 1st defendant's company resolution, showing that PW2 had been appointed as the joint signatories of the USD Account and the RM Account;

(76) Although the Agreements specified for the Investment Amount to be placed in a CCA to be opened by KJD Glove, it was agreed between the parties that the USD Account would be deemed as the CCA, as that was the Account in which the Investment Amount had been placed by the 2nd plaintiff; and

(77) In her answer to Q10 concerning what happened after the depositing of Tranche I of the monies into the Account, PW2 said as follows:

"

Q10: What happened after the depositing of the monies (i.e. the Tranche I amount) into the Account?

A10.1 On 23 March 2007, I met the 2nd and 3rd defendants in the 'Hagan Dazz' ice-cream parlor in Bangsar Shopping Centre. The 2nd defendant presented me a transfer instruction to sign on to instruct MBB to transfer an amount of US$1,189,029.00 from the USD Account to the RM Account. This however differs from the Transfer Instruction as reflected on page 235 in the Common Bundle of Documents (Part B) (Jilid 2) which shows only the 2nd defendant's signature for the said transfer.

A10.2 During this same meeting, I was also presented with the RM Account cheques to be co-signed with the 2nd defendant. These were payments from the RM Account for the purchase of machines and payment of

several invoices. The 2nd and 3rd defendants showed me a cash account payment registration book detailing each transfer payment for the one USD 1,189,029.00 transfer to the RM Account and subsequent payments from the RM Account for machines and other invoices. I, however, have not been shown any other transfer of payments or the cash account payment registration book for the USD Account after the first transfer of USD 1,189,029.00 by the 2nd defendant. Since 23 March 2007, I was not told to sign for any other transfer for the USD Account.

One of the RM Account cheques which I co-signed with the 2nd defendant was a payment made to E-Circle for the sum of a unit of coating machine. I was presented with purchase order issued by the 1st defendant signed by 3rd defendant, Delivery order and invoice issued by E-Circle to the 1st defendant signed by 2nd defendant as supporting document for the purchase and payment. I had earlier *via* email dated 17 March 2007 to Foong, telling him to convey to the 2nd defendant that all purchase of machines have to be accompanied by supporting documents. In addition, during the signing of the cheque, I also told both the 2nd and 3rd defendants that this being a payment made to E-Circle, which is 100% owned by them, they have to take care of the reporting of this transaction. All related transactions have to be accurately reflected in the accounts of the respective companies involved in the transaction and this was indeed taken up in the Audited Account of the 1st defendant for the financial year ended 31 March 2007.

(Please refer to on page 343 in the audited accounts of the 1st defendant in the Common Bundle of Documents (Part B) (Jilid 2).

(A copy of the cheque making the said payment can be seen on page 236 of the Common Bundle of Documents (Part B) (Jilid 2).

A10.3 Meanwhile, we were informed by the 2nd and 3rd defendants that they had appointed an individual named Teo Hun Theng (hereinafter referred to as “Teo”) to act in the capacity of a Financial Controller for the Relevant Investee Group of Companies. For the avoidance of any doubt, Teo was at all times an employee of the Relevant Investee Group of Companies. We were advised by the 2nd defendant to deal with Teo in all matters pertaining to the use of the Investment Amount with the Relevant Investee Group of Companies.

A10.4 At the end of Foong’s probationary period on/around April 2007, the 2nd plaintiff decided not to confirm Foong’s employment due to Foong’s own admission that the job’s performance demands were not a good fit for him. He subsequently joined the 2nd and 3rd defendants in the EPC Group of Companies as a Manager and Foong’s plan was unknown to me until Chris Chia and I discovered the fact sometime later in May/June 2007. I am however not too sure as to when exactly Foong joined the 2nd and 3rd defendants in the EPC Group of Companies.

A10.5 As per the provisions of the Agreements, the 1st defendant proceeded to make one (1) payment to KJD Glove (L) Limited for the total amount of USD$ 365,500.00 as re-payment under the Loan Agreement, which was noted by KJD Glove (L) Limited in their records. From here, KJD Glove (L) Limited had made one (1) payment on 20 September 2007 to the 1st and/or 2nd plaintiffs for the total amount of USD$ 365,500.00 as re-payment of the interest of the Investment Amount under the Subscription Agreement.

(Please refer to Schedule 4D of the Subscription Agreement on page 486 of the Common Bundle of Documents (Part B) (Jilid 3).

Apart from the one (1) payment made on 20 September 2007, the 2nd and 3rd defendants (as covenanters) and/or the Relevant Investee Group of Companies, in clear breach of the terms and conditions of the Subscription Agreement, did not make any further payments as provided under Schedule 4D of the Subscription Agreement.

A10.6 Apart form the one (1) payment of USD$ 365,500.00 and the request for the purchase of machinery as mentioned above, there was not much forthcoming from the 2nd and 3rd defendants and/or the Relevant Investee Group of Companies, which included but was not limited to details of the progress of the business

and expansion of the Relevant Investee Group of Companies. Requests to the 2nd and 3rd defendants and/or the Relevant Investee Group of Companies from KJD Glove (L) Limited, the 1st plaintiff and/or the 2nd plaintiff for financial information, business progress updates, business expansion plans and so forth were met with various excuses from the 2nd and 3rd defendants and/or Teo.

In particular, I do remember receiving emails from Teo on 13 July 2007 attached with Monitoring memorandum stating that all conditions, representations and warranties to the Agreements were still valid and binding, except for operational/financial ratios on the performance of the Relevant Investee Group of Companies due to delay in the sale orders. It also stated that no material transactions occurred in the prior quarter. In another email dated 7 August 2007, Teo mentioned that the 1st defendant was still holding cash and these monies were merely sitting idly in the Bank Account at all material times.

(Please refer:

(i) *page 60-64 of the plaintiffs' Additional Bundle of Documents for the Email dated 13 July 2007; and*

(ii) *page 193 of the Common Bundle of Documents (Part C) (Jilid 2) for Teo's email dated 7 August 2007).*

A10.7 On/about September 2007, the 1st defendant had requested KJD Glove (L) Limited and/or the 1st plaintiff for an extension of time of a period of three (3) months for the release of the Investment Amount under Tranche II purportedly on the basis that the business plans and/or the projects of the Relevant Investee Group of Companies was not taking off/commencing.

Teoh had on 3 September 2007 sent another email to the 2nd plaintiff attached with financial projections of 1st defendant for discussion purposes. In the projections "Glove Financial Model V7_070830 (new biz line).xls", it showed the following:

(i) that the 1st defendant had lent RM 4 million to EPCB and RM 1 million to the 5th defendant;

(ii) A cash balance of RM 16.6 million; and

(iii) Machineries up to RM 7.1 million.

which clearly gave the impression that all the monies including the USD 2 million in the USD Account were intact and were sitting idly in the USD Account. Meanwhile, the 2nd plaintiff did not agree to the 1st defendant giving a loan to EPCB which is outside the ambit of the use of proceeds under the Loan Agreement. What was given to us were basically items that updated us on the progress of the business. All these emails and communications from Teo were copied to the 2nd and 3rd defendants.

(see pages 196-200 of the plaintiffs' Additional Bundle of Documents for the Teo's email dated 3 September 2007).

The above information together with the representations given by Teo, the 2nd and 3rd defendants and the Relevant Investee Group of Companies gave us the impression that most of the cash of Tranche I of the Investment Amount was at all times still sitting in the USD Account due to the delay and/or non-commencement of the project of the Relevant Investee Group of Companies.

(Please refer to the exchange of emails between Teo, the 5th defendant and myself from 6 August 2007 until 13 September 2007 as can be seen on pages 188 until 194 of the Common Bundle of Documents (Part C) (Jilid 2) and Foong's email dated 26 October 2007 at pages 189-191 of the plaintiffs' Additional Bundle of Documents).

A10.8 KJD Glove (L) Limited and/or the 1st plaintiff had agreed to the 1st defendant's request on the condition that KJD Glove (L) Limited and/or the 1st plaintiff was entitled to impose on the Investment Amount,

which was to be released to apply and subscribe for the Bonds under Tranche II, that USD$ 4,300,000.00, a facility fee of 3% per annum on the Tranche II amount (USD$ 4,300,000.00) until December 2007, which was the time when the Tranche II amount was to be released. This condition was accepted and agreed to by the 1st defendant and/or its representative *vide* a letter dated 12 September 2007.

(Please refer to:

(i) *Pages 181 and 182 of the Common Bundle of Documents (Part C) (Jilid 2) for a copy of the 1st defendant's letter dated 12 September 2007 requesting for the said deferment of Tranche II;*

(ii) *Pages 179 and 180 of the Common Bundle of Documents (Part C) (Jilid 2) for a copy of KJD Glove (L) Limited's letter to the 1st plaintiff dated 12 September 2007 requesting for the said deferment of Tranche II; and*

(iii) *The exchange of emails between Teo, Loo Tatt King, Chris Chia and myself from 13 September 2007 until 1 October 2007 as can be seen on pages 197 of the Common Bundle of Documents (Part C) (Jilid 2).*

A10.9 I would also note here that, at all material times, despite some reminders and/or follow up by ZICO and the 2nd plaintiff, no steps were taken by the 2nd and 3rd defendants:

(i) to fulfill the unsatisfied Conditions Precedent (as per paragraph 5.4.1 (c) above) which had been deferred at the request and for the benefit of the 2nd and 3rd defendants; and/or

(ii) to fulfill any of the Conditions Subsequent as provided in the Subscription Agreement.

A10.10 At that point of time after the execution of the Agreements, the Conditions Precedent which had not been met were, *inter alia*, as follows:

(i) Clause 2.1 (g) of the Subscription Agreement – the setting up of the USD Account as per its joint account requirement of operation, although we were led to believe that it had been completed by the 2nd defendant under Maybank Accound Number 7141 5000 1809 as defined as the Cash Collateral Account whereupon the proceeds of the Investment Amount are disposed into;

(ii) Clause 2.1 (i) of the Subscription Agreement – the lease agreements for machineries between the 1st defendant (as lessor) with EPC Bangi and the 5th defendant; and

(iii) Clause 2.1 (i) of the Subscription Agreement – the incorporation of the intermediate holding companies and/or the proper structuring of the EPC Group of Companies in accordance wich Schedule 3 of the Subscription Agreement. There were still several actions which were required by the 1st defendant, the 4th defendant and EPC Bangi.

Most of the Conditions Subsequent as provided in clause 2.3 of the Subscription Agreement had not been fulfilled by the 2nd and 3rd defendants, the 1st defendant, the 4th defendant and/or the 5th defendant.

A10.11 I would also add here that one of the key elements of the Investment Plan was to ensrue that I was a joint signatory of both the USD Account and the RM Account, in particular the USD Account. As explained earlier, the USD Account represented 'the vault' in which the entire Investment Amount was placed in and it was from here that the Investment Amount would be released to the Relevant Investee Group of Companies to be used/utilized in accordance with the Subscription and/or Loan Agreement.

By excluding me from the joint signatory, it would mean that the 2nd and 3rd defendants being the two sale directors of the 1st defendant have a 'free hand' to use the Investment Amount at their sole direction. My appointment as a joint signatory to the USD Account, therefore, was to act as a check and balance on usage of the funds in the USD Account together with the requirement for the consent of KJD Glove (L) Limited to be obtained for any payment from the USD Account involving more than USD$ 50,000.00.

(Please refer to clause 4.4(c) of the Subscription Agreement – page 443 of the Common Bundle of

Documents (Part B) (Jilid 3)).

A10.12 If we (KJD Glove (L) Limited, the 1st plaintiff and the 2nd plaintiff) had known at the time that I had not been appointed as a joint signatory to the USD Account number, we would not have proceeded with the transaction and for sure would not have released Tranche I of the Investment Amount into the USD Account as there was no way for us to oversee and/or exert some form of control over the use of the Investment Amount.

(Please refer to page 779 of the Common Bundle of Documents (Part B) (Jilid 4))"

[48]In her further examination-in-chief, that was done *vide* a supplementary witness statement (P72), YEO (PW2) said as follows concerning the outcome of the third party claim by Maple Challenge and Impulse Talent, the 1st and 4th defendants, respectively, in the Third Party proceedings over all the monies in various bank accounts belonging to the 1st defendant, EPCB, EPCM, Impulse Talent and E-Circle, which were frozen for purposes of the criminal proceedings in the Criminal Sessions Court Case No. 62-(49-52)-2009:

(1) On 28 June 2013, the Criminal Sessions Court ordered the release of the monies in the bank account of the 1st defendant (see paragraph 2(ii) of the letter from the Sessions Court Judge to Messrs. Richard Wee & Yip dated 11 September 2013 confirming the Order made by the Criminal Sessions Court on 28 June 2013 at pages 1 and 2 of the plaintiffs' Additional Bundle of Documents (2)).

(2) Pursuant to this release, the 1st defendant then transferred the sum of USD 567,397.57 to KJD Glove on 20 September 2013 (see the confirmation of the transfer of the sum of USD 567,397.57 into the account of KJD Glove at DBS Bank Ltd on 20 September 2013 at page 4 of the plaintiff's Additional Bundle of Documents (2)).

(3) On 28 June 2013, the Criminal Sessions Court also ordered the release of the monies in the bank account of the 4th defendant (see paragraph 2(i) of the letter from the Sessions Court Judge to Messrs. Richard Wee & Yip dated 11 September 2013 confirming the Order made by the Criminal Sessions Court on 28 June 2013 at pages 1 and 2 of the plaintiff's Additional Bundle of Documents (2)); and

(4) Pursuant to this release, the 4th defendant then transferred the sum of USD 1,211.87 to KJD Glove on 19 September 2013 (see the confirmation of the transfer of the sum of USD 1,211.87 into the account of KJD Glove at DBS Bank Ltd on 19 September 2013 at page 3 of the plaintiff's Additional Bundle of Documents (2)).

[49]Mr. Onn (PW3) is an accountant by profession. He qualified as an accountant when he passed the professional examination of the Association of Chartered Certified Accountants in 1988. He is also a licensed auditor. He was aged 48 years old at the time he testified in the full trial on 2 August 2013.

[50]PW3 is an Associate Director in Hicks-Woode, which is involved in the provision of advisory and consultancy services.

[51]PW3 also gave his evidence in his examination-in-chief in the form of a witness statement (P54).

[52]He said that Hicks-Woode was engaged by the 1st plaintiff to conduct an inquiry into the 1st defendant, the 4th defendant, the 5th defendant, EPCB and EPCM ("the EPC Group of Companies").

[53]Dennis Wuisan (PW4) is an Indonesian citizen. He was aged 41 years old at the time he testified in the full trial on 2 August 2013.

[54]He is the director of KJD Glove, which executed the Subscription Agreement. Since 28 November 2008, he has also held the post of Director in both the 1st defendant and the 4th defendant.

[55]He has been working in the field of Asset Management for approximately nine (9) years prior to 2 August 2013. Prior to focusing on Asset Management, he had worked in Financial Advisory and Investment Banking, including at Goldman Sachs in Singapore in the Investment Banking Division. He holds a Bachelor of Arts Degree in Physics from the University of California at Berkeley, graduating in 1994.

[56]He is also the director of the 2nd plaintiff, which is in the business of advising the Fund.

[57]PW4 also gave his evidence in his examination-in-chief in the form of a witness statement (P56).

[58]PW4 gave evidence with regard to the terms and conditions of the Subscription Agreement.

[59]Loo Tatt King (PW5) also gave his evidence in his examination-in-chief in the form of a witness statement (P63). He gave, *inter alia*, the following evidence in his examination-in-chief:

(1) In his answer in A6.1.1, he said as follows:

> "
>
> (iii) that the parties to the Subscription Agreement, had expressly and unequivocally, agreed and undertaken to use and apply the Investment Amount for two (2) specific purposes only, which were as follows:
>
> (aa) that KJD Glove (L) Limited uses the Investment Amount to grant a loan to the 1st defendant to enable the 1st defendant to purchase plant machinery; and
>
> (bb) that KJD Glove (L) Limited uses the Investment Amount to grant a loan to the 1st defendant for the 1st defendant to extend inter-company loans for the business purposes of the Group of Companies, that is, the production of "keypad" and "LCD window" components for mobile phones.
>
> (iv) that the Investment Amount was to be disbursed into an account known as "the Cash Collateral Account" (which was later identified as the USD Account) upon terms and conditions which were agreed to by the 2nd plaintiff. This "Cash Collateral Account" (the USD Account) is to be jointly operated and maintained by KJD Glove (L) Limited and the 2nd plaintiff (via their respective representatives)."

(2) He was informed by Foong that all the conditions precedent regarding the opening of the USD Account and the RM Account had been complied with;

(3) Subsequent to the signing of the Agreements on 15 March 2007, and based on his follow-up with the 2nd and 3rd defendants on the status of the fulfillment of the conditions precedent by the 2nd and 3rd defendants, he gave clearance to the 2nd plaintiff, for the draw down of Tranche I of the loan money to take place;

(4) All the conditions precedent except 3 (three) remained outstanding at that time and it was the prerogative of the 2nd plaintiff whether to reject the Subscription Agreement on the ground that the 3 outstanding conditions precedent had not been fulfilled or whether it would accept a deferment of the fulfillment of the 3 conditions precedent;

(5) When the situation pertaining to the withdrawal of the Investment Amount arose in early September 2007, PW5 had advised the 1st and/or 2nd plaintiffs that he would not be able to represent the 1st and/or the 2nd plaintiff in any litigation proceedings pertaining to the Agreements and/or the Investment Documents as he and his colleagues at ZICO were potential witnesses for any litigation proceedings which may arise from and/or be related directly or indirectly to the Agreements and/or the Investment Documents, and as such they stood in a position of conflict of interest.

(6) Thereafter, he had very minimal involvement in the transaction until November 2007, when he received a call from Chris Chia (PW1) that the 2nd and 3rd defendants had breached several covenants, one of which was the withdrawal of the monies from the USD Account without the knowledge or the signature of YEO;

(7) As instructed by PW1, he (PW5) drafted a personal guarantee to be signed by the 2nd and 3rd defendants;

(8) Pursuant to this event, he (PW5) was then instructed by the 1st plaintiff and/or the 2nd plaintiff to attend a meeting with the 2nd defendant on 13 November 2007;

(9) He (PW5) was informed by PW1 that the 1st and/or the 2nd plaintiff had discovered, *inter alia*, the following:

(a) The 2nd defendant (DW1) had been able to withdraw monies from the USD Account without the express consent and/or knowledge of the 1st plaintiff, the 2nd plaintiff and/or YEO (as the 2nd plaintiff's representative) by using only a single signature despite the USD Account allegedly having been set-up as requiring joint signatories;

(b) That the 2nd defendant (DW1) had proceeded to withdraw almost the entire amount of Tranche I of the Investment Amount from the USD Account; and

(c) That there remained a minimal amount of Tranche I of the Investment Amount in the USD Account;

(10) PW5 attended the meeting on 13 November 2007 together with YEO (PW2), Chris Chia (PW1) and one of the colleagues of Chris Chia, namely, Ms. Claudia;

(11) Foong and Teo Hun Theng ("Teo") were also present at the meeting;

(12) At the meeting, the 2nd defendant admitted to his mistake in using the loan monies without authority and he explained that he had taken the monies wrongfully and unlawfully because of a desperate need to settle the debts of one of his companies i.e. EPCM;

(13) PW5 was instructed to assist in preparing a supplemental letter to capture all the points agreed upon the previous day and that all the points were to be incorporated in a supplementary agreement to be executed the following day;

(14) PW5 could recall the 2nd defendant saying a few times in the meeting that he wished to find a way to resolve the situation amicably with the 1st and/or the 2nd plaintiff i.e. to return the monies taken from the USD Account; and

(15) At the meeting, PW5 was informed by Chris Chia (PW1) that the 2nd defendant had agreed to all the terms and conditions of the draft personal guarantee and indemnity prepared by him (PW5) the day before and that the 2nd and 3rd defendants had proceeded to execute the guarantee and indemnity in favour of the 2nd plaintiff ("the Personal Guarantee") and the Personal Guarantee was dated 12 November 2007.

[60]Mdm. Chin (PW6) gave her evidence in her examination-in-chief in the form of a revised witness statement (P77).

[61]PW6 is an independent consultant. She was aged 56 years old at the time she testified in the full trial on 26 March 2014.

[62]She is a Member of the Association of Certified Chartered Accountants, United Kingdom (ACCA, UK) as well as a Member of the Malaysian Institute of Accountants. She has more than 20 (twenty) years of work experience in the accountancy profession.

[63]PW6 was engaged by Hicks-Woode to carry out and supervise an inquiry, for and on behalf of Hicks-Woode, into the EPC Group of Companies. The details of the breaches of/defaults in the terms and conditions of the Subscription Agreement are set out in the Report that was prepared by Hicks-Woode after the inquiry was conducted.

[64]PW6 gave, *inter alia*, the following evidence:

"

Q2. Are you familiar with the 2nd and 3rd defendants in the matter? If so, how?

A2.1 I had first met the 2nd defendant sometime in January 2008 when Hicks-Woode was engaged by the plaintiffs to conduct an 'Inquiry of Operational Conduct into the EPC Group of Companies'. I was engaged by Hicks-Woode to carry out and supervise the said inquiry for and on behalf of Hicks-Woode. Hicks-Woode had produced and forwarded two original sets of its formal report to the 1st plaintiff on 9 April 2008 (hereinafter referred to as "the Hicks-Woode Report").

[65]Apart from the evidence adduced during the trial of Suit 2256, which concluded on 13 September 2014, the plaintiffs in the three related suits also adopted and relied on the evidence led during the full trial of Suit 1123 which took place on 25 November 2014, and the full trial of Suit 246 which took place on 26 November 2014 and 27 November 2014.

[66]The Court noted that the plaintiffs did not call the following persons to testify in support of their pleaded case:

(1) Chan;

(2) Foong;

(3) Ms. Claudia; and

(4) Teo.

The Court is of the considered view that Chan and Ms. Claudia, unlike Foong and Teo, are not material witnesses in this case. This is because Chan only played the role of introducer i.e. he had introduced PW2 to the 2nd defendant. As for Ms. Claudia, although she was present at the meeting, the evidence did not show that she had played an active part in the meeting. The Court will deal with the issue whether the failure of the plaintiffs to call Foong any/or Teo is fatal to the plaintiffs' case later in this Judgment.

[67]Upon the conclusion of the plaintiffs' case, it was clear to the Court that the plaintiffs were relying on the evidence of the plaintiffs' six witnesses to prove that the 2nd and 3rd defendants have breached and/or defaulted in complying with the terms and conditions of the Subscription Agreement and the Guarantee to mount their claim against the 2nd and 3rd defendants in Suit 2256.

2nd and 3rd defendants' proven case

[68]Lim Wan Soon and Leng Khuan Yow (F), the 2nd and 3rd defendants, called 1 (one) witness. He is Lim Wan Soon, the 2nd defendant himself, who testified as DW1, for himself and also on behalf of his wife, Leng Khuan Yow (F), the 3rd defendant, who was present in Court but did not testify.

[69]At the time Lim Wan Soon (DW1) testified in the full trial on 4 August 2014, he was aged 53 years old and he was unemployed since 28 November 2008. DW1 informed the Court that at all material times prior to 28 November 2008, he was a legitimate businessman, the director of the 1st defendant and the director and shareholder of the 4th defendant together with the 3rd defendant. DW1 gave, *inter alia*, the following evidence in his examination-in-chief that was given in the form of a witness statement (D83):

(1) In question 5:

> "
>
> Q5: What was your occupation prior to 28 November 2008?
>
> A5: At all material times prior to 28 November 2008, I was:
>
> (1) A legitimate businessman;
>
> (2) The director of the 1st defendant together with the 3rd defendant; and
>
> (3) The director and shareholder of the 4th defendant together with the 3rd defendant.
>
> The 3rd defendant and I were also the directors and shareholders for a few other companies in our group of companies known as the 'EPC Group of Companies' which consisted of the following companies (including the 1st and 4th defendants):
>
> i. EPC Techonologi (M) Sdn. Bhd. (Company No.: 288122-T) ("EPCM");
>
> ii. EPC Technology (Bangi) Sdn. Bhd. (Company No.: 612715-P) ("EPCB");
>
> iii. E-Circle Technology Sdn. Bhd. (Company No.: 6347-M) ("E-Circle"); and
>
> iv. Maple Strategies Sdn. Bhd. (Company No.: 730633-D) ("Maple Strategies") (the 5th defendant).
>
> (hereinafter the 1st defendant, the 4th defendant, EPCM, EPCB, E-Circle and the 5th defendant shall collectively be referred to as "the 2nd and 3rd defendants' Group of Companies"). This group of companies was worth between RM 25 million to RM 30 million."

(2) In question 6:

> "

Q6: There were 2 main agreements entered between the parties i.e. the Loan Agreement dated 15 March 2007 and the Subscription Agreement dated 15 March 2007. Can you tell the Honourable Court the details of the agreements?

A6: Yes. At all material times there was one (1) singular loan transaction for USD 8.6 million involving the following loan agreements and documents with the respective parties:

(a) Loan Agreement dated 15 March 2007 between KJD Glove (L) Limited ("Lender") and the 1st defendant ("Borrower") at pages 13 to 66 of the Common Bundle of Documents (Part B) Jilid 1 (hereinafter referred as "the said Loan Agreement");

(b) Subscription Agreement dated 15 March 2007 between Wira International Limited ("Existing Shareholder") and the 2nd and 3rd defendants ("Covenantors") and the 2nd plaintiff ("Investor") and KJD Glove (L) Limited ("Company") at pages 429 to 527 of the Common Bundle of Documents (Part B) Jilid 3 (hereinafter referred as "the said Subscription Agreement");

(c) Deed of Charges dated 15 March 2007 between the 4th defendant and the 2nd plaintiff at pages 97 to 126 of the Common Bundle of Documents (Part B) Jilid 1;

(d) Deed of Charges dated 15 March 2007 between the 5th defendant and the 2nd plaintiff at pages 127 to 156 of the Common Bundle of Documents (Part B) Jilid 1;

(e) Deed of Charges dated 15 March 2007 between the 1st defendant and the 2nd plaintiff at pages 157 to 186 of the Common Bundle of Documents (Part B) Jilid 1;

(f) Charge Over Shares dated 15 March 2007 between the 2nd plaintiff and the 2nd defendant ("Security Party") at pages 187 to 210 of the Common Bundle of Documents (Part B) Jilid 1;

(g) Charge Over Shares dated 15 March 2007 between the 2nd plaintiff and the 3rd defendant ("Security Party") at pages 211 to 234 of the Common Bundle of Documents (Part B) Jilid 2;

(h) Charge Over Shares dated 26 March 2007 between the 2nd plaintiff and the 4th defendant ("Security Party") at pages 237 to 260 of the Common Bundle of Documents (Part B) Jilid 2; and

Based on the said Loan Agreement and the said Subscription Agreement, KJD Glove (L) Limited and or the 1st plaintiff and or the 2nd plaintiff were to jointly and/ or severally loan to the 1st defendant the sum of USD 8.6 million which is clearly provided in clause 2.1 of the said Loan Agreement. The said loan sum of USD 8.6 million was to be released to the 1st defendant in two (2) tranches in which each tranche amounted to USD 4.3 million and subject to the terms and conditions of the said Loan Agreement. Hence, the 2nd and 3rd defendants aver that KJD Glove (L) Limited and/or the 1st plaintiff and/or the 2nd plaintiff are jointly and/or severally bound by the terms and conditions of all the above loan and security agreements."

(3) In question 7:

"

Q7: What was the purpose of the agreements?

A7: The purpose was for loans to the 2nd and 3rd defendants' Group of Companies as stated in clause 3.1 of the said Subscription Agreement and this included EPC Technology Malaysia Sdn. Bhd. (EPCM). It also included inter-company loans for the business of the group of companies. I also rely on clause 2.2(a) of the said Loan Agreement. Both the said Loan Agreement and the Subscription Agreement were prepared by the plaintiffs' solicitors, Zaid Ibrahim & Co."

(4) In question 13:

"

Q13: Can you explain to the Honourable Court, how was the said Loan utilised?

A13: Yes. The said Loan was utilised in accordance and in compliance with the said Subscription Agreement and the said Loan Agreement."

(5) In question 14:

"

Q14: Anything else?

A14: Yes. It is the 2nd and 3rd defendants' contention that the 2nd and 3rd defendants being the directors of the 2nd and 3rd defendants' Group of Companies and the 1st defendant had used the said Loan legitimately and in accordance with the terms and conditions of the said Loan Agreement and the said Subscription Agreement with full knowledge and approval from the plaintiffs at all material time. Moreover, at all material time the 2nd and 3rd defendants and or the 2nd and 3rd defendants' Group of Companies had never received any objection from the plaintiffs in relation to the operation of the accounts and the way the said Loan was utilised prior to November 2007. In addition, the 2nd and 3rd defendants aver that at all material time the plaintiffs were fully aware that the 2nd and 3rd defendants' Group of Companies received various loans and that all the loans needed to be serviced. Thus, all the payments made by the 1st defendant to various parties including but not limited to the 2nd and 3rd defendants' Group of Companies, banks and other individuals creditors were lawful and valid the full details are well within the knowledge of the plaintiffs."

(6) In question 15:

"

Q15: What happened in November 2007?

A15: Sometime in November 2007, KJD Glove (L) Limited and/ or the plaintiffs in particular their agents representatives namely Yeo Kar Peng and Chris Chia Woon Liat had pressed false allegations against the 2nd and 3rd defendants and the 2nd and 3rd defendants' Group of Companies in particular the 1st defendant, EPCM and EPCB that the 2nd and 3rd defendants and the 2nd and 3rd defendants' Group of Companies had misused the said Loan (which is strictly denied). Copies of the correspondence between both parties are found at pages 607 to 617 of BF. Following that the 2nd and 3rd defendants were threatened by KJD Glove (L) Limited and/ or its representatives to sign the Guarantee and Indemnity Agreement on 12 November 2007, failing which KJD Glove (L) Limited would not release the balance loan of USD 4.3 million. A copy the Guarantee and Indemnity Agreement are at pages 304 to 319 of the Common Bundle of Documents (Part B) Jilid 2 BD."

(7) In question 16:

"

Q16: What happened then?

A16: Subsequently the plaintiffs through their agent representative namely Yeo Kar Peng had wrongly and with bad faith lodged police reports against the 1st defendant accusing the 2nd and 3rd defendants of committing breach of trust and money laundering. The police reports are at pages 320 to 321 and pages 365 to 367 of the Common Bundle of Documents (Part B) Jilid 2. It had then resulted in the police to press charges against the 2nd and 3rd defendants for offences under Anti-Money Laundering Act 2001, cheating and abetment of cheating. The police reports were made with the intention to prejudice and to force the 2nd and 3rd defendants and the 2nd and 3rd defendants' Group of Companies to pay the whole of the loan amount and interest which is contrary with the terms of the said Loan Agreement and the said Subscription Agreement."

(8) In question 17:

"

Q17: What happened to the police cases?

A17: The trial for the criminal charges against the 2nd and 3rd defendants were heard before the Kuala Lumpur Sessions Court in the Criminal Division under Criminal Case No: 62-51-2009 (against me) and Criminal Case No: 62-52-2009 (against the 3rd defendant). I and my wife were found not guilty without defence being called."

(9) In question 18:

"

Q18: What happened after that?

A18: The plaintiffs had with the knowledge and consent of the representatives of KJD Glove (L) Limited initiated legal action in the Kuala Lumpur High Court in Suit No. D3-22-1728-2007 against the defendants and had wrongfully obtained an order for injunction on 3-1-2008 (hereinafter referred to as "the High Court Suit"). A copy of the Order dated 3 January 2008 is at pages 4 to 8 of the Common Bundle of Documents (Part A)."

(10) In question 28:

"

Q28: What do you wish to say about the plaintiffs' claim which is based on the non-compliance by the 2nd and 3rd defendants of the conditions precedent in the Loan and Subscription Agreement?

A28: I am a businessman. The plaintiffs are experts in the field of finance. They had even employed Zaid Ibrahim & Co. They had given evidence that there was a checklist before the loan was to be disbursed which checklist was with their solicitors. They would therefore be aware that the conditions precedent were not met prior to the release of the 1st tranche of the loan."

(11) In question 29:

"

Q29: The plaintiffs say that Yeo Kar Peng was to be a joint signatory to the Malayan Banking Berhad USD Account No. 71415001809 and that you showed Yeo Kar Peng the company resolution naming her as a co-signatory?

A29: This again is not true. Her evidence on this issue was inconsistent. Further, she was a signatory to the Malayan Banking Berhad Ringgit Malaysia Account No. 514150332181 where money from the USD Account was transferred to her and she signed I think at least 10 cheques from the Ringgit Malaysia Account."

(12) In question 30:

"

Q30: What about the use of the moneys under the 1st tranche of the loan?

Q30: It was for the normal operation of the business and this included:

(a) a sum of RM 1.5 million to purchase a machine. The cheque was signed by Yeo Kar Peng and me. Yeo Kar Peng said the machine did not exist but this is not true as the machine was seized under section 44 of the Anti-Money Laundering Act 2001 and is still with the authorities. And the rental was paid by EPCM to the 1st defendant; and

(b) as for the contention that money was taken out by me and the 3rd defendant, the plaintiffs have failed to consider deposits by me for example a sum of RM 500,000 into EPCM on 17 April 2007 and a sum of RM 500,000 on 21 December 2006 and the payments back to us were in order. A copy each of the 3 bank-in slips is at pages 360 to 361 of the Common Bundle of Documents (Part B) Jilid 2 BD. There were also repayments of the advances by me."

(13) In question 31:

"

Q31: What about the payments to Freshing Industrial Co Ltd?

A31: This was for the purchase of a machine from Taiwan (LCD) Lens Arching & Cleaning Auto System which does exist and was also seized under section 44 of the Anti-Money Laundering Act 2001."

(14) In question 32:

"

Q32: What about the 2 payments by the 1st defendant to EPC (M) each of which is USD 1.25 million?

A32: It was an inter-company loan which was then used to pay back the bank and other parties."

[70]Based on DW1's evidence-in-chief, it is clear to the Court, that the defence of the 2nd and 3rd defendants to the plaintiffs' claim is that they had utilised Tranche I of the loan legitimately, in accordance and in compliance with the terms and conditions of the Subscription Agreement and the Loan Agreement with the full knowledge and approval of the plaintiffs at all material times, including Teo, the plaintiffs' representative, who had advised the plaintiffs that the manner of the usage of Tranche I of the loan moneys was in accordance with the terms and conditions of the Subscription Agreement and the Loan Agreement. Further, prior to November 2007, DW1 and the 3rd defendant were not informed or notified by the plaintiffs that they (the plaintiffs) had any objection to the operation of the two Accounts by the 2nd and 3rd defendants and the manner in which the loan monies was utilised.

[71]In addition, the plaintiffs were fully aware at all material times that the 2nd and 3rd defendants' Group of Companies received various loans and that all the loans needed to be serviced. Hence, all the payments made by the 1st defendant to various parties including but not limited to the 2nd and 3rd defendants' Group of Companies, banks and other individual creditors were lawful and valid and the full details are well within the knowledge of the plaintiffs.

[72]The two agreements, the 3 Deeds of Charge and the 3 Charges ("the security documents") were actually one singular loan transaction because DW1 had signed both agreements and the security documents at the same time. Hence, the interpretation clause for "inter-company loans" in the Subscription Agreement should also apply to the Loan Agreement because the purpose of the two agreements, which were prepared by the plaintiffs' solicitors, ZICO, was to give a loan of USD 8.6 million in 2 tranches of USD 4.3 million each to the 2nd and 3rd defendants' Group of Companies, including EPCM as stated in clause 3.1 of the Subscription Agreement. The purpose of the two agreements also included the giving of inter-company loans (by the 1st defendant to the companies within the 2nd and 3rd defendants' Group of Companies) for the business of the 2nd and 3rd defendants' Group of Companies as provided in clause 2.2(a) of the Loan Agreement.

[73]Based on DW1's evidence, it is also clear to the Court that the reason why he had agreed to take the loan of USD 8.6 million from the 2nd plaintiff was because he wished to expand the business of the 2nd and 3rd defendants' Group of Companies, to use the loan proceeds to give loans by the 1st defendant to the other companies within the 2nd and 3rd defendants' Group of Companies and to repay to himself , the banks and other individual creditors the loans that he, the banks and the other individual creditors had given to the companies within the 2nd and 3rd defendants' Group of Companies.

[74]DW1 has sought to rely on the advice that was, purportedly, given to him by Teo, the Finance Manager of EPCB, who was appointed by YEO (PW2) and/or Chris Chia (PW1) and/or Dennis Wuisan (PW3), that he could use the loan proceeds to give loans to the other companies within the 2nd and 3rd defendants' Group of Companies and to repay to himself, the banks and other individual creditors the loans that he, the banks and the other individual creditors had given to the companies within the 2nd and 3rd defendants' Group of Companies to support his defence.

[75]However, the Court noted that the 2nd and 3rd defendants did not call Teo as a witness to corroborate DW1's

evidence as stated above. The Court will deal with the issue whether the failure of the 2nd and 3rd defendants to call Teo is fatal to their case later in this Judgment.

[76]DW1 also testified that YEO's (PW2's) evidence that he had shown to her, a company resolution that named her as a co-signatory of the USD Account, was untrue, that YEO (PW2) had knowledge of the various withdrawals of the loan proceeds from the RM Account because PW2 had co-signed at least 10 cheques from the RM Account including a cheque for a sum of RM 1.5 million for the purchase of a machine and that the machine did exist but it was seized (by the police) under s 44 of AMLA.

Statement of issues for the determination of the Court in Suit 2256

[77]The parties have framed the following 18 (eighteen) issues for the determination of the Court for Suit 2256 and Suit 1123 in their statement of issues to be tried that has been marked as 'K' by the Court. These are as follows:

1. Whether the defendants as covenantors and/or guarantors and/or security parties are entitled to utilize the Invesment Amount as if they are KJD Glove?
2. Whether the defendant had commited the following breaches/defaults of the terms of the Subscription Agreement dated 15 March 2007 ("the Subscription Agreement"):
   (a) Withdrawal of the monies from the USD Account in total amount of USD 3,000,000.00 by the 1st defendant without the knowledge and/or approval of the plaintiffs, for the purpose of making the following payment to EPC Technology (M) Sdn Bhd **("EPCM")** EPC Technology (Bangi) Sdn Bhd **("EPCB")** and Freshing Industrial Co. Ltd in breach of the specific purpose of the Investment Amount provided in the Subscription Agreement:
      (i) That the total amount of USD 2,500,000.00 withdrawn from the USD Account allegedly as direct payment to the 4th defendant was actually made to EPCM.
      (ii) That the equipment allegedly purchased by the 1st defendant from Freshing Industrial Co. Ltd was not utilized by EPCB and/or the 5th defendant but had been leased out to E-Circle Technology Sdn Bhd in breach of the terms of the Subscription Agreement.
      (iii) That the amount of USD 215,000.00 that was withdrawn from the USD Account allegedly as directly to EPCB by depositing the aforesaid amount into EPCB's account with Kuwait Finance House (Malaysia) Berhad.
   (b) The opening of the USD account by the 1st defendant without appointing the 2nd plaintiff's representative as co-signatory;
   (c) The withdrawal of the monies exceeding USD 51,000.00 from the USD account without the knowledge and/or express consent in writing of the plaintiff as provided in the Subscription Agreement;
   (d) The refusal, neglect and/or failure of the defendants to provide information and/or documentation to the plaintiffs despite the plaintiff's request/demand for such information/documentation;
   (e) The refusal, neglect and/or failure of KJD Glove and/or the defendants to ensure a minimum balance in the Accounts at all material times from 20 September 2007 until the filing date of this action as required in Schedule 4D of the Subscription Agreement.
3. If the Honourable Court decides that the defendants had commited the abovementioned breaches/defaults of the terms of the Subscription Agreement, the issues are as follows:
   (a) Whether the defendants had failed to remedy the abovementioned breaches of the terms of the Subscription Agreement?
   (b) Whether the 2nd and 3rd defendants as covenantors and/or guarantors and/or security parties under the Subscription Agreement failed to ensure the punctual payment of all outstanding amounts and the performance of all obligations under the terms of the Subscription Agreement?
4. Whether the use of the Investment Amount must be pursuant to the business plan attached to the Subscription Agreement and in accordance with the submission provided to Bank Negara Malaysia and Labuan Offshore Services Authority ("LOFSA") by the 1st defendant and KJD Glove, respectively?
5. Whether the defendants failed, neglected and/or refused to make repayment of the Investment Amount and any or all interest accrued thereon in breach of the Subscription Agreement?
6. Whether the plaintiffs are entitled to judgement as set out in paragraph 41 of the statement of claim?

7. Whether the deferred Conditions Precedent in the Subscription Agreement were ever fulfilled and whether the Conditions Subsequent in the Subscription Agreement were ever fulfilled?
8. Whether the Loan and Subscription Agreements are one and the same loan transaction?
9. Whether the USD 8.6 million was an illegal money lending transaction?
10. Whether the plaintiff and KJD Glove had complied with the terms of the Bank Negara Consent?
11. Whether the plaintiff and KJD Glove had knowledge that the condition precedent was not met?
12. Whether the plaintiff and the KJD Glove are estopped from raising the issue of the condition precedent?
13. Whether Yeo Kar Peng and Chris Chia made a false allegation against the defendants that the defendants had wrongly utilized the loan?
14. Whether the 2nd and 3rd defendants were threatened by the plaintiff to sign a guarantee in the month of November 2007?
15. Whether the plaintiff's representative had unlawfully entered into the premises of the 8th defendant on January 2008 and had *mala fide* intention to take over the premises?
16. Whether the fact that the defendants had on their own accord delayed the request for the 2nd tranche?
17. Whether the action of KJD Glove and the plaintiff in obtaining an injunction and freezing the accounts of the 1st, 4th and 5th defendants had caused the defendants to suffer loss and damage to the 2nd and 3rd defendants?
18. Whether the loan was utilized correctly?

2nd and 3rd defendants' submissions in Suit 2256

[78]Mr. Krishna Dallumah, the learned counsel, for the 2nd and 3rd defendants, submitted that the Court ought to dismiss the plaintiffs' prayers in paragraph 41(2) (a) to (d) of the plaintiffs' statement of claim dated 10 December 2008. He relied on the following reasons:

(1) The 1st plaintiff had no *locus standi* to initiate Suit 2256 because the Deed of Accession was marked only as ID7 and there were different versions of the signing page (see paragraphs 6 to 12 of their written submissions);

(2) The Subscription Agreement is illegal and was a sham as the Investment Amount was never disbursed to KJD Glove (see paragraphs 13 to 15 of their written submissions);

(3) The loan was illegal because the rate of interest that was charged was 17% per annum instead of 8% per annum as stated in the approval of BNM and, hence, the loss should lie where it falls (see paragraphs 44 to 46 of their written submissions);

(4) Although the approval from LOFSA for the loan was for KJD Glove as the lender i.e. the giver of the loan without any security, what had in fact transpired was that the loan monies came directly from Kendall Court, the 2nd plaintiff, and the securities were held in favour of Kendall Court, the 2nd plaintiff, in breach of section 147(1) of the Offshore Companies Act 1990 (see paragraphs 16 to 20 and 26 to 29 of their written submissions);

(5) The interest rate that was allowed by BNM in its letter dated 23 February 2007 for the Loan Agreement was 8% per annum but the plaintiffs had circumvented this condition by imposing an interest rate of 17% per annum in the Subscription Agreement;

(6) The interest rates in the Subscription Agreement and the Loan Agreement are a sham because of the two differing interest rates (see paragraphs 21 to 25 of their written submissions);

(7) The signing of the Subscription Agreement and Loan Agreement on the same day constituted a breach of the conditions precedent stipulated in the Subscription Agreement;

(8) There was no notice or approval from the Foreign Investment Committee ("FIC") or LOFSA or BNM to vary the interest rate of 8% per annum as provided for under clause 5.1 of the Loan Agreement for the loan, that was given not by KJD Glove but by Kendall Court, the 2nd plaintiff (see paragraphs 30 to 32 of their written submissions);

(9) The USD Account is not the CCA because the USD Account was intended to be opened by KJD Glove, which was to receive the monies from Kendall Court, the 2nd plaintiff, as the 2nd plaintiff's investment in KJD Glove by applying and subscribing to the KJD Glove Bonds up to the amount of USD 8.6 million (see paragraph 35 of their written submissions);

(10) That the plaintiffs' pleaded case was never that the CCA is the USD Account (see paragraph 61 of their written submissions);

(11) Since the USD Account was not opened by KJD Glove, the USD Account cannot be deemed as the CCA (see paragraph 36 of their written submissions);

(12) The plaintiffs should have also sued Wira International because it was a party to the Subscription Agreement but Wira International was not made a party to Suit 2256 and no action was ever taken against Wira International by the plaintiffs (see paragraphs 41 to 43 of their written submissions);

(13) The purpose of the loan as set out in clause 2.1 of the Loan Agreement included allowing the 1st defendant to extend inter- company loans to the 2nd and 3rd defendants' Group of Companies (see paragraph 53 of their written submissions);

(14) The plaintiffs' own statement of claim refers to EPCM and E-Circle as being part of the 2nd and 3rd defendants' Group of Companies (see paragraphs 50 to 59 of their written submissions);

(15) The Subscription Agreement and the Company Resolution dated 15 March 2007 of Maple Challenge, the 1st defendant, allowed the 1st defendant to give inter-company loans to the 2nd and 3rd defendants' Group of Companies, which included EPCM and EPCB (see paragraphs 50 to 59 of their written submissions);

(16) Reliance by the plaintiffs on the draw down notice does not prove that the USD Account was to be the CCA (see paragraphs 64 to 66 of their written submissions);

(17) YEO (PW2) knew that the USD Account of the 1st defendant was operated by the 2nd and 3rd defendants without PW2 as the joint-signatory (see paragraphs 67 to 90 of their written submissions);

(18) Since YEO (PW2) had relied on what was, allegedly, done by Foong in connection with the opening of the USD Account, Foong ought to have been called as a witness by the plaintiffs (see paragraphs 91 to 95 of their written submissions) to corroborate the evidence of YEO (PW2);

(19) The Hicks-Woode Report prepared by PW6 was inaccurate (see paragraphs 96 to 102 of their written submissions);

(20) The Hicks-Woode Report is also inadmissible because the source document must be produced in court before an accounting report can be deemed admissible but the source documents for the Hicks-Woode Report were not produced in Court by the plaintiffs (see paragraphs 96 to 109 of their written submissions);

(21) The various payments, which were made by the 2nd and 3rd defendants from the USD Account, and which are pleaded by the plaintiffs in their statement of claim, are justified as they were made in accordance with the terms and conditions of the Loan Agreement (see paragraph 111 of their written submissions);

(22) A sum of RM 3,000,000.00 had been agreed upon by the parties to the Subscription Agreement and Loan Agreement as repayment to the 2nd and 3rd defendants for the personal loans that they have given to the 2nd and 3rd defendants' Group of Companies (see paragraphs 112 to 116 of their written submissions);

(23) The 2nd defendant had paid more than RM 1 million to EPCM from his own money (see paragraphs 110 and 111 of their written submissions);

(24) The Guarantee and Indemnity Agreement dated 12 November 2007 ("the Guarantee") is invalid, null and void because the 2nd and 3rd defendants were forced to sign the Guarantee for the release of Tranche II of the monies (see paragraphs 117 to 123 of their written submissions);

(25) The plaintiffs have acted *mala fide* with the ill intention to take over the assets and shares of the 2nd and 3rd defendants' Group of Companies based on the following reasons:

(a) No notice was given to the 2nd and 3rd defendants to remedy their breach pursuant to clause 12 of the Loan Agreement before the plaintiffs lodged a police report against the 1st defendant;

(b) The plaintiffs went into the premises of EPCM and EPCB, who were never parties to the *ex-parte* Injunction or Suit 1728;

(c) The plaintiffs dated the share transfer forms, which were signed in escrow by the 2nd and 3rd defendants;

(d) The plaintiffs dated and filled in the resignation forms, which were signed in blank by the 2nd and 3rd defendants;

(e) The new Company Secretary took over, even before her appointment came into effect, without any notice to the previous Company Secretary or the 1st defendant's directors;

(f) The plaintiffs took over the various companies on 28 August 2008; and

(g) The machines which were worth approximately RM 2.5 million were taken over by the plaintiffs from the 1st defendant's company (see paragraphs 124 to 130 of their written submissions);

(26) The *ex-parte* Injunction obtained by the plaintiffs in Suit 1728 did not include the premises of EPCM or E-Circle but the plaintiffs entered the premises of the two companies and a notice was issued by the representative of the plaintiffs to the employees to inform them that EPCM has been taken over by the plaintiffs and that the employees were required to work on Awal Muharam i.e. 19 January 2008, and also on 20 January 2008 and the plaintiffs had also proceeded to freeze the accounts of EPCM despite knowing that EPCM was not in operation (see paragraphs 131 to 133 of their written submissions);

(27) The communications between Loo Tat King (PW5), the lawyer from ZICO, and the 2nd and 3rd defendants are not admissible as evidence in Court as they are protected by professional privilege (see paragraphs 134 and 135 of their written submissions);

(28) The emails, allegedly, sent by Teo and relied upon by the plaintiffs are inadmissible being hearsay evidence since Teo was never called as a witness by the plaintiffs (see paragraphs 136 to 139 of their written submissions);

(29) The discussions between the plaintiffs and the 2nd and 3rd defendants on 12 November 2007, 13 November 2007 and 16 November 2007, respectively, were discussions held to negotiate a settlement and, hence, evidence of what had transpired during these meetings are not admissible as they are "without prejudice" discussions (see paragraphs 140 to 143 of their written submissions);

(30) The 2nd and 3rd defendants' liabilities are limited to the value of the shares and assets that were charged to the plaintiffs under the security documents (see paragraphs 146 to 150 of their written submissions); and

(31) The plaintiffs are bound by the interest rate that is specified in the letter of BNM i.e. 8% per annum, but the plaintiffs have recovered more than what is due to them because the plaintiffs have charged the defendants interest at the rate of 17% under their Subscription Agreement (see paragraphs 151 to 153 of their written submissions).

1st and 2nd plaintiffs' submissions in Suit 2256

[79]Mr. Brendan Siva, the learned counsel for the 1st and 2nd plaintiffs, submitted that the plaintiffs are entitled to prayers 41(2) (a) to (d) of the plaintiffs' statement of claim dated 10 December 2008. He relies on the following reasons:

(1) PW5 confirmed during the trial that ZICO had indeed informed the plaintiffs that the enforcement of the securities under the Subscription Agreement was lawful due to the alleged breaches by the 2nd and 3rd defendants (see also A15.3 (ii) at page 105 of P53); and

(2) The plaintiffs had, therefore, lawfully and validly enforced their rights pursuant to the express terms and conditions of the Subscription Agreement and in accordance with the terms and conditions of the security documents.

[80]The other reasons relied upon by Mr. Brendan Siva, the learned counsel for the 1st and 2nd plaintiffs, have been adopted in this judgment.

2nd and 3rd defendants' submissions-in-reply in Suit 2256

[81]In reply, Mr. Krishna Dallumah, the learned counsel for the 2nd and 3rd defendants, submitted that the plaintiffs' claim, as set out in paragraph 179 of their written submissions, fails to account for various payments in paragraph 152 of the written submissions of the 2nd and 3rd defendants dated 8 January 2015 and hence, he prayed that the plaintiffs' claim be dismissed with cost based on the reasons as set out in the 2nd and 3rd defendants' submissions-in-reply and which have been considered by the Court and noted in this Judgment under the various captions below:

Subscription Agreement

[82]The Subscription Agreement was executed between Kendall Court, the 2nd plaintiff, and KJD Glove, Wira International, on the one part with Lim Wan Soon and Leng Khuan Yow (F), the 2nd and 3rd defendants, as Covenantors, on the other part, whereby Kendall Court, the 2nd plaintiff, agreed to invest the Investment Amount i.e. a total sum of USD 8.6 million, in KJD Glove by applying for and subscribing to the Bonds of KJD Glove and subject to the terms and conditions, including the conditions precedent and the conditions subsequent, as set out in the Subscription Agreement.

[83]In consideration of Kendall Court, the 2nd plaintiff, executing the Subscription Agreement, the 2nd and 3rd defendants had also, irrevocably and unconditionally, guaranteed and covenanted as principal debtors and not merely as sureties, jointly and severally, with Kendall Court, the 2nd plaintiff.

[84]As security for the Investment Amount, various security documents were executed in favour of Kendall Court, the 2nd plaintiff.

Loan Agreement

[85]The Loan Agreement was executed between KJD Glove and Maple Challenge, the 1st defendant, whereby KJD Glove agreed to, *inter alia*, grant and make available to Maple Challenge, the 1st defendant, a term loan up to a maximum aggregate principal amount of USD 8,600,000.00 ("the Loan Amount") which was to be drawn down in two tranche payments amounting to USD 4,300,000.00 per tranche (see clause 2.1 at page 22 Bundle C).

Whether the 1st plaintiff has the ***locus standi*** to commence Suit 2256?

[86]In paragraphs 6 to 12 of their written submissions, the 2nd and 3rd defendants contended that the 1st plaintiff had no *locus standi* to commence Suit 2256 primarily because the Deed of Accession was marked only as ID7 and there were different versions of the signing page.

[87]The 2nd and 3rd defendants' submitted-in-reply that in paragraphs 27 to 31 of the plaintiffs' written submissions, the plaintiffs contended that the original copy of ID7 was lost but they did not explain the following matters:

(a) Why was the signature in ID7 different? (see Annexure 4, an excerpt of PW4's evidence)?

(b) Why did Dennis Wuisan (PW4) say that ID7 was not the original?

(c) Why were there different copies of ID7?

(d) Why did Chris Chia (PW1) not give evidence on what had happened to the final copy of ID7 that was to be sent to him?

(e) Why Dennis Wuisan's (PW4's) original signature and Chris Chia's (PW2's) original signature could not be located? (see Annexure 4, an excerpt of PW4's evidence). All PW1 said was that it could have been lost during the moving of the Jakarta office in 2009;

(f) Why the pages of ID7 are not paginated?;

(g) Why the director's indemnity letter that was referred to in Schedule 7 had not been mentioned anywhere in ID7?;

(h) Why do the signatures appear to be different in ID7 and ID8 and whether the page with the signatures could possibly be from a different document?;

(i) Why was reference made to a Subscription Agreement dated 16 March 2007 instead of a Subscription Agreement dated 15 March 2007?;

(j) Why was no police report made when PW1 and/or PW3 and/or PW4 discovered that the original copy of ID7 was lost?; and

(k) Why was the last page of ID7 printed out using paper that appears different from the paper that was used to print out the first and second pages? (see Annexure 4, an excerpt of PW4's evidence).

[88]Mr. Krishna Dallumah also drew the attention of the Court to what had transpired when this Court had further questioned PW4 on why the signatures appeared to be different in ID7 and ID8 and also on who had initialled

against the words “certified true copy” and PW4 had said “I do not know” (see Annexure 4, an excerpt of PW4’s evidence).

[89]However, the Court rejected the 2nd and 3rd defendants’ contention based on the following reasons:

(1) The marking of the document as ID7 was specifically qualified by Mr. Brendan Siva, the learned counsel for the plaintiffs;

(2) During the trial, the Court had ruled that this issue on the admissibility of ID7 would be determined by the Court after hearing submissions from both parties;

(3) Hence, on 27 March 2014, Mr. Brendan Siva had recalled PW4 to give further evidence on this issue for the purpose of proving that the original copy of ID7 could not be located and must be taken to have been lost;

(4) Upon the conclusion of the trial, the Court agreed with and accepted the submissions of Mr. Brendan Siva, the learned counsel for the plaintiffs, that ID7 is admissible and that, therefore, the marking of ID7 ought to be converted to P7 based on the following reasons:

(a) The only reason why the Deed of Accession was initially marked as ID7 by the Court was because the original of the document could not be located. It is trite law that when an original copy of a document is lost and when sufficient effort has been taken to locate the same but to no avail, secondary evidence of the document can be admitted as evidence in Court (see section 65 of the Evidence Act 1950 and *Tan Sri Tan Hian Tsin v Public Prosecutor* [1979] 1 MLJ 73);

(b) Secondary evidence includes copies made from or compared with the original counterparts of documents as against the parties, who did not execute them or oral accounts of the contents of a document given by some person, who has himself seen or heard it or perceived it by whatever means (see section 63 of the Evidence Act 1950);

(c) PW4 (Dennis Wuisan) has testified at length as follows as to the manner in which ID7 was executed and signed in counterparts and the reason why the original copy of ID7 could not be located:

(i) PW1 executed ID7 on 16 March 2007;

(ii) PW1 then emailed or faxed the Deed of Accession to the remaining parties for their execution;

(iii) The original document was couriered by PW1 to PW4 in Jakarta; and

(iv) Each party then executed their respective parts and sent it back to PW1;

(v) However, the original copy of ID7, which was executed by the 2nd and 3rd defendants, was never sent back to PW1 (see Q&A 2 and 13 and the subsequent questions by the learned Judge on pages 10 to 12 of the Notes of Proceedings for 27 March 2014);

(vi) The only original copy that is currently in the possession of PW4 is the one that contains the signature of one Chin Chee Kee, ID7B;

(vii) The remainder of ID7B is a copy made from the original, i.e. a photostated copy (see the question by the learned Judge on page 17 of the Notes of Proceedings for 27 March 2014);

(viii) The original copy of ID7 which contains the signatures of both PW1 and PW4 could not be located by PW4;

(ix) An attempt was made by PW4 to locate the same but he had failed to do so;

(x) The Jakarta office of PW4 had moved in 2009; and

(xi) Hence, it is possible that the original copy could have been lost during the move (see Q&A 14 at pages 12 and 13 of the Notes of Proceedings for 27 March 2014);

(5) Based on the evidence of PW4 as set out above, the Court found that there is credible and cogent evidence of the following facts:

(a) ID7 was executed in counterparts;

(b) Despite taking efforts to locate the original copy of ID7, which contains the signatures of PW1 and PW4, PW4 had failed to locate the same; and

(c) ID7 and ID7B are copies made from the original copy of the Deed of Accession.

(6) Therefore, the Court converted ID7 to P7 before arriving at its decision for Suit 2256;

(7) The Court also took into consideration the fact that, in their pleadings, the 2nd and 3rd defendants have not specifically denied the existence of the Deed of Accession and its effect on the transactions between the contracting parties. In other words, the *locus standi* of the 2nd plaintiff was never challenged in their pleadings by the 2nd and 3rd defendants. It is trite law that parties are bound by their pleadings; and

(8) Be that as it may, even if the Deed of Accession is not admitted into evidence, it does not in any way exonerate the 2nd and 3rd defendants because the 2nd and 3rd defendants are still liable as covenantors to return to the 2nd plaintiff the sums of monies claimed by the 2nd plaintiff under the Subscription Agreement.

Whether the Subscription Agreement is invalid, illegal and a sham?

[90]The 2nd and 3rd defendants contended in paragraphs 13 to 15 of their written submissions that the Subscription Agreement is invalid, illegal and a sham as the Investment Amount was never disbursed directly to KJD Glove.

[91]In paragraphs 33 to 40 of the plaintiffs' written submissions, the plaintiffs contended that the Investment Amount was never disbursed directly to KJD Glove due to the 2nd and 3rd defendants' request for Tranche I of the loan to be released on an urgent basis.

[92]In reply to paragraphs 33 to 40 of the plaintiffs' written submissions, the 2nd and 3rd defendants submitted that there is no evidence to show that the 2nd and 3rd defendants had requested for Tranche I of the loan to be released on an urgent basis. Exhibit P3 is merely a supplemental letter and not a letter requesting for the money to be released on an urgent basis, while Exhibit D60 is merely a letter from the 1st defendant to KJD Glove to release the money into the USD account.

[93]The 2nd and 3rd defendants also submitted that the CCA was in fact never opened and the plaintiffs cannot presume that the USD Account was to be the CCA. Monies should have been transferred/paid by the 2nd plaintiff into the CCA of KJD Glove and then transferred/paid by KJD Glove into the USD Account. The 2nd and 3rd defendants relied on paragraphs 13 to 15 of their written submissions dated 8 January 2015.

[94]It is also the contention of the plaintiffs, that if this Court agrees with the 2nd and 3rd defendants' submissions that the Subscription Agreement is invalid, null and void, the 2nd and 3rd defendants are, nonetheless, bound to restore the money to the 2nd plaintiff.

[95]However, in reply to the plaintiffs' contentions, the 2nd and 3rd defendants submitted that in that case, the plaintiffs are also bound to restore the 2nd and 3rd defendants to their original positions but the plaintiffs are not able to do that because they have already obtained the *ex parte* Injunction against the defendants in Suit 1728 with the resulting adverse consequences to the defendants, in particular, the companies concerned in the 2nd and 3rd defendants' Group of Companies have been wound up whilst the 2nd and 3rd defendants have been adjudicated bankrupt.

[96]Section 66 of the Contracts Act 1950 does not apply to the facts of the instant case based on the following reasons:

(a) The plaintiffs had Loo Tatt King (PW5) as their legal advisor;

(b) Loo Tatt King (PW5) was aware of section 147 (1) of the Offshore Companies Act 1990 and he had referred to it in his legal opinion, which was a condition precedent (see pages 211 to 219 of Bundle I, Exhibit P64); and

(c) Loo Tatt King (PW5) had, in fact, requested permission from LOFSA under section 147 (1) of the Offshore Companies Act 1990 (see page 425 of Bundle E).

[97]In the circumstances, the plaintiffs were parties to the illegality and they have not come to the Court with clean hands (see *Soh Eng Keng v Lim Chin Wah* [1979] 2 MLJ 91 and *Hashim bin Adam v Daya Utama Sendirian Berhad* [1980] 1 MLJ 125).

[98]Alternatively, the plaintiffs have already been restituted since they have enforced the securities. The 2nd and 3rd defendants relied on paragraphs 144 of 152 of their written submissions dated 8 January 2015.

[99]It is the contention of the plaintiffs that the Subscription Agreement is valid and binding in law. However, the 2nd

and 3rd defendants submitted that as the plaintiffs were aware or should have been aware of the illegality, the Court should not assist the plaintiffs and the loss should lie where it falls. Further, the manner in which the transaction was carried out was to conceal its true nature and character from LOFSA and BNM and, therefore, the whole transaction was a sham.

[100]The plaintiffs contended that the disbursement of the monies directly from the 2nd plaintiff to the 1st defendant did not alter the structure of the transaction. However, the 2nd and 3rd defendants submitted that the Subscription Agreement and the Loan Agreement were put in place to disguise the true nature and character of the transaction. They also submitted that the plaintiffs have not explained why the 1st defendant was made to pay interest at the rate of 17% per annum under the Subscription Agreement, while under the Loan Agreement, the rate of the interest that was charged was merely 8% per annum.

[101]However, the Court rejected the contentions of the 2nd and 3rd defendants based on the following reasons:

(1) The Court agreed with and accepted the submissions of the plaintiffs that the Subscription Agreement is valid in law as it is a genuine contract between the parties concerned;

(2) The Subscription Agreement provided for the Investor i.e. Kendall Court, the 2nd plaintiff, to pay the Investment Amount directly to KJD Glove, which is stated as the "Company" in the preamble to the Subscription Agreement, by paying the Investment Amount into the "Cash Collateral Account";

(3) It is clearly stated in clause 4.4(c) of the Subscription Agreement that the "Cash Collateral Account" shall be an account jointly opened by KJD Glove and the 2nd plaintiff. Therefore, the CCA is distinct from the USD account;

(4) However, it is undisputed that the Investment Amount was not disbursed directly to KJD Glove;

(5) The Court found that there is a good and satisfactory reason why the Investment Amount was not disbursed directly to KJD Glove;

(6) This is because there was sufficient evidence before the Court that the 2nd and 3rd defendants had requested for the Investment Amount to be disbursed on an urgent basis, directly, into the USD Account of Maple Challenge, the 1st defendant (see A9.5 at pages 60-61 of PW2's witness statement (Exhibit P53), Exhibit P3 at pages 175 to 175A Bundle H and Exhibit D60 at page 73 Bundle I);

(7) After the monies were disbursed into the USD Account of the 1st defendant, the USD Account of the 1st defendant was then deemed to be the "Cash Collateral Account" (see A9.1.7 at page 59 of PW2's witness statement (Exhibit P53);

(8) This is pursuant to the definition of the words "Cash Collateral Account" as set out in clause 4.4(c) of the Subscription Agreement. By virtue of this definition, the "Cash Collateral Account" is "the bank account to be set up with a bank and on such terms and conditions as approved by the Investor, into which the proceeds from the subscription of the Bonds shall be paid into. The "Cash Collateral Account" shall be jointly operated by the Company and the Investor (see the definition of the "Cash Collateral Account" at page 433 of Bundle E);

(9) Hence, the Court was satisfied that the disbursement of the Investment Amount in this manner was valid even though it was not done in compliance with and in accordance with the terms and conditions of the Subscription Agreement and that the 2nd and 3rd defendants have agreed the USD Account which is deemed to be the CCA shall be jointly operated by KJD Glove and the 2nd plaintiff;

(10) Hence, the 2nd and 3rd defendants are estopped from relying on this ground to defeat the plaintiffs' claim. In other words, the 2nd and 3rd defendants cannot use the non-disbursement of the Investment Amount into the CCA as a reason to claim that the Subscription Agreement was invalid since the plaintiffs have established the fact that the Investment Amount was disbursed directly into the USD Account of Maple Challenge, the 1st defendant, for its benefit and upon its own request;

(11) It follows from the above, that having already utilized, without any complaint whatsoever, the monies that they had received in the USD Account of Maple Challenge, the 1st defendant, the defendants are bound to restore it to the 2nd plaintiff as they have received an advantage under the Subscription Agreement (see section 66 of the Contracts Act 1950 and *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301); and

(12) Section 66 of the Contracts Act 1950 states as follows:

"Obligation of person who has received advantage under void agreement, or contract that becomes void

66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

ILLUSTRATIONS

(a) A pays B RM 1,000 in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the RM 1,000.

(b) A contracts with B to deliver to him 250 gantangs of rice before the 1st of May. A delivers 130 gantangs only before that day, and none later. B retains the 130 gantangs after the 1st of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her RM100 for each night's performance. On the sixth night A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for RM 1,000, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the RM 1,000 paid in advance."

Illegality

[102]In paragraphs 44 to 46 of their written submissions, the 2nd and 3rd defendants contended that the loan was illegal and, therefore, pursuant to section 24 of the Contracts Act 1950, the loss should lie where it falls.

[103]S 24 of the Contracts Act 1950 (Act 136) provides as follows:

"24. **What considerations and objects are lawful, and what not** The consideration or object of an agreement is lawful, unless—

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another, or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

ILLUSTRATIONS

(a) A agrees to sell his house to B for RM10,000. Here, B's promise to pay the sum of RM10,000 is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the RM10,000. These are lawful considerations.

(b) A promises to pay B RM1,000 at the end of six months, if C, who owes that sum to B , fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d) A promises to maintain B's child, and B promises to pay A RM1,000 yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay RM1,000 to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between Aand B is void, as it implies a fraud by concealment, by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under a written law, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's advocate, promises to exercise his influence, as such, with B in favour of C, and C promises to pay RM1,000 to A. The agreement is void, because i t is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code."

[104]In reply to paragraphs 41 and 60 of the plaintiffs' written submissions, the 2nd and 3rd defendants submitted that it is trite law that the Court can take cognisance of illegality even if it is not pleaded. Here, illegality was raised in the Defence (see paragraph 13 of the statement of defence at page 131 of Bundle A).

[105]In reply to the plaintiffs' submissions on section 147(1) of the Offshore Companies Act 1990, the 2nd and 3rd defendants submitted as follows:

(a) All the powers of attorney were in the Deeds of Charge and were in favour of Dennis Wuisan (PW4);

(b) PW4 was the sole director of KJD Glove, which is an offshore company, and thus section 147(4) of the Offshore Companies Act 1990 is applicable as the control of the domestic companies' board of directors was under the control of PW4, who had used the powers of attorney to, in fact, appoint Chris Chia (PW1) and YEO (PW2) as the new directors and shareholders of the three companies and to remove the previous Company Secretary and also the 2nd and 3rd defendants, as directors and shareholders of the three companies.

[106]However, the Court rejected the 2nd and 3rd defendants' contentions that the loan was illegal. The Court agreed with and accepted the plaintiffs' submissions that the loan was not illegal based on the following reasons:

(1) The loan was provided for in the Subscription Agreement, which the Court found to be a valid and binding legal document, and all the transactions were performed pursuant to the terms and conditions as set out in the Subscription Agreement; and

(2) Hence, section 24 of the Contracts Act 1950 is inapplicable;

Approval from LOFSA

[107]In paragraphs 16 to 20 and 26 to 29 of their written submissions, the 2nd and 3rd defendants contended as follows:

(1) although the approval from the Labuan Offshore Financial Services Authority Malaysia ("LOFSA") was for KJD Glove to give a loan to the 1st defendant, the monies, nonetheless, came from the 2nd plaintiff;

(2) the securities were held in favour of the 2nd plaintiff in breach of section 147(1) of the Offshore Companies Act 1990;

(3) PW4, as the sole director of KJD Glove, had a "controlling interest" in the 1st defendant;

(4) LOFSA was not informed of the existence of the Subscription Agreement;

(5) In fact, LOFSA's approval was for KJD Glove to hold the debt obligation and not for the 2nd plaintiff to do so (see Annexure 5, an excerpt of PW5's evidence);

(6) Loo Tatt King (PW5) was the plaintiffs' own solicitor and in cross-examination, PW5 admitted that KJD Glove would be holding the securities of the debt obligation under the Subscription Agreement;

(7) Further, PW5 also admitted that KJD Glove was set up by the 2nd plaintiff (see Annexure 5, an excerpt of PW5's evidence); and

(8) If the plaintiffs contend that KJD Glove did not hold the securities, then this would contradict the approval by LOFSA under section 147(1) of the Offshore Companies Act 1990 (see page 425 of Bundle E).

[108]However, the Court rejected their contentions because these contentions and the particulars of these contentions were not pleaded by the 2nd and 3rd defendants in their statement of defence. It is trite law that parties are bound by their pleadings (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 and *Pacific Forest Industries Sdn Bhd & Anor v Lin-Wen Chih & Anor* [2009] 6 MLJ 293).

[109]Be that as it may, the Court agreed with the submissions of the plaintiffs that these contentions are unsustainable both in law and on the facts for the following reasons:

(1) The fact that the monies came directly from the 2nd plaintiff was as a result of the 2nd defendant's own action;

(2) The 1st and 2nd plaintiffs have proven the following primary facts:

(a) Under the Subscription Agreement, the 2nd plaintiff was to invest the Investment Amount in KJD Glove (see clause 3.2 and 3.4 at page 441 of Bundle E);

(b) Thereafter, under the Loan Agreement, KJD Glove was to grant the 1st defendant the Loan Amount, which was to be drawn down in two tranche payments amounting to USD 4,300,000.00 per tranche (see clause 2.1 at page 22 of Bundle C);

(c) But the 2nd and 3rd defendants had requested for the Investment Amount to be disbursed on an urgent basis directly to the USD Account of the 1st defendant; and

(d) Accordingly, the sum of USD 4,189,033.00 was transferred into the 1st defendant's USD Account (see A9.5 at pages 60 and 61 of PW2's witness statement (Exhibit P53), page 370 of Bundle D and Q&A 330 at page 45 of the Notes of Proceedings for 8 May 2014).

Cash Collateral Account (CCA)

[110]In paragraph 61 of their written submissions, the 2nd and 3rd defendants contended that the plaintiffs' pleaded case was never that the CCA is the USD Account.

[111]However, the Court rejected the 2nd and 3rd defendants' contention based on the following reasons:

(1) The plaintiffs did plead in their statement of claim that KJD Glove proceeded to open or cause the opening of the USD Account, which was, subsequently, used as the CCA, in accordance with the terms of the Subscription Agreement; and

(2) The plaintiffs had, in accordance with the terms of the Subscription Agreement, deposited or caused to be deposited Tranche I of the loan amounting to USD 4,189,033.00 into the CCA on 20 March 2007 (see paragraph 21 and 22 of the plaintiffs' statement of claim at page 80 Bundle A).

[112]To this, the 2nd and 3rd defendants contended in paragraph 36 of their written submissions that since the USD Account was not opened by KJD Glove, the USD Account cannot be deemed as the CCA.

[113]However, the Court rejected the 2nd and 3rd defendants' contention based on the following reasons:

(1) The 2nd and 3rd defendants cannot be allowed to rely on this argument, as this is clearly an attempt to deviate from the main issue i.e. that whatever is said and done, the sum of USD 4,189,033.00 was paid into the USD Account and it was received by the 1st defendant;

(2) They cannot run away from the fact that the loan was given by the 2nd plaintiff to the 1st defendant and such loan must be accounted for by them; and

(3) In any event, the transfer of the aforesaid sum was done at the request of the 2nd defendant himself wherein the 2nd defendant (DW1), as the managing director of the 1st defendant, had requested for the monies to be deposited into the 1st defendant's USD Account (see page 73 Bundle I - Exhibit D60).

[114]The Court agreed with and accepted the submission of the plaintiffs that the USD Account is deemed as the CCA based on the following reasons:

(1) Upon being shown the Maybank statement of account for the 1st defendant at page 370 of Bundle D, DW1 agreed during cross-examination that the sum of USD 4,189,033.00 was transferred by the 2nd plaintiff into the 1st defendant's USD Account on 20 March 2007 (see Q&A 330 at page 45 of the Notes of Proceedings for 8 May 2014);

(2) The 2nd and 3rd defendants in their own statement of defence admitted that the USD Account and the RM Account were opened with Malayan Banking Bhd in compliance with the terms of the Subscription Agreement (see paragraph 18 of the Defence at page 131 Bundle A). This must be taken to mean that the USD Account and the RM Account were opened for the purpose of the CCA as set out in the Subscription Agreement; and

(3) The 2nd defendant, who was then the managing director of the 1st defendant, had accepted this manner as the manner in which the money will be deposited directly from the 2nd plaintiff to the 1st defendant. If the 2nd defendant did not agree to such a manner or arrangement, he ought to have protested or objected to the same. The fact remains that there is no evidence that there was ever any such protest or objection from the 2nd defendant.

Whether Lim Wan Soon and Leng Khuan Yow (F) have complied with all the conditions precedent in the Subscription Agreement?

[115]The 2nd and 3rd defendants contended that the conditions precedent in the Subscription Agreement are to be complied with not just by the 2nd and 3rd defendants but also KJD Glove and the existing shareholders of KJD Glove and also Wira International, which is not a party to this suit, and also by the plaintiffs themselves and their solicitors, ZICO, who were tasked with the duty to ensure that these obligations were met or waived.

[116]However, the Court agreed with and accepted the plaintiffs' contention in paragraphs 14 and 15 of the plaintiffs' written submissions that it is the 2nd and 3rd defendants' obligation to fulfill all the conditions precedent in the Subscription Agreement. The Court found that the 2nd and 3rd defendants have failed to comply with all the conditions precedent in the Subscription Agreement based on the following reasons:

(1) Lim Wan Soon and Leng Khuan Yow (F), the 2nd and 3rd defendants, were under a contractual obligation to fulfill the conditions precedent as set out in the Subscription Agreement;

(2) The 2nd and 3rd defendants had requested for the Investment Amount to be disbursed on an urgent basis to the USD Account of Maple Challenge, the 1st defendant;

(3) This led to their request for the postponement of the fulfillment of all the conditions precedent as set out in the Subscription Agreement (see A9.5 at pages 60-61 of PW2's witness statement (Exhibit P53), Exhibit P3 at pages 175-175A, Bundle H and Exhibit D60 at page 73, Bundle I);

(4) At that point in time, the conditions precedent which had not been complied with after the execution of the Subscription Agreement and the Loan Agreement, are those conditions precedent, which are set out in the supplemental letter dated 15 March 2007, that was executed in counterparts by the 2nd and 3rd defendants, KJD Glove and Wira International.

[117]The letter is important and is reproduced below:

"Date: 15 March 2007

To: KENDALL COURT MEZZANINE (ASIA) INVESTMENT MANAGER LIMITED

P.O. Box 709GT, 122 Mary Street

Zephyr House

Grand Cayman

Cayman Islands

Attention: Yeo Kar Peng/Chris Chia/Dennis Wuisan

Dear Sirs

SUBSCRIPTION AGREEMENT RELATING TO ISSUE OF US$8.6 MILLION CONVERTIBLE BONDS BY KJD GLOVE (L) LIMITED: SUPPLEMENTAL LETTER ON NON-SATISFACTION OF CONDITIONS PRECEDENT

We refer to the Subscription Agreement dated 15 March 2007 (the "**Subscription Agreement**") between KJD Glove (L) Limited (the "**Company**"), Lim Wan Soon and Leng Khuan Yow (the "**Covenantors**"), Wira International Limited (the "**Existing Shareholder**") and Kendall Court Mezzanine (Asia) Investment Manager Limited (the "**Investor**"), in respect of the issue by the Company and the subscription by the Investor of Bonds up to the amount of US$8,600,000.

This letter is supplemental to the Certificate of even date under clause 4.3(d) of the Subscription Agreement, executed by the Company, the Covenantors and the Existing Shareholder (the "**Certificate**"). Terms defined in the Subscription Agreement shall have the same meaning when used in this Certificate.

We hereby confirm that, notwithstanding Paragraph (c) of the Certificate, the following conditions precedent to the Completion of the issuance of the Tranche I Bonds have yet to be satisfied as of the date of this letter.

S/No.	Clause in Subscription Agreement	Condition Precedent
	2.1(c)(vi)	Impulse Talent Sdn. Bhd. ("ITSB") has yet to: (a) increase its issued and paid up share capital to RM 10,000; (b) purchase the entire issued share capital of EPC Technology (Bangi) Sdn. Bhd. ("EPC Bangi") (5,000,000 ordinary shares of RM 1 each) from the Covenantors, such that EPC Bangi becomes a wholly owned subsidiary of ITSB; and (c) subscribe for 4,998 ordinary shares in Maple Challenge Sdn. Bhd. ("MCSB"), such that MCSB becomes a subsidiary ot ITSB. Accordingly, the information regarding the share capital and shareholding structure of ITSB, MCSB and EPC Bangi, as disclosed in Schedule 3 (Group Structure) and Schedule 6 (Particulars of Group Companies) of the Subscription Agreement, are not accurate as fo the date of this letter.
	2.1(g)	The opening of the Cash Collateral Account by the Company has yet to be

S/No.	Clause in Subscription Agreement	Condition Precedent
		completed.
	2.1(j)	The requisite forms for registration of the leasing business of MCSB under section 21(1) of the Banking and Financial Institutions Act ("BAFIA") have been submitted to Bank Negara Malaysia ("BNM"), but the registration has yet to be confirmed in writing by BNM.
	2.1(k)	The written consent of Kuwait Finance House (M) Berhad to the restructuring of the shareholding of EPC Bangi has yet to be received.
	2.1(l)	ITSB has yet to become the holding company of MCSB and EPC Bangi and the issued share capital of ITSB has yet to be increased to RM 10,000 (see item 1 above). Accordingly, the structure of the Group Companies does not correspond with the structure set out in Schedule 3.
	4.3(b)	ITSB has yet to become the holding company of MCSB and EPC Bangi and the issued share capital of ITSB has yet to be increased to RM 10,000 (see item 1 above). Accordingly, ITSB does not yet have any share certificates of MCSB and EPC Bangi.

If, notwithstanding the above, the Completion of the subscription of the Tranche I Bonds occurs and the proceeds of the issue of the Bonds are lent by the Company to MCSB pursuant to the Loan Agreement between the Company and MCSB (the "**Loan Agreement**"), we hereby jointly and severally covenant and undertake that we shall procure the satisfactory completion and fulfillment of the above outstanding conditions precedent by no later than 2 weeks from the Tranche I Completion Date. If any of the above conditions precedent are not satisfied within 2 weeks of the Tranche I Completion Date, it will be an Event of Default under the Bonds and under the Loan Agreement.

This letter, together with the covenants and undertakings under this letter, shall be read and construed together with and shall be deemed to be an integral part of, the Subscription Agreement.

This letter may be executed in counterparts.

Yours faithfully

…….……..	…….……..
LIM WAN SOON	LENG KHUAN YOW
……..... (signed) ……	……..……..
Dennis Alexander Wuisan	Name: ……..
For and or behalf of	for and or behalf of

KJD GLOVE (L) LIMITED WIRA INTERANTIONAL LIMITED"

(Emphasis added).

Whether the plaintiffs failed to account for the value of the shareholdings of the 2nd and 3rd defendants, in the EPC Group of Companies, which have been transferred to them?

[118]In reply to paragraphs 22 to 25 of the plaintiffs' written submissions, the 2nd and 3rd defendants submitted as follows:

(1) the plaintiffs have failed to account for the value of the shareholdings of the 2nd and 3rd defendants in the EPC Group of Companies, which have been transferred to them;

(2) The amount of the monies that was obtained by the plaintiffs from the enforcement of the Charges and Deeds of Charge far exceeds what was due to the plaintiffs; and

(3) The plaintiffs in this action have prayed for the Charges to be enforced but, nonetheless, they have already proceeded to enforce the Charges because they have admitted that they have already obtained Judgment-in-default against KJD Glove, which was, in fact, controlled by the plaintiffs themselves.

[119]However, the Court rejected the 2nd and 3rd defendants' contentions. This is because the burden is on the 2nd and 3rd defendants to provide an account of the value of the shareholdings of the 2nd and 3rd defendants in the EPC Group of Companies, which have been transferred to the plaintiffs since it is the 2nd and 3rd defendants who are asserting that the amount of the monies that was obtained by the plaintiffs from the enforcement of the Charges and Deeds of Charge far exceeds what was due to the plaintiffs.

Whether the conditions for the approval of the loan by Bank Negara Malaysia are relevant to the Subscription Agreement?

[120]In paragraphs 21 to 25 of their written submissions, the 2nd and 3rd defendants contended that in the letter dated 23 February 2007 of BNM, it is stated that the interest rate for the Loan Agreement was to be 8% per annum. But the plaintiffs then circumvented this by imposing an interest rate of 17% per annum in the Subscription Agreement. The 2nd and 3rd defendants also contended that the interest rates imposed by the plaintiffs are a sham because of the two differing interest rates in the two agreements.

[121]In paragraph 62 of their written submissions, the plaintiffs contended that BNM's letter does not contain conditions.

[122]However, in reply, the 2nd and 3rd defendants submitted that apart from confirming the registration of the loan given by KJD Glove to the 1st defendant, BNM's letter had also stated that the loan is subject to the terms in the "Lampiran" at page 428 of Bundle E.

[123]In paragraphs 63 to 66 of the plaintiffs' written submissions, the plaintiffs contended that BNM's letter is not relevant to the Subscription Agreement as the Subscription Agreement and the Loan Agreement are two different agreements involving separate parties for separate purposes and the 2nd and 3rd defendants have never objected to the two different rates of interest in the two agreements or raised the issue of the illegality of the Loan Agreement with BNM prior to the filing of this suit by the plaintiffs.

[124]In reply to paragraphs 63 to 66 of the plaintiffs' written submissions, the 2nd and 3rd defendants repeated paragraphs 21 to 25 of their written submissions dated 8 January 2015 and they further relied on Loo Tatt King's (PW5's) evidence, as mentioned above, that LOFSA's approval was for KJD Glove to hold the debt obligation and that under the Subscription Agreement, KJD Glove would be holding the securities of the debt obligation.

[125]In cross-examination, Loo Tatt King (PW5) confirmed that he was involved in the drafting of the letter of application *via* online to BNM and that he had informed BNM that the interest rate was 8% per annum. When he was asked why the rate of interest that was stipulated in the Loan Agreement i.e. 8% per annum, was different from the rate of interest that was stipulated in the Subscription Agreement i.e. 17% per annum, his reply was "I cannot give an answer why it wasn't the same in both agreements" (see Annexure 5, an excerpt of PW5's evidence).

[126]However, the Court rejected the contentions of the 2nd and 3rd defendants based on the following reasons:

(1) BNM's letter does not contain conditions which are to be imposed on the parties to the Subscription Agreement;

(2) It is only a confirmation of the registration of the loan to be given to the 1st defendant by KJD Glove;

(3) This is clear from paragraph 2 of the letter, in which BNM provides the 1st defendant with a registration number i.e. F075107T for the loan (see page 426 of Bundle E);

(4) In cross-examination, the 2nd defendant (DW1) agreed that this letter of BNM is a confirmation of the registration of the loan (see Q&A 296 at page 34 of the Notes of Proceedings for 8 May 2014);

(5) The terms as set out in the "Lampiran" in Malay or "Annex" in English to the letter of BNM are terms which were provided to BNM for the purposes of the registration of the loan transaction;

(6) The Subscription Agreement and the Loan Agreement are two separate documents, involving separate parties for separate purposes;

(7) The purpose of the Subscription Agreement was for the 2nd plaintiff to subscribe to the Bonds of KJD Glove and the Bond itself carries a bond yield of 17% (see Q&A 1128 at pages 128 and 129 of the Notes of Proceedings for 25 March 2014);

(8) At all material times, this bond yield was never challenged and/or disputed by the parties to the Subscription Agreement;

(9) It was a commercial transaction entered into at arm's length by the parties to the Subscription Agreement;

(10) As for the Loan Agreement, which was signed between KJD Glove and the 1st defendant, the loan carries an interest rate of 8% (see Q&A 1128 at pages 128 and 129 of the Notes of Proceedings for 25 March 2014);

(11) Again, this interest rate charged was not challenged and/or disputed by the parties to the Loan Agreement at all material times;

(12) It was also a commercial transaction that was entered into at arm's length by the parties to the Loan Agreement;

(13) The Loan Agreement and the Subscription Agreement were both executed by the 2nd and 3rd defendants on 15 March 2007; and

(14) Hence, they are bound by the strict terms of the two agreements.

[127]It is also significant that Tranche I of the Investment Amount amounting to USD 4.3 million was disbursed on 20 March 2007 (see page 370 Bundle D). In arriving at the above conclusion, the Court took into account the following evidence of the parties's witnesses:

(a) In cross-examination, the 2nd defendant (DW1) admitted that the issue concerning the illegality of the loan was never raised by him from the time the monies were received by the 1st defendant in March 2007 right until November 2007 (see Q&A 309 at page 39 of the Notes of Proceedings for 8 May 2014);

(b) In cross-examination, the 2nd defendant (DW1) also admitted that no letter was ever issued to BNM to even clarify with BNM whether the loan transaction was illegal or not (see Q&A 314 at page 40 of the Notes of Proceedings for 8 May 2014);

(c) There is also no evidence of any letter ever being issued to BNM to complain about any alleged breach of BNM's alleged "conditions" in the granting of its approval; and

(d) BNM has never confirmed that the loan transaction is illegal and in breach of any alleged "conditions" imposed by them.

The role of Wira International

[128]In paragraphs 41 to 43 of their written submissions, the 2nd and 3rd defendants contended that the plaintiffs' claim has no merit because Wira International was not made a party to this suit and no action was ever taken against Wira International by the plaintiffs.

[129]In the plaintiffs' submissions, the plaintiffs contended that it is their prerogative not to bring in Wira International as a party to this action and they cited *The State Government of Sarawak & Ors v Teo Soo Chuan* [2014] 4 MLJ 114 in support of their contention.

[130]In their submissions-in-reply, the 2nd and 3rd defendants' contended that the plaintiff's contention ought to be rejected because that case is not applicable to this action as it is a case on easement.

[131]However, the Court rejected the 2nd and 3rd defendants' contention based on the following reasons:

(1) The Court agreed with and accepted the submissions of the plaintiffs that it is always the choice of a plaintiff to decide as to the cause of action on which to mount a claim against a defendant and also the facts that a plaintiff chooses to rely upon in support thereof;

(2) A plaintiff is also entitled to the decision on the case that it puts before the Court, and not on the case that it could have put before the Court;

(3) The decision of the Court in *The State Government of Sarawak & Ors v Teo Soo Chuan, supra* is applicable to the facts of this action even though it is a case on easement;

(4) Therefore, the choice not to proceed with Court action against Wira International remains a prerogative of the plaintiffs in this suit; and

(5) Be that as it may, if the 2nd and 3rd defendants were of the view that Wira International ought to have been made a party to this proceedings, they should have issued a third party notice to Wira International. This was not done by the 2nd and 3rd defendants and they cannot now put the blame on the plaintiffs.

The purpose of the loan

[132]In paragraphs 50 to 59 of their written submissions, the 2nd and 3rd defendants contended that the purpose of the loan as set out in clause 2.1 of the Loan Agreement included allowing the 1st defendant to extend inter-company loans to the Group Companies as set out in paragraph 53 of their written submissions. The 2nd and 3rd defendants also contended that the plaintiffs' own statement of claim refers to EPCM and E-Circle as being part of the Group Companies.

[133]In paragraphs 85 to 94 of the plaintiffs' written submissions, the plaintiffs contended that the purpose of the Subscription Agreement and Loan Agreement does not dictate the manner in which the loan is to be utilized.

[134]In reply, the 2nd and 3rd defendants submitted that the purpose of the Subscription Agreement and the Loan Agreement had been clearly stated therein and it does include inter-company loans and, therefore, the 2nd and 3rd defendants had utilised the loan monies in a manner that is allowed for in the Subscription Agreement as well as in the Loan Agreement.

[135]However, based on the following reasons, the Court rejected the 2nd and 3rd defendants' contentions as being wholly misconceived:

(1) The Court noted that in this action, the plaintiffs have specifically pleaded in their statement of claim that their cause of action is under the Subscription Agreement

(2) The plaintiffs have also alleged in paragraphs 10(iii) (a) and (b) of their statement of claim that the parties to the Subscription Agreement have expressly agreed and undertaken to use and apply the Investment Amount for the two purposes specifically pleaded therein (see paragraph 9 to 13 of statement of claim at page 64 to 73 of Bundle A);

(3) The 2nd and 3rd defendants have misconstrued clause 3.1 of the Subscription Agreement and clause 2.2 of the Loan Agreement;

(4) Clause 3.1 of the Subscription Agreement provides as follows:

> "
>
> 3. USE OF PROCEEDS AND SUBSCRIPTION OF BONDS
>
> 3.1 Use Of Proceeds: The Company hereby agrees with and undertakes to the Investor that it will, and the Covenantors and the Existing Shareholder hereby agree with and undertake to the Investor that they will procure that the **Company will, use the subscription monies received from the Inventor pursuant to the subscription of the Bonds to extend a loan to Maple Challenge Sdn. Bhd., to enable Maple**

> **Challenge Sdn. Bhd. to purchase plant machinery and extend inter-company loans for the purposes of the business of the Group."**
>
> (Emphasis added).

(5) However, the Subscription Agreement is the agreement whereby the 2nd plaintiff has agreed to invest the Investment Amount in KJD Glove by applying and subscribing to the "bonds" of KJD Glove subject to the terms and conditions as set out in the Subscription Agreement;

(6) The Subscription Agreement is not the agreement which dictates the manner in which the loan is to be utilized by the 1st defendant;

(7) The clause that dictates and governs the purpose upon which the 1st defendant can use the proceeds of the loan is clause 2.2 of the Loan Agreement;

(8) However, in constructing what are the purposes for which the loan proceeds may be utilized, it was clear to the Court that it is clause 2.2 of the Loan Agreement that must be referred to and not clause 3.1 of the Subscription Agreement;

(9) Clause 2.2 of the Loan Agreement provides as follows:

> **"2.2 Purpose**
>
> The Borrower hereby agrees with and undertakes to the Lender that it will use the Loan for the following purposes:-
>
> (a) the purchase plant machinery in order to enable the Borrower to lease the plant machinery to EPC Technology (Bangi) Sdn Bhd and Maple Strategies Sdn Bhd, for the purposes of such Group Companies' business; and
>
> (b) to on-lend a portion of the Loan to Maple Strategies Sdn Bhd for the working capital requirements of Maple Strategies Sdn Bhd when Maple Strategies Sdn Bhd becomes a subsidiary of Impulse Talent Sdn Bhd."
>
> (See page 22 Bundle C).

(10) However, clause 2.2(b) of the Loan Agreement is not applicable because Maple Strategies, the 5th defendant, never became a subsidiary of Impulse Talent, the 4th defendant (see A10.10 at pages 68 and 69 of PW2's witness statement – Exhibit P53);

(11) The 2nd defendant (DW1) had further confirmed this in cross-examination (see Q&A 172 at page 10 of the Notes of Proceedings for 26 November 2014);

(12) Therefore, clause 2.2(a) of the Loan Agreement is the only clause that spells out the purpose for which the loan proceeds may be utilized;

(13) It is trite law that the construction of a written agreement is a question of mixed law and fact. The expression "construction" as applied to a document includes two things, first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them;

(14) The determination of the meaning of the words is a question of fact. The determination of the legal effect which is to be given to the words is a question of law;

(15) The following excerpt from Chitty on Contracts, Volume I, General Principles, Sweet & Maxwell is directly applicable:

> **"Law and fact.** The construction of written instruments is a question of mixed law and fact. The expression "construction" as applied to a document includes two things, first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. Construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts. However, the meaning of an ordinary English word, of

technical or commercial terms and of latent ambiguities, and the discovery of the surrounding circumstances (when they are relevant) are questions of fact."

(16) It is trite law that the modern approach to the construction of a contract is to apply the common-sense principles by which any serious utterance would be interpreted in ordinary life subject to examination of the relevant circumstances surrounding the transaction;

(17) The following excerpts from Chitty on Contracts, Volume I, General Principles, Sweet & Maxwell are directly applicable to the facts of the instant case:

> **"Principles of construction.** Certain principles of construction have been formulated by the courts. Previously, these principles, referred to as "rules", were applied somewhat rigidly and adhered to tenaciously (even though the application of one rule in preference to another might lead to an opposite result). However, it has been pointed out that **the modern approach to construction is**:
>
> > "… to assimilate the way in which [contractual] documents are interpreted by judges to **the common-sense principles by which any serious utterance would be interpreted in ordinary life**."
>
> As a result, most principles of construction are nowadays better regarded merely as guidelines or assumptions as to what the court may regard as the normal use of language and which assist judges to arrive at a reasonable interpretation of the words used, though **subject to examination of the relevant circumstances surrounding the transaction**. Some principles, on the other hand, such as the contra proferentem principle, are of a different nature in that they are less obviously designed to assist in interpretation and are more closely assimilated to "rules" in the traditional sense.
>
> (Emphasis added).

(18) It is trite law that in constructing a contract, the starting point is that words are to be given their ordinary and natural meaning. The ordinary and natural meaning is not necessarily the dictionary meaning of the word. It is that which is generally understood. Hence, terms are to be understood in their plain, ordinary, and popular sense, unless the terms have acquired a peculiar sense distinct from the popular sense of the same words; or unless the terms are to be understood in some other special and peculiar sense based on the context in which the words are used in order to give effect to the immediate intention of the parties to that contract;

(19) The following excerpt from Chitty on Contracts, Volume I, General Principles, Sweet & Maxwell is directly applicable:

> **"Adoption of the ordinary meaning of words.** The starting point in constructing a contract is that words are to be given their ordinary and natural meaning. This is not necessarily the dictionary meaning of the word, but that in which it is generally understood. The courts assume that the parties have used language in the way that reasonable persons ordinarily do. So terms are:
>
> > "… to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."

(20) It is also trite law that where the same words or contractual provisions have for many years received a judicial contruction, the court will suppose that the parties have contracted upon the belief that their words

will be understood in the accepted legal sense. This principle of construction is known as the established judicial contruction;

(21) The following excerpt from Chitty on Contracts, Volume I, General Principles, Sweet & Maxwell is directly applicable:

> **"Established judicial contruction.** Where the same words or contractual provisions have for many years received a judicial contruction, the court will suppose that the parties have contracted upon the belief that their words will be understood in the accepted legal sense."

(22) Upon constructing the words of clause 2.2(a) based on their ordinary and natural meaning, the Court was satisfied that clause 2.2(a) clearly provides that the loan sum can only be used to *purchase plant and machinery* to be subsequently *leased* to *EPCB and MSSB* for the purposes of *such* Group Companies' business and that it cannot under any circumstances be construted or interpreted to allow inter-company loans to the entire Group Companies' business;

(23) The Court is of the considered view that the attempt by the 2nd and 3rd defendants to combine the two separate and distinct clauses in two different agreements in order to support his contention that the loan proceeds can be utilized for inter-company loans to any company within the 2nd and 3rd defendants' group of companies and to rely upon the definitions of the words "Group of Companies" in both Agreements as justification is to ignore and disregard the specific wordings of clause 2.2(a) of the Loan Agreement;

(24) Based on the evidence before the Court, there is ample evidence that clause 2.2(a) of the Loan Agreement has clearly been breached as the loan proceeds were in fact utilized in manners not permitted under clause 2.2(a) of the Loan Agreement; and

(25) The fact that the words "Group Companies" in both the Subscription Agreement and the Loan Agreement refer to EPCM and E-Circle as part of their meaning and the plaintiffs themselves admitted as such in their pleading, does not in any way, alter the proper meaning of clause 2.2(a) of the Loan Agreement.

The draw down notice

[136]In paragraphs 64 to 66 of their written submissions, the 2nd and 3rd defendants contended that the plaintiffs' reliance on the draw down notice does not prove that the USD Account was to be the "Cash Collateral Account".

[137]In reply to paragraphs 95 to 96 of the plaintiffs' written submissions on the draw down notice, the 2nd and 3rd defendants repeated paragraphs 64 to 66 of their written submissions dated 8 January 2015.

[138]However, the Court rejected the 2nd and 3rd defendants' contention. This is because based on the reasons given earlier in this Judgment, the Court found that the USD Account was, subsequently, upon the agreement of the parties, deemed to be or treated as the "Cash Collateral Account".

The evidence of PW2

[139]In paragraphs 67 to 90 of their written submissions, the 2nd and 3rd defendants contended that PW2 knew that the USD Account of the 1st defendant was operated by the 2nd and 3rd defendants without PW2 as the joint-signatory. The 2nd and 3rd defendants also contended that the plaintiffs knew of the withdrawals from the RM Account because the cheques for the withdrawals were all co-signed by YEO (PW2). Therefore, the plaintiffs were aware of the transfer of monies from the USD Account to the RM Account.

[140]In paragraphs 98 to 103 of their written submissions, the plaintiffs contended that neither the plaintiffs nor PW2 has any knowledge of the opening of the USD Account or has consented to the same and that it was operated without PW2 as the co-signatory and that the 2nd and 3rd defendants had withdrawn monies from the USD Account and the RM Account without the knowledge or consent of the plaintiffs.

[141]In reply, the 2nd and 3rd defendants contended that the contention of the plaintiffs is untrue because PW2, herself, had gone to the Wisma Genting Branch of MBB to verify her signature and she was informed that the signatories of the USD Account were as per the resolution submitted. Further, she had signed various cheques from the RM Account for payments to be made to the persons or companies named therein. Hence, the 2nd and 3rd defendants reiterated and adopted paragraphs 110 to 116 of their written submissions dated 8 January 2015 and contended that the plaintiffs are, therefore, estopped from saying otherwise.

[142]Further, the following 3 emails, on which the plaintiffs rely on, do not support the plaintiffs' case:

(1) Exhibit P53 is an email dated 13 March 2007 at page 779 of Bundle F, and all that is stated in the email is that the USD Account with MBB was opened but it does not state who are the signatories;

(2) ID68 is an email dated 8 March 2007 at pages 45 to 46 of Bundle I, and it is from Foong, who was never called and the email states, *inter alia,* that the opening of KJD Glove's and/or the 2nd plaintiff's account is still in progress; and

(3) ID69 is an email dated 14 March 2007, at pages 47 to 49 of Bundle I, and it is a mere closing checklist, which distinguishes the Operations Account of the 1st defendant, and which was done (item 6.3) based on the CCA by KJD Glove, and which was almost completed (item 6.4);

[143]The plaintiffs cannot rely on PW2's answer during re-examination in which PW2 testified that she had relied on Foong to ensure that the USD Account and the RM Account were opened with her name as the co-signatory, to support the plaintiffs' case (see paragraph 101(c) of the plaintiffs' written submissions) because it is the plaintiffs' case that the opening of the accounts was handled by Foong but Foong was never called as a witness by the plaintiffs to support their case.

[144]Furthermore, although the plaintiffs have also relied on an alleged transfer form for USD 1.18 million, this form was never produced and this allegation was never put to the 2nd defendant (DW1).

[145]If the plaintiffs are contending that the 2nd and 3rd defendants had falsely represented to PW2 concerning the opening of the USD Account without YEO (PW2) as the co-signatory, the standard of proof that is applicable is that for fraud and the plaintiffs bear the onus of proving the fraud beyond reasonable doubt. Mr Krishna Dallumah cited the following cases in support of his submissions:

(a) The Privy Council in *Saminathan v Pappa* [1981] 1 MLJ 121 ("**Saminathan's** case**")** held as follows:

> "There is a sentence in the trial judge's judgment which suggests that he found this allegation proved but counsel for Saminathan has been unable to point to even a shred of evidence that any such representation, whether true or false, was ever made to the Collector. The onus of proof of fraud in Malaysia is proof beyond reasonable doubt."

(b) The Federal Court in *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 AMR 553, which affirmed the decision of the Privy Council in **Saminathan's** case, stated as follows:

> "The Court of Appeal was misconceived in holding that the proper test to establish fraud is that of on the balance of probabilities. It had obviously misdirected itself in rejecting the proposition of law applied in Saminathan i.e. that the standard of proof for fraud in civil proceedings, is one of beyond reasonable doubt."

(c) The Court in *Asean Securities Paper Mills Sdn. Bhd. v CGU Insurance Bhd* [2007] 2 MLJ 301 held as follows:

> "[16] It is now settled law that the standard of proof required where there is an allegation of fraud in a civil proceedings must be one of beyond reasonable doubt and not on balance of probabilities."

[146]However, in the instant case, apart from merely pleading fraud, the plaintiff did not adduce an iota of evidence to prove that the fraud has been committed by the 2nd and 3rd defendants. Therefore, the plaintiffs have failed to prove fraud against the 2nd and 3rd defendants on a beyond reasonable doubt standard. Mr. Krishna Dallumah cited *Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193 in support of his submissions.

[147]However, the Court rejected the 2nd and 3rd defendants' contentions based on the following reasons:

(1) It is trite law that before the latest decision of the Federal Court in *Sinnaiyah & Sons Sdn. Bhd. v Damai Setia Sdn. Bhd.* [2015] 7 CLJ 584 ("**Sinnaiyah**") that has approved the decision of the Federal Court in

Boonsoom Boonyanit v Adorna Properties Sdn. Bhd. [1997] 3 CLJ 17 CA, the burden of proof that is applicable in proving fraud is proof beyond reasonable doubt as was decided by the Privy Council in **Saminathan's** case;

(2) However, since the three related suits were decided before **Sinnaiyah** was decided by the Federal Court, the decision of of the Privy Council in **Saminathan's** case is still applicable;

(3) The decision of the Privy Council in **Saminathan's** case was affirmed by the Federal Court in *Yong Tim v Hoo Kok Chong & Anor, supra* ;

(4) In *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd, supra* , the Court also held at page 315, that it is settled law that the standard of proof required where there is an allegation of fraud in civil proceedings must be one of beyond reasonable doubt and not on a balance of probabilities;

(5) The Court believed and accepted PW2's evidence that although PW2 had signed the cheques for the withdrawals of the monies from the RM Account she was not told the true purpose of the withdrawals;

(6) There was no reason for PW2 to lie to the Court whereas there was a good reason for the 2nd defendant (DW1) to lie to the Court as he wished to use the loan proceeds to suit his own purposes;

(7) Based on the evidence, the Court drew an irresistible inference that it was the 2nd defendant (DW1), who was one of the two directors in the 1st defendant and who, acting as covenantor to KJD Glove, had proceeded, with the assistance and collusion of Foong, to open/cause the opening of Account No. 7141 5000 1809 with MBB, which was subsequently, used as the USD Account, without making YEO (PW2) the co-signatory of the USD Account;

(8) Hence, at all material times, due to the concealment and misrepresentation by and the collusion between DW1 and Foong, neither the plaintiffs nor PW2 was aware or knew that the USD Account was opened and operated by the 1st defendant without PW2 as a joint-signatory;

(9) In her witness statement, A9.1.2 to A9.1.6 at pages 54 to 59 of Exhibit P53, PW2 explained clearly the events that had transpired, which had led her to believe that she had executed all the relevant documents to become a joint-signatory of both the USD Account and the RM Account (bearing Account No. 5141 5033 2181, which was also opened with MBB by the 1st defendant on/about the same time as the USD Account) when unbeknown to her, she was not made a joint-signatory of the USD Account (see A9.1.2 to A9.1.6 at pages 54 to 59 of Exhibit P53);

(10) PW2 can rely on the 3 emails at A9.1.2 to A9.1.6 of Exhibit P53, which are contemporaneous documentary evidence, to support her oral evidence that she was deceived by Foong, who was acting as the 2nd and 3rd defendants' agent into believing that she was made a co-signatory of the USD Account, when this was false. The email dated 13 March 2007 at page 779 Bundle F is a Part B document. The ID markings on the two remaining emails i.e. the email dated 8 March 2007 at pages 45 and 46 Bundle I (ID68) and the email dated 15 March 2007 at pages 47 to 49 Bundle I (ID69) ought to be converted to P markings i.e. Exhibit P68 and Exhibit P69, respectively, since based on PW2's evidence, Foong was acting as the agent of the 2nd and 3rd defendants with regard to the opening of the USD Account;

(11) During re-examination, PW2 explained why she did not make copies of the other contemporaneous documents relied upon by her to support her oral evidence and why she was under a clear and distinct impression that she was a joint-signatory to the USD Account. Her explanation is as follows:

(a) Upon signing the signature specimen card, PW2 passed the stack of account opening forms and the, respective, bank account opening resolutions together with the, respective, signature specimen cards back to Foong to be handed back to the 2nd and 3rd defendants;

(b) However, at that point in time, it did not occur to PW2 to instruct Foong to make copies of all the documents which were executed by her or showed to her as PW2 had assumed that Foong would make the necessary copies and that he would hand them over to her, subsequently, (see Q&A 1134 at page 132 of the Notes of Proceedings for 25 March 2014);

(c) It was not in the normal course of business to keep a copy of the specimen signatory card and PW2 had never done so in any of her accounts (see Q&A 1132 at page 130 of the Notes of Proceedings for 25 March 2014);

(d) When PW2 went to the 1st defendant's Company Secretary's office after 12 November 2007, she saw a copy of the RM Account opening resolution, which had her name as a joint-signatory;

(e) PW2 then saw the USD Account opening resolution which was different from the copy that was shown to her earlier. The copy at the 1st defendant's Company Secretary's office did not bear PW2's name as a joint-signatory (see Q&A 1133 at pages 131 and 132 of the Notes of Proceedings for 25 March 2014);

(f) PW2 was presented with a transfer form to transfer a sum of USD 1.18 million from the USD Account to the RM Account. The transfer form bore the name of PW2 as a signatory, right next to the name of the 2nd defendant;

(g) PW2 had executed the transfer form before she signed the RM Account cheques (see Q&A 1135 and 1136 at pages 132 and 133 of the Notes of Proceedings for 25 March 2014); and

(h) Hence, PW2 was under a clear and distinct impression that she was a joint-signatory to the USD Account.

[148]Therefore, the Court found that Foong had colluded with the 2nd and 3rd defendants in deceiving the plaintiffs, in particular, YEO (PW2), who was the plaintiffs' representative, at all material times, with regard to the opening of the USD Account without PW2 as the co-signatory. Consequently, the Court found that the plaintiffs had succeeded in proving beyond reasonable that the 2nd and 3rd defendants had, falsely, represented to the 2nd plaintiff that PW2 had been appointed as a joint-signatory of the USD Account with the knowledge that such a fact was not true.

[149]The Court also found that the failure of the 2nd and 3rd defendants to ensure that PW2 was appointed a joint-signatory to the USD Account is a clear breach of the Subscription Agreement and the Loan Agreement (see clause 4.4(c) of the Subscription Agreement at page 443 Bundle E, clause 9(d) of the Loan Agreement at page 47 Bundle C, page 11 Bundle C and Q&A 259 and 260 at page 27 of the Notes of Proceedings for 26 November 2014).

Whether the failure of the plaintiffs to call Foong as a witness is fatal to the plaintiffs' case?

[150]In paragraphs 91 to 95 of their written submissions, the 2nd and 3rd defendants contended that Foong ought to have been called as a witness by the plaintiffs and that the failure of the plaintiffs to call Foong as a witness is fatal to the plaintiffs' case.

[151]In paragraphs 105 to 109 of the plaintiffs' written submissions, the plaintiffs contended that it is the duty of the 2nd and 3rd defendants to call Foong since it is their case that the plaintiffs and PW2 knew that the USD Account was opened without PW2 as the co-signatory.

[152]In reply, the 2nd and 3rd defendants submitted that it is the duty of the plaintiffs to call Foong because YEO (PW2) said that she relied on Foong and the duty to call Foong did not shift to the 2nd and 3rd defendants. This is because the proposition "*secundum allegare et probate*" i.e. he who asserts must prove, applies as provided in section 102 of the Evidence Act 1950 in that "the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side". Hence, the 2nd and 3rd defendants reiterated their reliance on paragraphs 70 to 73 of their written submissions dated 8 January 2015.

[153]However, the Court rejected the 2nd and 3rd defendants' contention based on the following reasons:

(1) The plaintiffs' case is that the USD Account had been opened without the appointment of the 2nd plaintiff's representative, YEO (PW2), as a joint-signatory and this constitutes a breach of the Subscription Agreement;

(2) It is also the plaintiffs' case that at the time the 1st defendant, falsely, represented to the 2nd plaintiff that PW2 had been appointed as a joint-signatory of the USD Account, the 1st defendant had knowledge that the representation was not true;

(3) It is undisputed that PW2 is not a director of Maple Challenge, the 1st defendant (see paragraph 25.2 of the plaintiffs' statement of claim at page 85 Bundle A);

(4) In fact, it was the 2nd and 3rd defendants, who had pleaded that the USD and RM Accounts were opened pursuant to the terms of the Subscription Agreement (see paragraph 18 of the 2nd and 3rd defendants' Defence at page 131 Bundle A);

(5) Hence, Foong is a material witness for the 2nd and 3rd defendants and, therefore, the burden is on the 2nd and 3rd defendants, to call Foong as a witness to prove their allegation that the plaintiffs and/or PW2 had

known all along that the USD Account of the 1st defendant was not opened and operated with PW2 as a joint-signatory;

(6) Since the 2nd and 3rd defendants deny that they have committed the fraudulent misrepresentation and that they have colluded with Foong to open the USD Account without making YEO (PW2) as the joint-signatory, the 2nd and 3rd defendants should not have any problem in calling Foong as their witness to testify in support of their case;

(7) Furthermore, the 2nd and 3rd defendants have alleged that since Foong was an employee of the 2nd plaintiff from January 2007 to April 2007, the plaintiffs and PW2 had knowledge from Foong of the manner in which the USD Account was to be operated i.e. without PW2 as a joint-signatory;

(8) Therefore, it is also incumbent on the 2nd and 3rd defendants to call Foong as a witness to testify and prove that allegation;'

(9) It is trite law that the party who alleges must prove the allegation and the onus is on the 2nd and 3rd defendants to do so (see s 101 of the Evidence Act 1950);

(10) The fact that the 2nd and 3rd defendants had made the allegations as mentioned above and had failed to produce Foong as a witness is fatal to their case (see *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627);

(11) Further, notwithstanding that PW2 had testified as to Foong's role in the opening of the USD and the RM Accounts, it is clear that the only persons, who could open the USD and RM Accounts of the 1st defendant, were the 2nd and 3rd defendants, as they were the only two directors and shareholders of Maple Challenge, the 1st defendant, at that material time (see Q&A 251 at page 26 of the Notes of Proceedings for 26 November 2014 and page 705 Bundle F);

(12) Hence, Foong is not a material witness for the plaintiffs but he is a material witness for the 2nd and 3rd defendants;

(13) Therefore, based on the above reasons, the Court was of the considered view that the failure of the plaintiffs to call Foong as a witness was not fatal to the plaintiffs' pleaded case but it was fatal to the 2nd and 3rd defendants' pleaded case; and

(14) The failure of the 2nd and 3rd defendants to ensure that PW2 was appointed as a joint-signatory to the USD Account is a clear breach of the two agreements (see clause 4.4(c) of the Subscription Agreement at page 443 Bundle E, clause 9(d) of the Loan Agreement at page 47 Bundle C, page 11 Bundle C and Q&A 259 and 260 at page 27 of the Notes of Proceedings for 26 November 2014).

Evidence of PW6

[154]In paragraphs 96 to 109 of their written submissions, the 2nd and 3rd defendants contended that the Subscription Agreement allowed the 1st defendant to give inter-company loans and this included the giving of loans by Maple Challenge, the 1st defendant, to EPCM and EPCB. They also contended that the Hicks-Woode Report prepared by PW6 was inaccurate. They further contended that the source document had to be produced in court before an accounting report could be admitted as evidence.

[155]In reply to paragraphs 17 to 20 of the plaintiffs' written submissions, the 2nd and 3rd defendants submitted as follows:

(a) The Hicks-Woode Inquiry was carried out as a result of an *ex parte* Injunction order which has since been set aside.

(b) The cross-examination of Mdm. Chin (PW6) clearly showed that the basis of her report was one sided, biased, based on hearsay and that she had not taken into consideration clause 3 of the Subscription Agreement, which allows inter-company loans, or the accounts of EPCM, which show monies had been invested by the 2nd and 3rd defendants and the 5th and 6th defendants in Suit 1123.

[156]The 2nd and 3rd defendants also submitted that in their submissions, the plaintiffs had relied on page 7 of Bundle G i.e. the purpose of the Hicks-Woode Report, which includes the review of the relevant documents and information, but this does not at all state what were the source documents relied on and why they were never produced together with the Report. Hence, in their submissions-in-reply, the 2nd and 3rd defendants reiterated their written submissions that the Hicks-Woode Report is not admissible.

[157]The plaintiffs also relied on section 65(1)(g) of the Evidence Act 1950 in support of their submissions for the admission of the Hicks-Woode Report but the 2nd and 3rd defendants submitted that for section 65(1)(g) of the Evidence Act 1950 to apply, the plaintiffs must first establish the following requirements:

(a) when the originals consist of numerous accounts or other documents;

(b) which cannot conveniently be examined in court; and

(c) the fact to be proved is the general result of the whole collection.

[158]However, it has not been proven that it was Mdm. Chin (PW6), who had examined all the documents, and PW6 has also admitted that some of the matters mentioned were investigated by her team and not by her personally (see Annexure 6, an excerpt of PW6's evidence).

[159]Hence, the 2nd and 3rd defendants submitted-in-reply that section 65(1)(g) cannot be resorted to since the plaintiffs have failed to prove these requirements.

[160]Therefore, even if the Court allows the admission of the Hicks-Woode Report (P32), the 2nd and 3rd defendants urged the Court not to give too much weight to it.

[161]However, the Court rejected the 2nd and 3rd defendants' contention that the source document had to be produced in court before an accounting report could be deemed admissible based on the following reasons:

(1) The manners in which the loan proceeds can be utilized have been dealt with earlier in this Judgment;

(2) The Hicks-Woode Report was prepared based on documents which were reviewed by PW6 and her team upon entry into the premises of the 1st defendant (see Annexure 8 to the plaintiffs' written submissions);

(3) The Hicks-Woode Report is not an accounting report as it is only a report of an inquiry of operational conduct that was done pursuant to the *ex-parte* Injunction;

(4) The Hicks-Woode Report clearly states that "*Our review of the relevant documents and information*, particularly with regards to the financial statement of The Group, *should not be construed as an audit* and accordingly we do not express an audit opinion on the true and fair view of the financial statement" (see page 7 Bundle G – Exhibit P32);

(5) There was evidence before the Court that the Hicks-Woode Report and the findings of the Hicks-Woode Report are based on documents and information which were made available to PW6 and her team;

(6) The Court also noted that the work of PW6 and her team was limited due to the factors as set out in section 4 of the Hicks-Woode Report and these factors include the following:

  (a) Lack of co-operation from the 2nd defendant (DW1) and his team (see item (i) of section 4 at page 11 Bundle G – Exhibit P32);

  (b) The 2nd defendant (DW1) hindered their work through constant harassment and threats to their staff (see item (ii) of section 4 at page 11 Bundle G – Exhibit P32);

  (c) Difficulty in obtaining information owing to a lack of co-operation and also incomplete records (see item (iii) of section 4 at page 12 Bundle G – Exhibit P32);

  (d) Time constraint due to a lack of co-operation from the management staff (see item (iv) of section 4 at pages 12 and 13 Bundle G – Exhibit P32);

  (e) Issuance of cheques without approval (see item (v) of section 4 at page 13 Bundle G – Exhibit P32); and

  (f) The freezing of bank accounts (see item (vi) of section 4 at page 13 Bundle G – Exhibit P32).

(7) In any event, section 65(1)(g) of the Evidence Act 1950 provides that secondary evidence may be given when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection; and

(8) Section 65(2)(d) of the Evidence Act 1950 provides that such evidence may be given as to the general results of the documents by any person who has examined them.

[162]Therefore, the Court held that the testimony of PW6 in Court and also her findings in the Hicks-Woode Report (P32) are admissible as evidence for the purposes of this matter.

Whether the withdrawals of the monies from the USD Account by the 2nd and 3rd defendants were wrongful?

[163]In paragraphs 110 and 111 of their written submissions, the 2nd and 3rd defendants attempted to justify the various payments which the plaintiffs alleged were wrongfully made from the USD Account. The 2nd and 3rd defendants also contended that a sum of RM 3,000,000.00 had been agreed upon as repayment to the 2nd and 3rd defendants. The 2nd defendant also contended that he had paid more than RM 1 million to EPCM from his own money.

[164]On this issue, the 2nd and 3rd defendants submitted-in-reply that the plaintiffs pleaded case in this suit is based on the Subscription Agreement and not on the Loan Agreement but the plaintiffs have not answered the 2nd and 3rd defendants' written submissions dated 8 January 2015 on the existence of the Resolution of the 1st defendant, which was produced by the plaintiffs and which allows for the giving of inter-company loans by Maple Challenge, the 1st defendant.

[165]Hence, the 2nd and 3rd defendants reiterated and adopted paragraphs 110 to 116 of their written submissions dated 8 January 2015 that the sum of RM 3 million was agreed upon by the plaintiffs or their representative to be repaid to the 2nd and 3rd defendants from the loan proceeds.

[166]However, the Court rejected the 2nd and 3rd defendants' contentions based on the following reasons:

[167]Firstly, the manners in which the loan proceeds were to be utilized by the 1st defendant are set out in clause 2.2 of the Loan Agreement. Clause 2.2 has been reproduced earlier in this Judgment.

[168]The Court was of the considered view that based upon a proper construction of clause 2.2 of the Loan Agreement, and the application of clause 2.2 to the various payments, the various payments were not for purposes allowed for under clause 2.2 of the Loan Agreement. Hence, these payments made by the 2nd and 3rd defendants were in direct breach of the terms of the Loan Agreement.

[169]The Court also rejected the 2nd and 3rd defendants' contention that they are to receive a repayment in the sum of RM 3,000,000.00 from the loan proceeds as it is also totally without any basis whatsoever. This is because the Subscription Agreement and the Loan Agreement do not contain any provision to the effect that an amount of RM 3,000,000.00 was to be repaid and/or intended by the parties to be repaid to the 2nd and 3rd defendants.

[170]Therefore, based on the Court's construction of the wording of clause 2.2, the 2nd defendant's contention that he had paid more than RM 1 million to EPCM from his own money, even if it is true, could not justify any repayment of a sum of RM 3 million to him personally. This is because as stated earlier, the manners in which the loan that was received by the 1st defendant were to be utilized is dictated by clause 2.2 of the Loan Agreement. In the event that the loan was used in any other manner apart from the purpose dictated by clause 2.2 of the Loan Agreement, it would constitute a breach of the Loan Agreement.

Repayment of RM 3 million

[171]In paragraph 112 of their written submissions, the 2nd and 3rd defendants contended that an amount of RM 3,000,000.00 was supposed to be given to them as an alleged 'repayment'.

[172]The 2nd and 3rd defendants did not dispute that the Subscription Agreement does not state the return of the RM 3 million to the 2nd defendant but the fact of the matter is that it was discussed and the parties had agreed to return to the 2nd and 3rd defendants, the monies that they have invested in the machinery. The 2nd and 3rd defendants relied on DW1's evidence (see Annexure 2, an excerpt of DW1's evidence).

[173]It must also be remembered that the 2nd and 3rd defendants merely signed the last page of the agreements (see Annexure 5, an excerpt of PW5's evidence).

[174]It is the contention of the plaintiffs that the discussions on the repayment of the sum of RM 3 million to the 2nd and 3rd defendant are pre-contractual negotiations. However, it is the 2nd and 3rd defendants' submission that during the execution of the agreements, the terms were explained to the 2nd defendant (DW1) and the 3rd defendant by

Chua Wei Min and she had told them that the terms include the repayment to the 2nd and 3rd defendants of whatever money that the 2nd and 3rd defendants had contributed to the Group of Companies.

[175]The Court noted that the 2nd and 3rd defendants did not call Chua Wei Min to testify in support of their version on this issue in the full trial.

[176]Therefore, the Court rejected the 2nd and 3rd defendants' contention as it was wholly misconceived based on the following reasons:

(1) There is no provision in the Subscription Agreement and/or the Loan Agreement which allows the 2nd and 3rd defendants to take the sum of RM 3,000,000.00 as a purported 'repayment' to themselves;

(2) The terms of the Subscription Agreement and the Loan Agreement are clear;

(3) They do not in any way suggest that an amount of RM 3,000,000.00 was supposed to be repaid to the 2nd and 3rd defendants;

(4) It is trite law that the intention of the parties must be found within the four walls of each of the two agreements and each must be construed as a whole, and so far as practicable, to give effect to every part of it (see *Royal Selangor Golf Club v Anglo-Oriental (M) Sdn Bhd* [1990] 3 CLJ (Rep) 37);

(5) The Court noted that the only evidence that was produced by the 2nd and 3rd defendants to support this allegation was an email by one Chua Wei Min (see Exhibit ID67 at page 2 Bundle T and Q&A 523 and 524 at page 36 of the Notes of Proceedings for 27 November 2014);

(6) However, this document remains as an ID document and Chua Wei Min, who is a material witness to the defence of the 2nd and 3rd defendants, was never called as a witness by the 2nd and 3rd defendants during the trial;

(7) More importantly, these were pre-contractual negotiations and discussions that later did not form part of the terms agreed upon by the parties and were not incorporated into either the Subscription Agreement or the Loan Agreement;

(8) Hence, the Court agreed with and accepted the plaintiffs' submissions that these matters cannot be treated as if they were the terms of the contract between the parties;

(9) The Subscription Agreement contains an "entire agreement clause" i.e. clause 13.1 of the Subscription Agreement, that expressly states that the Subscription Agreement and the documents referred to therein represents the whole agreement between the parties thereto;

(10) Clause 13, 13.1 and 13.2 of the Subscription Agreement state as follows:

> **"PREVIOUS AGREEMENTS**
>
> 13.1 **Entire Agreement**: This Agreement and the documents referred to herein are in substitution for all previous agreements, both written and oral, between all or any of the parties and contain the whole agreement between the parties relating to the subject matter of this Agreement.
>
> 13.2 **Amendements**: No amendment or variation of this Agreement shall be effective unless in writing and signed by or on behalf of each of the parties."

(11) Therefore, the 2nd and 3rd defendants are precluded from relying on any pre-contractual promises or assurances made in the course of the negotiations as they do not have any contractual force (see *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585 and *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11);

(12) The Court was also of the considered view that the alleged repayment of the RM 3 million to the 2nd and 3rd defendants would certainly amount to a variation of the Subscription Agreement;

(13) In order for it to be effective and enforceable against the plaintiffs, the 2nd and 3rd defendants must show that there exist a written variation to the terms of the Subscription Agreement signed by the parties thereto to this effect, which the 2nd and 3rd defendants failed to do (see clause 13.2 of the Subscription Agreement);

(14) Similarly, there can be no variation to the terms of the Loan Agreement if it is not expressly stated in writing (see clause 17.5 of the Loan Agreement); and

(15) Consequently, this contention of the 2nd and 3rd defendants must fail.

The Guarantee

[177]In paragraphs 117 to 123 of their written submissions, the 2nd and 3rd defendants contended that they were forced by threats and undue influence to sign the Guarantee and Indemnity Agreement dated 12 November 2007 ("the Guarantee") in consideration for the release of Tranche II of the monies.

[178]However, the plaintiffs' contention is that the 2nd and 3rd defendants executed the Guarantee voluntarily.

[179]In their submissions-in-reply, the 2nd and 3rd defendants reiterated paragraphs 117 to 123 of their written submissions dated 8 January 2015 that the consideration for the Guarantee as stated in the preamble of the guarantee was for the release of Tranche II of the loan and that this fact was confirmed by PW4 (see Annexure 4, an excerpt of PW4's evidence).

[180]PW4's evidence in his answer 9.4 at page 31 was that he had been informed by Chris Chia (PW1) at the further meeting on 13 November 2007 that a guarantee dated 13 November 2007 was executed (see Annexure 4, an excerpt of PW4's evidence).

[181]However, the Court rejected the 2nd and 3rd defendants' contention based on the following reasons:

(1) PW1 and PW2 denied ever making any threat against the 2nd and 3rd defendants;

(2) No credible evidence whatsoever was adduced by the 2nd and 3rd defendants to prove the allegation of undue influence or that threats were made towards the 2nd and 3rd defendants.

(3) In fact, in cross-examination DW1 confirmed as follows:

(a) PW1 and PW2 made no threats of violence against the 2nd and 3rd defendants (see Q&A 371 at Page 7 of the Notes of Proceedings for 27 November 2014);

(b) DW1 did not feel any threat or fear and was 'ok' with the statements made by PW1 and PW2 (see Q&A 372 and 374 at Page 7 of the Notes of Proceedings for 27 November 2014);

(c) DW1 understood threats as being serious criminal offences (see Q&A 366 and 368 on pages 6 and 8 of the Notes of Proceeding for 27 November 2014) but despite so, he did not lodge any police reports against PW1 and PW2 for the alleged threats as he did not feel that the threats were 'sufficiently serious' to justify the lodging of a police report (see Q&A 376 to 378 at pages 7 and 8 of the Notes of Proceedings for 27 November 2014).

(4) Section 14 of the Contracts Act 1950 provides that consent is free, *inter alia*, when it is not caused by coercion as defined in section 15;

(5) Section 15 provides that "coercion" is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement;

(6) The Courts are slow to invoke the concept of coercion as defined in section 15 unless there is positive evidence to that effect and to such an extent that it vitiates the free consent of the party;

(7) In determining whether there was coercion in the instant case, it is essential to inquire whether the 2nd and 3rd defendants did or did not protest in response to the alleged coercion at the material time, whether they did or did not have an alternative course open to them at the material time, whether they were independently advised and whether after entering into the contract, they took steps at the earliest opportunity to set aside the agreement on the ground of coercion (see *OCBC Securities (Melaka) Sdn Bhd v Koh Kee Huat* [2004] 2 MLJ 110 and *Pao On v Lau Yiu Long* [1980] AC 614); and

(8) Based on the evidence before the Court, the Court found that there was no cogent evidence that the plaintiffs had threatened the 2nd and 3rd defendants.

[182]The Court also agreed with and accepted the plaintiffs' submissions that the 2nd and 3rd defendants' attempt to rely upon the concept of undue influence on the plaintiffs' part is wholly misconceived based on the following reasons:

(1) The wording of the Guarantee dated 12 November 2007 is clear and it is not stated in the Guarantee that it is to be a condition for the release of Tranche II of the monies;

(2) Further, the 2nd and 3rd defendants' contention that they were forced to sign the Guarantee in consideration for the release of Tranche II of the loan makes no sense at all as the 2nd defendant himself admitted during cross-examination that by 12 November 2007, he had already requested for the postponement of the disbursement of Tranche II of the loan and that such request for postponement was accepted by KJD Glove and the 1st plaintiff (see Q&A 353 at page 54 of the Notes of Proceedings for 8 May 2014 and pages 181 and 182 Bundle H (Exhibit P21);

(3) It is also crucial to note that the 2nd and 3rd defendants only raised these allegations for the very first time on 12 December 2007, which is 1 (one) month after the alleged threats took place, in their reply to the letter of demand dated 4 December 2007, which was issued by the 2nd plaintiff's solicitors (see Q&A 355 and 356 at pages 54 and 55 of the Notes of Proceedings for 8 May 2014 and pages 610 to 614 Bundle F);

(4) Therefore, this 1 (one) month delay in raising the allegations of undue influence shows that this allegation is most probably an afterthought and was raised for the sole purpose of evading liability for the plaintiffs' claims; and

(5) Furthermore, the 2nd and 3rd defendants' contention that PW4 has stated in his witness statement that the Guarantee was dated 13 December 2007 is incorrect because paragraph A9.4 of PW4's witness statement correctly states the date of the Guarantee as 12 November 2007.

Whether the plaintiffs were motivated by bad faith when they did or omitted to do certain acts?

[183]In paragraphs 124 to 130 of their written submissions, the 2nd and 3rd defendants contended that the plaintiffs were motivated by bad faith when the plaintiffs did or omitted to do the following acts:

(a) Not giving notice to the 2nd and 3rd defendants to remedy their breach pursuant to clause 12 of the Loan Agreement;

(b) Lodging a police report;

(c) Entering into the premises of EPCM and EPCB, who were never parties to the *ex-parte* Injunction or Suit 1728;

(d) Dating the share transfer forms, which the 2nd and 3rd defendants signed in escrow;

(e) Dating the resignation forms, which the 2nd and 3rd defendants had signed in blank;

(f) Appointing the new Company Secretary, who took over even before her appointment came into effect, without giving any notice to the previous Company Secretary or directors;

(g) Taking over the various companies on 28 August 2008; and

(h) Taking over the machines, which were worth approximately RM 2.5 million, from the 1st defendant's company.

[184]The plaintiffs contended that no notice of the alleged breach is required to be given to the 2nd and 3rd defendants under the Subscription Agreement.

[185]In reply, the 2nd and 3rd defendants submitted that the plaintiffs failed to take into consideration clause 6.2 whereby a notice to remedy any material breach is required under the terms and conditions of the bonds. Hence, the 2nd and 3rd defendants reiterated paragraphs 124 to 130 of their written submissions dated 8 January 2015 and added that the plaintiffs' reliance on the notice dated 22 November 2007 is misplaced as this is not a notice to remedy the breach but a demand for the full amount outstanding (see pages 604 and 605 of Bundle E).

[186]The 2nd and 3rd defendants submitted that the 1st defendant is only a party to the Loan Agreement. The 1st defendant is not a party to the Subscription Agreement. Further, the 2nd and 3rd defendants are also not parties to the Loan Agreement. Hence, clause 12 of the Loan Agreement, which requires notice to be given in the event of a default by the borrower is applicable and not the Subscription Agreement.

[187]The manner in which the plaintiffs entered the premises of EPCB and EPCM, used the blank transfer forms, changed the Company Secretary and took over the companies show a total disregard of the rights of the defendants. The plaintiffs' contention that the machines are worthless is not substantiated. In fact, YEO (PW2) had claimed in her re-examination that a valuation was done on the machines but that valuation was never produced in Court (see Annexure 3, an excerpt of PW2's evidence).

[188]However, the Court rejected the 2nd and 3rd defendants' contentions based on the following reasons:

(1) There is no requirement in the Subscription Agreement to give any notice to the 2nd and 3rd defendants to remedy their breach of the Subscription Agreement;

(2) Hence, such notice is not a pre-requisite under the Subscription Agreement before the 2nd plaintiff can exercise its rights thereunder;

(3) Therefore, the issue regarding the absence of the 30 days notice is irrelevant and it cannot in any way be a valid defence against the plaintiffs' claim that is founded on the Subscription Agreement;

(4) Be that as it may, the fact is that the 2nd and 3rd defendants were given a notice to remedy their breaches and an opportunity to remedy their breaches when they received the 2nd plaintiff's letter of demand through the 2nd plaintiff's solicitors on 22 November 2007 (see pages 604 to 606 of Bundle F);

(5) Nonetheless, the 2nd and 3rd defendants continued to breach the terms of the Subscription Agreement;

(6) The police report (see page 320, Bundle D) was lodged by PW2 concerning the breaches of the Subscription Agreement and Loan Agreement;

(7) The 2nd and 3rd defendants were in fact charged by the police for cheating and money-laundering as a result of the police report;

(8) Although they were acquitted by the Sessions Court, the Attorney-General's Chambers have appealed against the acquittal (see Q&A 397-399 at page 11 of the Notes of Proceedings for 27 November 2014);

(9) There is no element of bad faith whatsoever on the part of the plaintiffs or PW2 since PW2 was never charged for making a false or inaccurate police report;

(10) The signing of the undated blank share transfer forms and resignation letters was a condition pursuant to clause 4.3(b) of the Subscription Agreement (see page 442 Bundle E);

(11) The 2nd and 3rd defendants, as covenantors under the Subscription Agreement, are bound to fulfill the conditions stipulated in the Subscription Agreement;

(12) The appointments of Mdm. Lee Wai Ngan and Chan Toye Ying, as the new company secretaries of the 1st and 4th defendants, on/about November 2008, were done pursuant to the enforcement of the plaintiffs' rights, as the 2nd and 3rd defendants had breached the terms of the Subscription Agreement (see A2.3 of Lee Wai Ngan's witness statement (D97) at page 3);

(13) The plaintiffs had taken over the companies concerned on 28 August 2008 as a result of the breaches of the subscription Agreement by the 2nd and 3rd defendants;

(14) Hence, the plaintiffs had validly enforced their rights pursuant to the security documents, which were executed pursuant to the Subscription Agreement; and

(15) The machines seized were, in any event, worthless because Chris Chia (PW1) has clarified in re-examination that the value of the machines was RM 2.5 million pursuant to the accounting records which were prepared in 2007 (see Q&A 451 at pages 83 and 84 of the Notes of Proceedings for 16 April 2013) and since then, the machines have been seized by AMLA, while one machine is sitting idly in a factory and the location of the other machines is not known (see Q&A 452 and 452 at page 84 of the Notes of Proceedings for 16 April 2013).

Entry into premises

[189]In paragraphs 131 to 133 of their written submissions, the 2nd and 3rd defendants contended that the *ex-parte* Injunction obtained by the plaintiffs in Suit 1728 did not include the premises of EPCM or E-Circle. The 2nd and 3rd defendants also contended that the plaintiffs had proceeded to freeze the various bank accounts of EPCM despite knowing that the 1st defendant was not in operation. The 2nd and 3rd defendants then contended that a notice was issued by the representative of the plaintiffs (PW6 or PW1), to the employees to inform them that EPCM had been taken over and that the employees of EPCM were required to work on Awal Muharam i.e. 19 January 2008 and 20 January 2008.

[190]The plaintiffs contended that the *ex parte* Injunction allowed the plaintiffs to enter the 1st defendant's premises. However, in their submissions-in-reply, the 2nd and 3rd defendants contended that the plaintiffs were aware that the 1st defendant was not operating yet but the plaintiffs, nonetheless, went on to freeze the bank accounts of EPCM.

[191]In their submissions-in-reply, the 2nd and 3rd defendants also contended that the *ex parte* Injunction only allowed the plaintiffs to enter the premises of the 1st, 4th and 5th defendants. The *ex parte* Injunction did not allow the plaintiffs to enter EPCB's premises or EPCM's premises. Hence, the plaintiffs themselves have breached the *ex parte* Injunction as they very well knew that the addresses i.e. No. 2, 4, 14 and 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor Darul Ehsan, belong to EPCB and EPCM, and that they do not belong to the 1st, 4th or 5th defendants. Hence, the 2nd and 3rd defendants reiterated and adopted paragraphs 131 to 133 of their written submissions dated 8 January 2015.

[192]The 2nd and 3rd defendants also contended that they never submitted that EPCM was not in operation as contended by the plaintiffs in paragraph 149 of the plaintiffs' written submissions. What they had submitted was that the 1st defendant was not in operation as stated in paragraph 132 of their written submissions dated 8 January 2015.

[193]Even if the companies' addresses were the same, the 2nd and 3rd defendants contended that the notice given by Hicks-Woode was invalid because it was given to all the employees of the EPC Group of Companies instead of only to the employees of the 1st defendant (see page 178 of Bundle H, exhibit D78).

[194]With regard to the freezing of the bank accounts of EPCM, paragraph 6 (iii) of the *ex parte* Injunction, at page 7 of Bundle B, does not authorize the freezing of the bank accounts of EPCM because it merely states as follows in Malay:

> "Akaun bank yang didaftar EPC Technology"

In English, these words in the *ex-parte* Injunction mean "the registered bank akaun of EPC Technology".

[195]Mdm. Chin (PW6) in her cross-examination confirmed that EPCM was not a party to the *ex parte* Injunction and she confirmed that paragraph 6 (iii) is ambiguous as there is no company number or Sdn. Bhd. stated after the words "EPC Technology" or whether the company named "EPC Technology" in the *ex parte* Injunction is EPCM or EPCB (see an excerpt of PW6's evidence in Annexure 6 to the 2nd and 3rd defendants' submissions-in-reply).

[196]She further went on to state that she knew she had entered the premises of EPCM and that she and her team then made copies of the books of EPCM (see an excerpt of PW6's evidence in Annexure 6 to the 2nd and 3rd defendants' submissions-in-reply).

[197]In their written submissions, the plaintiffs contended that the address of the 1st defendant and the addresses of EPCM and EPCB are similar. However, in their reply, the 2nd and 3rd defendants submitted that the plaintiffs' contentions ought to be rejected by the Court. This is because although the addresses of the two companies are similar, the 3 addresses are still not the same. The numbers of the lots are also different. Further, there was a sign board on the premises that clearly stated the name of the company i.e. EPCM. The address of the 1st defendant as at 14 September 2012 is in Taman Desa Petaling Kuala Lumpur as per the Company Search at page 528 of Bundle E. Therefore, the plaintiffs' contention that the Hicks-Woode team had entered the premises of the 1st defendant pursuant to the *parte* Injunction ought to be rejected by the Court.

[198]In their reply, the 2nd and 3rd defendants also submitted that the notice (Exhibit D78) that was given by Hicks-Woode to the employees on the premises further contravenes the *ex-parte* Injunction because the entry by Hicks-Woode was not to preserve the business but to carry out an investigation. Further, Mdm. Chin (PW6) was very evasive until this Court had to advise her and to impress upon her to answer the questions that were posed to her (see Annexure 6, an excerpt of PW6's evidence). Based on the contents of the Hicks-Woode Report, at page 11 under item 4(i), the plaintiffs knew they were entering into the premises of EPCB.

[199]On this issue, the Court found partially in favour of the plaintiffs and partially in favour of the 2nd and 3rd defendants. With regard to the first part of the Court's findings, the Court found as follows:

(1) It is irrelevant whether or not the 1st defendant was still in operation as the plaintiffs had exercised its rights of entry pursuant to a Court Order.

(2) However, the said *ex-parte* Injunction only allowed the plaintiffs to enter the premises of the 1st defendant and it did not include the premises of EPCB and EPCM (see pages 4 to 8 of Bundle B for the said *ex-parte* Injunction dated 3 January 2008);

(3) There is some similarities in the addresses of the 1st defendant, EPCM and EPCB;

(4) This is based on the following comparison of the addresses of the 3 (three) entities:

(a) The 1st defendant's address is No. 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor Darul Ehsan (see page 79 Bundle I – Exhibit P87) and No. 2, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 61800 Batu Caves, Selangor Darul Ehsan (see page 370 Bundle D);

(b) The address of EPCM is No. 2 and 4, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu 68100 Batu Caves (see page 362 Bundle D); and

(c) The address of EPCB is No. 14 and 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor Darul Ehsan.

(5) Based on the comparison as set out above, it can be seen that there is some overlapping in the addresses of the 1st defendant, EPCM and EPCB;

(6) This is because the address of the 1st defendant at No. 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor, Darul Ehsan overlaps with the address of EPCB at the same address;

(7) The address of the 1st defendant at No. 2, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 61800 Batu Caves, Selangor Darul Ehsan overlaps with the address of EPCM at the same address; and

(8) Hence, the plaintiffs and/or its representatives had entered into the premises of the 1st defendant, lawfully, as set out above pursuant to the *ex-parte* Injunction.

[200]With regard to the second part of the Court's findings, the Court found in favour of the 2nd and 3rd defendants as follows:

(1) There was evidence that Hicks Woode had entered into the premises of EPCM and EPCB;

(2) The entry by Hicks-Woode into the premises of EPCM and EPCB was unlawful as it was not authorized by the *ex-parte* Injunction;

(3) This evidence is contained in the Hicks-Woode Report and the oral evidence of Mdm. Chin;

(4) It was stated in the Hicks-Woode Report that the team from Hicks-Woode went to the factory of EPCB, at No. 14 and 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor Darul Ehsan, on 8 January 2008 (see paragraph 4(i) at page 11 of Bundle G – Exhibit P32); and

(5) The freezing of the bank accounts of EPCM was not done in accordance with paragraph 6(iii) of the *ex-parte* Injunction (see page 7 Bundle B) because the *ex-parte* Injunction does not include the freezing of the bank accounts of EPCM;

(6) The notice given by Hicks-Woode was invalid because it was given to all the employees of the EPC Group of Companies instead of only to the employees of the 1st defendant (see page 178 of Bundle H, exhibit D78).

(7) Thirdly, the notice that is being referred to i.e. Exhibit D78 (see page 187 of Bundle H), expressly states that the presence of Hicks-Woode "may be a concern but they would like to ensure each and every one that they have no intention whatsoever to distrupt the ongoing business of the company and in fact their entry into the company is to preserve the business and make every attempt to ensure that the company develops successfully." Hence, the intention was to attempt to ensure that the business of the company is preserved and that the company develops successfully and that it was not to take over the company.

(8) This is so even though the notice expressly states that the presence of Hicks-Woode "may be a concern but they would like to ensure each and every one that they have no intention whatsoever to disrupt the ongoing business of the company and in fact their entry into the company is to preserve the business and make every attempt to ensure that the company develops successfully.";

(9) This is because the evidence before the Court shows that the Hicks-Woode team had conducted investigations at the premises of EPCM and EPCB even though the intention of Hicks-Woode as stated in the notice was only to preserve the business and to ensure that the company develops successfully;

(10) The allegation that the representative of the plaintiffs had asked the workers to work on Awal Muharam i.e. 19 January 2008 and 20 January 2008, is untrue because the plaintiffs were able to produce oral and documentary evidence to substantiate their allegations that in fact, it was the team from Hicks-Woode that

had requested for permission to work on 10 January 2008, which was Awal Muharam day (not 19 January 2008 and 20 January 2008), and on 12 January 2008, which was a Saturday (see paragraph 4(iv) at page 12 Bundle G – Exhibit P32); and

(11) In any event, this request was rejected by the management and this hampered the assignment of Hicks-Woode due to the time constraint in view of the public holiday and weekends (see paragraph 4(iv) at page 12 Bundle G – Exhibit P32).

Professional privilege

[201]In paragraphs 134 and 135 of their written submissions, the 2nd and 3rd defendants contended that the communications between Loo Tatt King (PW5), the lawyer from ZICO, and the 2nd and 3rd defendants are protected by professional privilege. As such, they are not admissible as evidence in Court.

[202]The 2nd and 3rd defendants also contended that PW5 never referred to his legal opinion in his evidence. There was also no claim that his legal opinion, a copy of which was given to the Company Secretary, was a privileged document.

[203]The 2nd and 3rd defendants also contended that the legal opinion given by PW5 to the plaintiffs only came out during the cross- examination of Lee Wai Ngan (the 10th defendant in Suit 246, who had testified as DW1 in the trial of that suit) and that it clearly shows that PW5 was in a position of conflict of interest. This is because PW5 was not only advising the 2nd and 3rd defendants on the Subscription Agreement and also the Loan Agreement but he had also witnessed the transfer of the shares after he had dated Form 32A, without the knowledge and presence of the 2nd and 3rd defendants, and also after he had dated their letters of resignation.

[204]The Charges, Deeds of Charge and the undated letters of resignation were prepared by PW5 and pre-signed by the 2nd and 3rd defendants. Further, the Charges and Deeds of Charge were only to be enforced upon the release of the full sum of the loan of USD 8.6 million.

[205]In their submissions-in-reply, the 2nd and 3rd defendants repeated paragraphs 134 and 135 of their written submissions dated 8 January 2015.

[206]However, the Court rejected the 2nd and 3rd defendants' contentions based on the following reasons:

(1) At all material times, PW5's firm, ZICO, was appointed by the plaintiffs and not the 2nd and 3rd defendants (see Q&A 106 at page 25 of the Notes of Proceedings for 25 November 2014);

(2) PW5 himself testified that he, personally, and also ZICO had advised the 2nd and 3rd defendants to seek independent legal advice on the terms and conditions of the Investment Plan and/or the agreements;

(3) PW5 also testified that the 2nd and 3rd defendants had informed him that they did not wish to do so as they were comfortable dealing with PW5 and ZICO;

(4) PW5 also testified that another reason why the 2nd and 3rd defendants chose not to seek independent legal advice on the terms and conditions of the Investment Plan and/or the agreements was also because the 2nd and 3rd defendants did not want to incur additional legal fees in the matter (see A4.5 at pages 9 and 10 of PW5's witness statement – Exhibit P63);

(5) The fees charged by ZICO were paid by the 2nd and 3rd defendants as covenantors under the Subscription Agreement pursuant to clause 9.1 of the Subscription Agreement. The clause provides that "the Covenantors shall procure and bear all costs and expenses (including legal costs and expenses incurred by or on behalf of the Investor) incurred in the preparation, negotiation, execution and completion of the Agreement and all other Transaction Documents, and all due diligence costs" (see page 448 Bundle E);

(6) Hence, notwithstanding that the 2nd and 3rd defendants had paid the legal fees of ZICO, ZICO remains the plaintiffs' solicitors at all material times. This is because the obligation of the 2nd and 3rd defendants to pay ZICO's legal fees is as Covenantors under the Subscription Agreement. This does not in any event mean that ZICO would become the solicitors of the 2nd and 3rd defendants; and

(7) Therefore, section 126 of the Evidence Act 1950 is not applicable to confer solicitor and client privilege on the communications between the 2nd and 3rd defendants and PW5 and/or ZICO.

The emails

[207]In paragraphs 136 to 139 of their written submissions, the 2nd and 3rd defendants contended that the emails relied upon are inadmissible because they are hearsay evidence since Teo Hun Theng was never called as a witness.

[208]In their submissions-in-reply they reiterated that Teo's emails are inadmissible as they are hearsay evidence. This is because although the plaintiffs have relied on my decision in *Petroliam Nasional Bhd & Ors v Khoo Nee Kiong* [2003] 4 MLJ 216, the facts in that case are different as that case involved an interlocutory application for an injunction where Order 41 allows hearsay evidence. Furthermore, the defendants did not dispute that the deponent of the plaintiffs had deposed that he had personal knowledge at paragraphs F and G at page 237 of that case. The issue of who was the author of the email in that case could be decided by circumstantial evidence. In any event, the weight of the documents would also have to be decided.

[209]Reverting back to the instant case, with regard to the impression that the 1st defendant was holding cash (negative cash balance) and this was the actual case as admitted by YEO (PW2), that there was still a sum of USD 365,500.00 in the USD Account as at 7 August 2007, apart from a sum of RM 1.7 million which the plaintiffs received *via* the AMLA proceedings (see Annexure 3, an excerpt of PW2's evidence). And even based on the email, at page 201 of Bundle I, YEO (PW2) admitted that the email does not show a cash balance of RM 16.6 million as at September 2007 as claimed by her (see Annexure 3, an excerpt of PW2's evidence).

[210]However, the Court rejected the 2nd and 3rd defendants' contentions based on the following reasons:

(1) Under section 90A(1) of the Evidence Act 1950, in order for a document produced by computer to be admitted as evidence, the condition precedent is that it must have been produced by the computer in the course of its ordinary use;

(2) This condition may be proved by tendering in evidence a certificate as stipulated by section 90A(2) read with section 90A(3) of the Evidence Act 1950; and

(3) Once the certificate is tendered as evidence, the presumption contained in section 90A(4) is activated to establish that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced (*Hanafi bin Mat Hassan v PP* [2006] 4 MLJ 134 and *Petroliam Nasional Bhd & Ors v Khoo Nee Kiong* [2003] 4 MLJ 216).

[211]In *Petroliam Nasional Bhd & Ors v Khoo Nee Kiong* , *supra*, I had the occasion to hold as follows:

> "The reason is because the plaintiffs need only tender the section 90A certificate if the plaintiffs do not wish to call the officer who has personal knowledge as to the production of the computer printouts by the computer to testify to that effect at the trial proper."

[212]Reverting back to Suit 2256, PW2, PW4 and PW5 had tendered their respective section 90A certificates in Court during the trial of this matter. These certificates were, accordingly, marked as Exhibits P70, P58 and P66, respectively by the Court. Hence, the Court agreed with and accepted the submissions of the plaintiffs that the emails referred to in the aforementioned section 90A certificates ought to be admitted as evidence for purposes of this trial and to be considered by this Court. Therefore, the Court allowed ID9, ID10, ID11, ID13, ID14, ID15, ID16, ID17, ID18, ID24, ID26, ID28, ID30, ID30A, ID57, ID67, ID68, ID69 and ID71 to be admitted as exhibits and to be remarked, accordingly, as P9, P10, P11, P13, P14, P15, P16, P17, P18, P24, P26, P28, P30, P30A, P57, P67, P 68, P69 and P71.

[213]Based on the email sent by Teo Hun Theng on 7 August 2007 at 8.36 a.m. (re-marked as Exhibit P9) at page 193 Bundle H, Teo Hun Theng had stated "*We currently holding cash while servicing the interest, i.e. on negative cash flow. Utilization of the proceeds from KCourt to purchase equipment would not be as planned*". It was this statement by Teo Hun Theng in P9 that had given the impression to the plaintiffs that the proceeds were still sitting idly in the USD Account of the 1st defendant (see A10.6 at pages 64 and 65 of PW2's witness statement – Exhibit P53). However, it was later discovered that this was not true as the monies available in the USD Account as at 31 July 2007 was USD 217,109.29 (see page 374 Bundle D).

[214]Therefore, the 2nd and 3rd defendants had clearly misrepresented to the plaintiffs that the loan proceeds were still in the USD Account of the 1st defendant, when in fact the loan proceeds had already been utilized in breach of

the agreements (as set out in paragraph 40 of the 1st to 3rd defendants' written submissions in Suit 246).

Without prejudice communication

[215]In paragraphs 140 to 143 of their written submissions, the 2nd and 3rd defendants contended that the discussions on 12 November 2007, 13 November 2007 and 16 November 2007, were discussions that were held to negotiate a settlement and, hence, evidence of what had transpired during these meetings ought not to be admissible as they are "without prejudice" discussions.

[216]In their submissions-in-reply, the 2nd and 3rd defendants reiterated and adopted their written submissions dated 8 January 2015 on the issue of "without prejudice" communications.

[217]However, the Court rejected the 2nd and 3rd defendants' contentions based on the following reasons:

(1) The discussion that was held on 12 November 2007 resulted in the execution of the Personal Guarantee and Indemnity dated 12 November 2007 ("the Guarantee") by the 2nd and 3rd defendants in favour of the 2nd plaintiff; and

(2) Hence, the negotiations that took place during the meeting on 12 November 2007 had culminated in a settlement, i.e. the Guarantee.

[218]It is trite law that where negotiations conducted without prejudice lead to a settlement, details of the negotiations become admissible in evidence of the terms of the agreement (see *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17). Hence, the Court held that the evidence of the meeting on 12 November 2007 is admissible as evidence for purposes of Suit 2256.

[219]As for the meetings that took place on 13 November 2007 and 16 November 2007, based on the evidence, these meetings were not meetings carried out on a "without prejudice" basis based on the following reasons:

(1) The Guarantee had already been executed on 12 November 2007;

(2) These meetings were follow-up meetings that were carried out to ensure that upon the execution of the Guarantee, the 2nd and 3rd defendants would give effect to all the terms that were agreed upon in the Guarantee (see A16.1 and to A16.3 at pages 73 to 75 of PW1's witness statement – Exhibit P1);

(3) Hence, these two follow-up meetings do not fall under the definition of "without prejudice" negotiations as negotiations had already culminated in the execution of the Guarantee; and

(4) Therefore, the contention by the 2nd and 3rd defendants that the discussions on 12 November 2007, 13 November 2007 and 16 November 2007 were "without prejudice" discussions is totally misconceived.

Maximum liability

[220]In paragraphs 146 to 150 of the 2nd and 3rd defendants' written submissions, they contended that their liability is limited to the value of the shares and assets that were charged under the security documents.

[221]In their submissions-in-reply, the 2nd and 3rd defendants reiterated that the value of the shares far exceed the amounts due and the plaintiffs have failed to account for the shares. In fact, the plaintiffs did not do a valuation of the shares at the point they took over the company. When the Court asked YEO (PW2) why did the plaintiffs not do a valuation, she did not reply (see Annexure 3, an excerpt of PW2's evidence).

[222]However, the Court rejected the 2nd and 3rd defendants' contentions based on the following reasons:

(1) In signing the Guarantee, the 2nd and 3rd defendants had extended their liability to include being liable for the repayment of the sums owed by Maple Challenge, the 1st defendant;

(2) The salient words of clause 2.1 of the Guarantee are that each personal guarantor, jointly and severally, guarantees unconditionally and irrevocably undertakes and agrees that, if for any reason the Borrower or the Issuer does not make payment of any amount of the Guaranteed Indebtedness, by the time, on the date in the currency and otherwise in the manner specified in the Transaction Documents (whether on the normal due date, on acceleration or otherwise), the Personal Guarantors will pay to the Beneficiary such amount of the Guaranteed Indebtedness on demand by the Beneficiary in the currency and in the manner provided in the Transaction Documents;

(3) Clause 4 of the Guarantee further states that the obligations of each Personal Guarantor under this Guarantee are additional to, and not instead of, any obligations contained in the Transaction Documents or any other agreement;

(4) The 2nd and 3rd defendants' obligations under the Guarantee are in addition to those under the Subscription Agreement;

(5) Thus, even if the Subscription Agreement does limit their liability to just the shares and assets under the security documents, the 2nd and 3rd defendants cannot deny or run away from their obligations under the Guarantee which they had agreed to fulfill; and

(6) Therefore, in light of the above, the reliance on clause 8.4 of the Subscription Agreement by the 2nd and 3rd defendants is misplaced as they had by their own conduct in signing the Guarantee agreed to extend their liability to include being responsible for the repayment of the sums owed by the 1st defendant.

Whether the disbursements of the monies directly from the 2nd plaintiff to the 1st defendant had, in any way, altered the structure of the transactions as set out in the Subscription Agreement and Loan Agreement or the contractual obligations of the parties thereunder?

[223]The Court was of the considered view that the disbursements of the monies directly from the 2nd plaintiff to the 1st defendant did not in any way alter the structure of the transactions as set out in the Subscription Agreement and Loan Agreement or the contractual obligations thereunder based on the following reasons:

(1) It is too late for the party, who has requested for this direct disbursement, to now turn around and claim the transaction is illegal for breach of LOFSA's approval;

(2) Even if it is true that the 2nd and 3rd defendants never requested for this, the fact remains that they accepted the manner in which the monies were disbursed;

(3) Further, they have only taken issue with this as being a contravention of LOFSA's approval after they have enjoyed the benefit of the monies.

[224]The Court was of the considered view that the 2nd and 3rd defendants' contentions that there is a breach of section 147(1) of the Offshore Companies Act 1990 has no merit. This is because section 147(1) provides that an offshore company may hold shares, debt obligations or other securities in a domestic company so long as such holding does not amount to a "controlling interest" in the domestic company.

[225]The section states as follows:

"Investment in domestic company

147.

(1) **An offshore company or a foreign offshore company may hold shares, debt obligations or other securities in a domestic company except a trust company so long as such holding does not amount to a controlling interest in the domestic company and is approved by the Registrar.**

(2) Notwithstanding subsection (1), where a resident holds shares, debt obligations or other securities in an offshore company, that offshore company may not hold shares, debt obligations or other securities in a domestic company.

(3) For the purposes of this section –

(4) **"controlling interest" in relating to a domestic company listed on the Kuala Lumpur Stock Exchange means –**

(a) **an offshore company or a foreign offshore company which controls –**

(i) **the composition of the board of directors of the domestic company; or**

(ii) **more than half of the voting power of the domestic company; or**

(b) **an offshore company or a foreign offshore company which holds more than half of the issued share capital of the domestic company (excluding any part thereof which carries no right to participate beyond a specified amount in a distribution of either profits or capital); or**

(c) **where the domestic company is a subsidiary of any corporating which is the subsidiary of the offshore company or foreign offshore company, that offshore company or foreign offshore company;**

"securities" has the same meaning as is assigned thereto by section 2 of the Securities Industry Act 1983 [Act 280].

(5) For the purposes of paragraphs (3)(a) and (b), the composition of the domestic company's board of directors shall be deemed to be controlled by an offshore company or a foreign offshore company if that offshore company or foreign offshore company by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove all or a majority of the directors; and for the purposes of this provision that offshore company or foreign offshore company shall be deemed to have power to make an appointment if –

(a) a person cannot be appointed as a director without the exercise in his favour by that offshore company or foreign offshore company of such a power; or

(b) a person's appointment as a director follows necessarily form his being a director or other officer of the offshore company or foreign offshore company.

[Sub. Act A988.]"

(Emphasis added).

[226]Based on the evidence before the Court, the Court found that the 2nd plaintiff is not an offshore company that is set up under the Offshore Companies Act 1990. Hence, the 2nd plaintiff is not in any way caught by section 147(1) of the Offshore Companies Act 1990.

[227]For the 2nd and 3rd defendants to say that the holding of the securities by the 2nd plaintiff amounts to a 'controlling interest', they must show that the holding of such securities amounts to a 'controlling interest' under the Offshore Companies Act 1990. This is not the case here.

[228]'Controlling interest' has been defined in section 147(3) of the Offshore Companies Act 1990, as set out above (see Q&A 583 at page 88 of the Notes of Proceedings for 7 September 2013).

[229]The securities that are held by the 2nd plaintiff are as follows:

(a) a Deed of Charges Charge over all the 1st defendant's assets;

(b) a charge over all shares owned by the 2nd and 3rd defendants in the 1st defendant; and

(c) a charge over all shares owned by the 4th defendant.

(See A5.3.1(c) (i) (aa)-(ff) at pages 29 and 30 of PW2' witness statement -Exhibit P53).

[230]Loo Tatt King (PW5), a partner in the firm of ZICO, was the solicitor in charge for the transactions between the 2nd plaintiff and the 2nd and 3rd defendants and/or the 2nd and 3rd defendants' Group of Companies (see A2.2 at page 3 of PW5's witness statement – Exhibit P63). PW5 testified that these transactions are the normal procedure used by foreign companies which carry out 'offshore investments' into Malaysia wherein Labuan is recognized as the hub for making such 'offshore investments' (see Q&3 at pages 3 to 7 of PW5's witness statement – Exhibit P63). PW5 further testified during re-examination that security interests in the form of charges are not prohibited by section 147(1) of the Offshore Companies Act 1990 as they do not fall within the definition of securities under the Securities Industry Act 1983 (Act 280) (see Q&A 583 at page 88 of the Notes of Proceedings for 7 September 2013).

[231]Since the 2nd and 3rd defendants have chosen not to call any witness to contradict or rebut PW5's testimony that these transactions are the normal procedure used by foreign companies which carry out 'offshore investments' into Malaysia wherein Labuan is recognized as the hub for making such 'offshore investments' the Court accepted his testimony on this issue.

[232]Therefore, the Court held that the holding of the three types of securities by the 2nd plaintiff as set out above

does not amount to having a "controlling interest" under the Offshore Companies Act 1990. The interests, that are held by the 2nd plaintiff, are merely security interests and do not amount to "controlling interest". These securities do not in any way give the 2nd plaintiff or KJD Glove the control over the directorship or shareholding in the 1st defendant. They are merely securities which are charged in favour of the 2nd plaintiff. These securities become enforceable only in the event of a breach under the Subscription Agreement. Prior to the commission of the breaches under the Subscription Agreement by the 2nd and 3rd defendants neither the 2nd plaintiff nor KJD Glove had any control over the 1st defendant.

[233]Based on the same reasoning, it is wrong for the 2nd and 3rd defendants to contend that PW4 had a "controlling interest" in the 1st defendant. The Deeds of Charge made by the 1st defendant in favour of the 2nd plaintiff only gave the 2nd plaintiff, the power of attorney to execute or sign any instrument on behalf of the 1st defendant pursuant to the said Deed (see clause 16.1 at page 176 of Bundle C and the particulars of the Investor in the Schedule attached to the Deeds of Charge at page 184 of Bundle C).

[234]A perusal of the 1st defendant's shareholders' circular resolution dated 28 November 2008 shows that PW4 had signed the said resolution in his capacity as the authorized representative of the 2nd plaintiff in order to appoint PW1 and PW2 as the new directors and remove the 2nd and 3rd defendants as the existing directors in the 1st defendant (see page 117 of Bundle I).

[235]Thus, the issue of PW4 being the sole director of KJD Glove who had control over the 1st defendant did not arise because it was not KJD Glove but rather the 2nd plaintiff who had exercised the power of attorney.

[236]PW4, as the sole director of KJD Glove, also never became part of Maple Challenge, the 1st defendant. He was the person who had appointed PW1 and PW2 as the new directors of Maple Challenge, the 1st defendant. PW1 and PW2 also had no connection whatsoever with KJD Glove.

[237]Further, LOFSA's approval is not required for the purposes of the Subscription Agreement. The Subscription Agreement is not and does not fall within the scope of the Offshore Companies Act 1990 as the same regulates transactions between offshore companies which are based in Labuan and domestic companies. Besides the 2nd plaintiff, the rest of the parties to the Subscription Agreement i.e. KJD Glove and Wira International, are not offshore companies and/or domestic companies as defined in the Offshore Companies Act 1990. Therefore, there is no necessity to inform LOFSA of such an agreement.

[238]The definition of 'domestic company' in section 2 of the Offshore Companies Act 1990 (Act 441) is as follows:

> ""domestic company" means a company incorporated under the Companies Act 1965 [Act 125]"

[239]Section 2 defines an 'offshore company' as follows:

> ""offshore company" means a company incorporated, or deemed to be incorporated, under this Act"

[240]Section 15 of the Offshore Companies Act 1990 (Act 441) provides for the registration and the incorporation of an 'offshore company'. It states as follows:

> **"Registration and incorporation**
>
> **15.**
>
> (1) A person desiring the incorporation of an offshore company shall lodge with the Registrar the memorandum and articles of the proposed company and the other documents required to be lodged by or under this Act, and the Registrar on payment of the prescribed fees shall, subject to this Act, register the company by registering the memorandum and articles.
>
> (2) The Registrar may require a statutory declaration made by an officer to be lodged stating that all or any of the requirements of this Act have been complied with, and the Registrar may accept such a declaration as sufficient evidence of compliance.

(3) On the registration of the memorandum, the Registrar shall certify under his hand and seal that the company is, on and from the date specified in the certificate, incorporated, and that the company is a company limited by shares.

(4) On and from the date of incorporation specified in the certificate of incorporation, but subject to this Act, the subscribes to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and of suing and being sued, and having perpetual succession and a common seal, with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act.

(5) A certificate of incorporation of a company issued by the Registrar shall be prima facie evidence of compliance with all the requirements of this Act in respect of incorporation.

(6) An incorporated offshore company shall pay such annual fee as may be prescribed, not later than thirty days from each anniversary of the date of its incorporation.

(7) Every subscriber to the memorandum shall be deemed to have agreed to become a member of an offshore company and, on the incorporation of the company, shall be entered as a member in its register of members in respect of the shares subscribed for or by him in the memorandum, and every other person who agrees to be a member of a company and whose name is entered into the register of members shall be a member of the company."

Whether there is any obligation on the part of the plaintiffs to give to the 2nd and 3rd defendants' notice of variation of the interest rate in the Loan Agreement?

[241]In paragraphs 30 to 32 of their written submissions, the 2nd and 3rd defendants contended that the signing of the Subscription Agreement and Loan Agreement on the same day constituted a breach of the conditions precedent stipulated in the Subscription Agreement. The 2nd and 3rd defendants also contended that there was no notice to vary the interest rate as provided for under clause 5.1 of the Loan Agreement or approval from the Foreign Investment Committee ("FIC") or LOFSA or BNM for the variation of the interest rate of the loan that was given by the 2nd plaintiff to the 1st defendant.

[242]In reply to paragraphs 67 to 71 of the plaintiffs' written submissions, the 2nd and 3rd defendants' submitted that clause 2.1(h) of the Subscription Agreement has clearly stated that the Loan Agreement should come first. Therefore, the condition precedent in that clause was not fulfilled because both Agreements were executed on the same day.

[243]In reply, the 2nd and 3rd defendants also submitted that the plaintiffs are contradicting themselves by saying that the Subscription Agreement and the Loan Agreement are two different agreements involving different parties serving two different purposes but at the same time saying that the release of the loan monies by the 2nd plaintiff directly to the 1st defendant, was in accordance with the terms of the agreements.

[244]The contention of the 2nd and 3rd defendants, that no notice of variation of the interest rate was given to the 2nd and 3rd defendants, was confirmed by the plaintiffs' own witnesses and the 2nd and 3rd defendants reiterated paragraphs 30 to 32 of their written submissions dated 8 January 2015.

[245]However, the Court rejected the 2nd and 3rd defendants' contentions based on the following reasons:

(1) The Subscription Agreement and the Loan Agreement are two separate agreements and do not constitute a single contract;

(2) Suit 2256 was filed by the plaintiffs against the defendants pursuant to the alleged breaches of/defaults in the terms and conditions of the Subscription Agreement not the Loan Agreement;

(3) KJD Glove has filed a separate suit i.e. Suit 1123 against the defendants for the alleged breaches of/defaults in the terms and conditions of the Loan Agreement;

(4) The fact that the two agreements were executed on the same day i.e. 15 March 2007, is a clear fulfilment of the condition precedent of the Subscription Agreement that is provided in clause 2.1(h) of the Subscription Agreement;

(5) The Loan Agreement was duly executed by KJD Glove and Maple Challenge (the 1st defendant) on 15 March 2007 and, therefore, it follows that the condition precedent in clause 2.1(h) of the Subscription Agreement was duly fulfilled;

(6) The allegation that there was no notice to vary the interest rate is based on the erroneous premise that the interest rate was actually varied;

(7) As stated above, the Subscription Agreement and the Loan Agreement are 2 distinct agreements, between 2 different parties and serve 2 very different purposes;

(8) The purpose of the Subscription Agreement was for the 2nd plaintiff to subscribe to the bonds of KJD Glove and those bonds carry a bond yield of 17%;

(9) In the Loan Agreement which was signed between KJD Glove and the 1st defendant, the loan carries an interest rate of 8%;

(10) There was thus no variation of the interest rate whatsoever and, accordingly, no notice was required;

(11) It was only the loan transaction that required the approval of LOFSA and registration with BNM;

(12) This was duly complied with by the plaintiffs;

(13) The Subscription Agreement relates only to the 2nd plaintiff's subscription to the bonds of KJD Glove and it cannot, in any manner, whatsoever, be construed as a loan; and

(14) This was confirmed by PW5 during re-examination on 7 September 2013 (see Q&A 585 at pages 88 and 89 of the Notes of Proceedings for 7 September 2013).

Interest

[246]In paragraphs 151 to 153 of their written submissions, the 2nd and 3rd defendants contended that the plaintiffs are bound by the interest rate that is specified in the letter of BNM i.e. that the interest would at most be 8%. The 2nd and 3rd defendants then contended that the plaintiffs had recovered more than what is due.

[247]However, the Court rejected the 2nd and 3rd defendants' contentions based on the following reasons:

(1) The subject matter of this present matter is the Subscription Agreement (see paragraphs 20 to 38 of the plaintiffs' statement of claim at pages 80 to 91 Bundle A);

(2) Hence, the plaintiffs are entitled to charge the interest rate of 17% per annum;

(3) There was no requirement for a notice of variation to be issued because the Subscription Agreement and the Loan Agreement are two separate and distinct agreements;

(4) In respect of the contention that the plaintiffs have recovered more than what is due, based on the evidence before the Court and the following reasons, the Court found that the plaintiffs have not recovered more than what is due:

(a) The deduction of USD 50,000.00 and USD 60,917.00, respectively, were deducted from the Tranche I proceeds as these monies were the transaction expenses and collateral requirements of the 1st plaintiff. These deductions were provided for under the terms and conditions of the Subscription Agreement (see clause 4.4(b) at page 443 and clause 9.1 of the Subscription Agreement at pages 448 and 449 Bundle E). Further, the 2nd and 3rd defendants were fully aware of these deductions and the purposes in which these deductions were made;

(b) As stated earlier in this judgment, PW1 had clarified that the value of the machines was RM 2.5 million pursuant to the accounting records which were prepared in 2007 (see Q&A 451 at pages 83 and 84 of the Notes of Proceedings for 16 April 2013). Since then, the machines have been seized by AMLA. One machine is sitting idly in a factory and the location of the other machines is not known (see Q&A 452 and 452 at page 84 of the Notes of Proceedings for 16 April 2013);

(c) The contention of the 2nd and 3rd defendants that the value of the 4th defendant's shares was at least RM 10 million is wholly misconceived. This is because at the time of purchasing 10% of the shares in May/June 2007, the purchase consideration was on the basis that the 4th defendant would be the holding company of 3 companies, namely EPCM, the 1st defendant and the 5th defendant. At that material time, the 1st and 5th defendants were start-up companies. The valuation was based primarily on the operating business of EPCB. The valuation was also based on the premise on a multiple of

EPCB's prior years' net income which is a typical formula applied to the valuation of an operating business (see Q&A 454 at pages 84 and 85 of the Notes of Proceedings for 16 April 2013);

(d) EPCB has since been wound up on 19 November 2011 (see pages 24 to 26 Bundle B); and

(e) EPCM has since been wound up on 10 August 2011 (see pages 37 and 38 Bundle B).

[248]Therefore, based on the above reasons, the Court agreed with and accepted the submissions of the plaintiffs that the 2nd and 3rd defendants are still liable to pay back to the plaintiffs the Redemption Amount of Tranche I; the interest at the rate of 17% on the principal amount of Tranche I; the facility fee of 3% per annum on the Tranche II amount not released; and the late payment charges of 2% per annum on the outstanding amount due and owing by the 2nd and 3rd defendants.

Conclusion of the Court for Suit 2256

[249]As stated earlier in this Judgment, the plaintiffs in this suit seek the following prayers, as set out in paragraph 41(2)(a) to (d) of the plaintiffs' statement of claim:

"

(a) The Redemption Amount of Tranche I amounting to USD 4,777,777.78 (RM 17,128,333.34);

(b) Interest on the principal amount of USD 4,300,000.00 (RM 15,415,500.00) at the rate of 17% per annum as at 22 November 2007 amounting to USD 124,510.99;

(c) Facility Fee at the rate of 3% per annum on the Tranche II amount not released (amounting to USD 4,300,000.00) from 21 September 2007 until 22 November 2007 amounting to USD 22,216.67 (RM 79,646.76);

(d) Late payment charges as at 22 November 2008 amounting to USD 1,320,958.18 (RM 4,735,635.08) and continuing at the rate of 2% per month on the total outstanding amount of USD 4,924,505.44 (RM 17,654,352.00) calculated on a daily basis based on 360 days per year until full and final settlement thereof."

[250]Based on the above reasons, the Court found that the documentary evidence put forward by the plaintiffs clearly show that the relevant provisions of the Subscription Agreement had been breached. Hence, the Court was satisfied that the plaintiffs have proven their claim against the 2nd and 3rd defendants on a balance of probabilities.

[251]Consequently, the plaintiffs are entitled to judgment for their claim with costs.

[252]However, since the plaintiffs have recovered the sums of USD 567,397.57 (RM 1,807,281.80), USD 1,211.87 (RM 3,982.78) and RM 111,518.73, respectively, pursuant to a third party claim made in the Criminal Sessions Court *vide* Criminal Case No. 62-(49-52)-2009 by Maple Challenge and Impulse Talent, the 1st and 4th defendants, respectively, in this suit, the plaintiffs are only entitled to judgment for the amount of the total claim as set out above less those sums (see A17.1 to A17.4 at pages 2 and 3 of PW2's Supplementary witness statement – Exhibit P72).

[253]Therefore, the Court granted judgment to the plaintiffs, accordingly.

Parties in Suit 1123

[254]The parties in this suit which was filed, together with Suit 2256, on 10 December 2008, are as follows:

(1) KJD Glove, the plaintiff, is a private limited company incorporated in Labuan under the Offshore Companies Act 1990 having its registered address at Level 1, Lot 7, Block F, Saguking Commercial Building, Jalan Patau-Patau, 87000 Labuan, Wilayah Persekutuan, Malaysia.

(2) Maple Challenge, the 1st defendant, is a private limited company incorporated under the Companies Act, 1965 having its registered address at Plaza 138, Suite 18.03, 18th Floor, No. 138, Jalan Ampang, 50450 Kuala Lumpur and its business address at No. 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor.

(3) Lim Wan Soon, the 2nd defendant, is an individual with a last known correspondence address at No. 17, Jalan SG 8/12, Taman Sri Gombak, 68100 Batu Caves, Selangor Darul Ehsan.

(4) Leng Khuan Yow (F), the 3rd defendant, is an individual with a last known correspondence address at No. 17, Jalan SG 8/12, Taman Sri Gombak, 68100 Batu Caves, Selangor Darul Ehsan.

(5) United Overseas Bank (Malaysia) Berhad, the 4th defendant, is a company incorporated under the Companies Act 1965 having a business address at Level 2, Menara UOB, Jalan Raja Laut, 50350 Kuala Lumpur.

(6) Choong Foon Lan (F), the 5th defendant, is an individual with a last known correspondence address at No. 17, Jalan SG 8/12, Taman Sri Gombak, 68100 Batu Caves, Selangor Darul Ehsan. She is the mother of the 2nd defendant.

(7) Leng Kam Meng, the 6th defendant, is an individual with a last known correspondence address at No. 17, Jalan SG 8/12, Taman Sri Gombak, 68100 Batu Caves, Selangor Darul Ehsan. He is the brother of the 3rd defendant.

(8) EPCM, the 7th defendant, is a private limited company incorporated under the Companies Act, 1965 having its registered address at Megan Corporate Park, B9-5-1A, Jalan 1/125E, Taman Desa Petaling, 57100 Kuala Lumpur and its business address at No. 16, jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor.

(9) The 7th defendant is owned by the 2nd and 3rd defendants.

(10) EPCB, the 8th defendant, is a private limited company incorporated under the Companies Act, 1965 having its registered address at Megan Corporate Park, B9-5-1A, Jalan 1/125E, Taman Desa Petaling, 57100 Kuala Lumpur and its business address at No. 16, jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor.

(11) E-Circle, the 9th defendant, is a private limited company incorporated under the Companies Act, 1965 having its registered address at Megan Corporate Park, B9-5-1A, Jalan 1/125E, Taman Desa Petaling, 57100 Kuala Lumpur and its business address at No. 16, jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor.

(12) The 7th, 8th and 9th defendants are companies wholly owned (100%) by the directors of the 1st defendant i.e. the 2nd and 3rd defendants.

Events before the commencement of the full trial of Suit 1123

[255]On 16 June 2011, judgment-in-default of defence was entered against Maple Challenge, the 1st defendant.

[256]On 10 August 2011, EPCM, the 7th defendant, was wound up.

[257]On 9 August 2012, judgment-in-default was entered against EPCB, the 8th defendant.

[258]On 9 August 2012, judgment-in-default was also entered against E-Circle, the 9th defendant.

[259]On 25 September 2012, the plaintiff withdrew this suit against United Overseas Bank (Malaysia) Berhad, the 4th defendant.

Decision of the Court in Suit 1123

[260]Hence, on 25 March 2014, the trial did not proceed against the other 5 (five) defendants i.e. Maple Challenge, the 1st defendant, United Overseas Bank (Malaysia) Berhad, the 4th defendant, EPCM, the 7th defendant, EPCB, the 8th defendant and E-Circle, the 9th defendant.

[261]On March 2014, the trial for Suit 1123 proceeded only against 4 (four) defendants. They are Lim Wan Soon, the 2nd defendant, Leng Khuan Yow (F), the 3rd defendant, Choong Foon Lan (F), the 5th defendant, and Leng Kam Meng, the 6th defendant.

[262]On 2 July 2015, after the conclusion of the full trial and after Mr. Krishna Dallumah, the learned counsel for the 2nd, 3rd, 5th and 6th defendants, had put in his written submissions for the 2nd, 3rd, 5th and 6th defendants, Mr. Brendan Siva, the learned counsel for the plaintiff, informed the Court that the plaintiff is abandoning its claims in paragraph 33(3) of the plaintiff's statement of claim against the 2nd and 3rd defendants for fraud and that the plaintiff is proceeding only with its claims against the 5th and 6th defendants in paragraph 33(5) and (6) of its statement of

claim, for the return of the two sums of money, which the plaintiff claims the 5th and 6th defendants is holding under a constructive or resulting trust for the plaintiff together with interest and cost.

[263]Paragraph 33(3) of the plaintiff's statement of claim states as follows:

"

(3) the Plaintiff claims against the 2nd Defendant and the 3rd Defendant jointly and severally for:-

(a) exemplary damages and aggravated damages to be immediately assessed by this Honourable Court and paid jointly and severally by the 2nd Defendant and the 3rd Defendant to the Plaintiff for the deceitful/fraudulent actions perpetrated by the 2nd Defendant and the 3rd Defendant on the Plaintiff;

(b) interest at the rate of 8% per annum from the date judgment is given by the Hounourable Court on the

(c) amount of damages ordered by this Honourable Court to be paid jointly and severally by the 2nd Defendant and the 3rd Defendant to the Plaintiff for the deceitful/fraudulent actions perpetrated by the 2nd Defendant and the 3rd Defendant on the Plaintiff until full and final settlement thereof;"

(See pages 95 and 96 Bundle U).

[264]In paragraph 33(5) and (6) of the plaintiff's statement of claim, the plaintiff prays for the following reliefs against the 5th and 6th defendants in Suit 1123:

"

(5) the Plaintiff claims against the 5th Defendant for:-

(a) the return of the amount of RM 201,000.00;

(b) Interest at the rate of 8% per annum on the amount of RM 201,000.00 from the date judgment is awarded by this Honourable Court until full and final settlement thereof;

(6) the Plaintiff claims against the 6th Defendant for:-

(c) the return of the amount of RM 120,000.00;

(d) Interest at the rate of 8% per annum on the amount of RM 120,000.00 from the date judgment is awarded by this Honourable Court until full and final settlement thereof;"

[265]After the Court had considered the written and oral submissions of the learned counsels for the parties, the Court allowed the claims of KJD Glove, the plaintiff, in paragraph 33(5) and (6) of the plaintiff's statement of claim against Choong Foon Lan (F) and Leng Kam Meng, the 5th and 6th defendants, respectively, with costs.

[266]For Suit 2256 and Suit 1123, the Court ordered Lim Wan Soon and Leng Khuan Yow (F), the 2nd and 3rd defendants, to pay a global sum of RM 200,000.00 as costs to the plaintiffs.

[267]For Suit 1123, the Court ordered Choong Foon Lan (F) and Leng Kam Meng, the 5th and 6th defendants, respectively, to pay a sum of RM 15,000.00 as costs to KJD Glove, the plaintiff.

Reasons for the decision of the Court in Suit 1123

[268]The reasons for the decision of the Court in Suit 1123 are as follows:

Background of Suit 1123

[269]The background of Suit 1123 is as follows:

(1) By the Loan Agreement, the plaintiff agreed to grant and make available to the 1st defendant a term loan up to a maximum aggregate principal amount of the Loan Amount i.e. USD 8,600,000.00 only, subject to the terms and conditions of the Loan Agreement:

(a) the Loan Amount was to be drawn in two (2) tranches of USD 4,300.000.00 each;

(b) that the draw down of the monies *via* the aforesaid tranches was to be performed within a period of six (6) months;

(c) that the 1st defendant had, expressly and unequivocally, agreed and undertaken to utilize the Loan Amount for the following two (2) specific purposes only:

(i) for the purchase of plant machinery for the purpose of the 1st defendant leasing the plant machinery to two (2) companies only i.e. the 8th defendant and Maple Strategies to be used by the said companies solely for the expansion of its keypad and LCD windows business;

(ii) to lend a portion of the Loan Amount to Maple Strategies for the working capital requirements of the said company only upon it being made a subsidiary of the company known as Impulse Talent.

(d) that the 1st defendant is to open and maintain two (2) Operation Accounts in USD currency and in Ringgit Malaysia currency respectively with a commercial bank agreed to by the plaintiff and into which all monies received by the 1st defendant shall be deposited into;

(e) that it is expressly agreed between the plaintiff and the 1st defendant that the aforesaid Accounts shall be managed, used and/or operated in the manner as provided in the Loan Agreement;

(f) that the Loan Amount would be drawn down into the USD Account;

(g) that in the event the 1st defendant refuses, neglects and/or fails to pay any amount due and owing under the Loan Agreement upon demand by the plaintiff and/or breaches any of the terms and conditions of the Loan Agreement:

(i) the entire amount loaned by the plaintiff to the 1st defendant under the Loan Agreement, including but not limited to the interest and charges on the Loan Amount and costs to the interest and charges on the Loan Amount and costs on a solicitor-client basis, shall become immediately due and payable by the 1st defendant to the plaintiff;

(ii) any portion of the Loan Amount not released by the plaintiff to the 1st defendant shall not be released and shall be cancelled; and

(iii) the plaintiff shall be entitled to immediately enforce the terms of the Loan Agreement and/or any guarantees/securities given by the 1st defendant, the directors of the 1st defendant and/or the 1st defendant's Group of Companies as security for the Loan Amount.

(2) The 1st defendant had then opened/caused the opening of the following accounts with MBB:

(a) the USD Account; and

(b) the RM Account"); and

(3) On or about 20 March 2007, the Tranche I of the Loan Amount in the sum of USD 4,189,033.00 (after deducting the transaction expenses and the collateral requirements of the plaintiff) into the USD Account.

(4) On 23 March 2007, the plaintiff approved/caused to be approved the transfer of the amount of USD 1,189,033.00 from the USD Account to the RM Account with the intention for the 1st defendant to use the said amount to purchase plant machinery as provided in the Loan Agreement.

(5) Subsequently, the plaintiff discovered that the 1st defendant had breached/defaulted the terms and conditions of the Loan Agreement such as:

(a) Withdrawals of monies from the USD Account by the 1st defendant without the knowledge/approval of the plaintiff;

(b) The opening of the Accounts without appointing the plaintiff's representative as a co-signatory;

(c) Withdrawal of monies exceeding USD 50,000.00 from the USD Account by the 1st defendant without the knowledge/consent of the plaintiffs;

(d) Refusal, negligence and/or failure of the 1st defendant to provide information and/or documentation to the plaintiffs; and

(e) Withdrawal of monies from the RM Account by the 1st defendant on a misrepresentation by the 2nd and/or 3rd defendant in breach of the Loan Agreement.

(6) The plaintiff also discovered that the following payments were made by the 7th defendant in breach of the terms and conditions of the Loan Agreement from the USD 2,500,000.00 transferred by the 1st defendant from the USD Account to the 7th defendant:

(a) Payment of the total sum of RM 4,461,000.00 into the accounts of the 2nd, 3rd, 5th and 6th defendants without cause and without any valuable consideration;

(b) Payment of RM 2,718,000.00 to the 4th defendant to settle the 7th defendant's loan with the 4th defendant; and

(c) Payment of RM 620,000.00 to the 2nd defendant without cause and without any valuable consideration.

(7) Due to the aforesaid breaches and due to the 1st defendant's failure to fulfill the conditions precedent for the release of Tranche II of the Loan Amount as provided in the Loan Agreement, Tranche II of the Loan Amount was not drawn down.

(8) By a letter dated 6 May 2008 issued by the plaintiff's solicitors to the 1st defendant, the plaintiff terminated the Loan Agreement and demanded for the repayment of, *inter alia*, Tranche I of the Loan Amount from the 1st defendant.

(9) However, as of to date, the 1st defendant refuses, fails and/or neglects to pay the aforesaid amount or any part thereof demanded by the plaintiff.

(10) In view of the breaches of the terms and conditions of the Loan Agreement, the plaintiff filed this suit to claim for, *inter alia*, the recovery of Tranche I of the Loan Amount.

Plaintiff's pleaded case in Suit 1123 against the 9 (nine) defendants

[270]In Suit 1123, KJD Glove, the plaintiff, sued the 9 (nine) defendants, based on, *inter alia*, the following causes of action as pleaded in its statement of claim, which was filed together with its writ of summons dated 10 December 2008, enclosure (1), which was filed on 10 December 2008, through its previous solicitors, Messrs. Syed Alwi Ng & Co., and which was, subsequently, amended.

[271]The amended writ of summons was re-dated 9 September 2013 and filed on 9 September 2013, enclosure (107), and the amended statement of claim was re-dated 9 September 2013 and filed on 13 September 2013, enclosure (107A), through its current solicitors, Messrs. Brendan Siva:

(1) Various breaches of and/or defaults in the terms of the Loan Agreement by the 1st defendant;

(2) Fraud perpetrated on the plaintiff by Maple Challenge, the 1st defendant, 2nd defendant and 3rd defendant;

(3) The return to the plaintiff of a sum of RM 2,718,000.00, which the 4th defendant had received on deceitful/fraudulent grounds and/or as a result of misrepresentations made to the plaintiff, or, alternatively, which the 4th defendant holds on the basis of a resulting trust and/or a constructive trust for and on behalf of the plaintiff;

(4) The return to the plaintiff of a sum of RM 201,000.00 and a sum of RM 120,000.00, which the 5th defendant and the 6th defendant had respectively received from the plaintif on deceitful/fraudulent grounds and/or as a result of misrepresentations made to the plaintiff, or, alternatively, which the 5th defendant holds on the basis of a resulting trust and/or a constructive trust for and on behalf of the plaintiff;

(5) A declaration that the 7th defendant holds all monies received from the USD Account and/or the RM Account in MBB in trust for and on behalf of the plaintiff and the return to the plaintiff of all or any monies which the 7th defendant had received from the USD Account and/or the RM Account in MBB and which remains in the 7th defendant's possession/control;

(6) A declaration that the 8th defendant holds all monies received from the USD Account and/or the RM Account in MBB in trust for and on behalf of the plaintiff and the return to the plaintiff of all or any monies which the 8th defendant had received from the USD Account and/or the RM Account in MBB and which remains in the 8th defendant's possession/control; and

(7) A declaration that the 9th defendant holds all monies received from the USD Account and/or the RM Account in MBB in trust for and on behalf of the plaintiff and the return to the plaintiff of all or any monies which the 9th defendant had received from the USD Account and/or the RM Account in MBB and which remains in the 9th defendant's possession/control.

[272]The plaintiff pleads, *inter alia*, the following facts in support of the above causes of action:

(1) The plaintiff had executed the Loan Agreement with the 1st defendant, whereby the plaintiff agreed to grant and make available to the 1st defendant a term loan up to a maximum aggregate principal of the Loan Amount i.e. USD 8,600,000.00 only, subject to the terms and conditions set out in the Loan Agreement;

(2) The 1st defendant had then opened/caused the opening of the following accounts with MBB;

(a) the USD Account; and

(b) the RM Account.

(3) The plaintiff had on or about 20 March 2007 released/caused the release of Tranche I of the Loan Agreement in the sum of USD 4,189,033.00 (after deducting the transaction expenses and the collateral requirements of the plaintiff) into the USD Account;

(4) On 23 March 2007, the plaintiff approved/caused to be approved the transfer of the amount of USD 1,189,033.00 from the USD Account to the RM Account with the intention for the 1st defendant to use the said amount to purchase plant machinery as provide in the Loan Agreement;

(5) Subsequently, the plaintiff discovered that the 1st defendant had breached/defaulted on the terms and conditions of the Loan Agreement;

(6) Due to the aforesaid breaches and due to the 1st defendant's failure to fulfill the conditions precedent for the release of Tranche II of the Loan Amount as provided in the Loan Agreement, Tranche II of the Loan Amount was not drown down;

(7) By a letter dated 6 May 2008 issued by the plaintiff's solicitors to the 1st defendant, the plaintiff terminated the Loan Agreement and demanded for the repayment of, *inter alia*, Tranche I of the Loan Amount from the 1st defendant;

(8) However, as of the date, the 1st defendant refuses, fails and/or neglects to pay the aforesaid amount or any part thereof demanded by the plaintiff; and

(9) In view of the breaches of the terms and conditions of the Loan Agreement, the plaintiff filed this suit to claim for, *inter alia*, the recovery of Tranche I of the Loan Amount.

Plaintiff's claims in Suit 1123

[273]In view of the breaches of the terms and conditions of the Loan Agreement, the plaintiff is claiming for, *inter alia*, the recovery of Tranche I of the Loan Amount.

[274]Hence, in paragraph 33 of the plaintiff's undated statement of claim in Suit 1123, in Bundle 'U', that was filed by Messrs. Syed Alwi Ng & Co., the plaintiff's previous solicitors, the plaintiff, is claiming for the following reliefs from the Court against the 1st to the 9th defendants:

"33. WHEREFORE:-

(1) the Plaintiff claims against the 1st Defendant, the 2nd Defendant and/or the 3rd Defendant jointly or severally for:-

(a) an order for a Mareva Injunction to be made against the 1st Defendant and/or the 3rd Defendant jointly and severally to prohibit the 1st Defendant, the 2nd Defendant and/or the 3rd Defendant from using, withdrawing and/or transferring monies in any form or manner whatsoever from:-

(i) Account No. 714150001809 (the USD Account); and

(ii) Account No. 514150332181 (the RM Account) in Malaya Banking Berhad;

(b) that 1st Defendant, the 2nd Defendant and the 3rd Defendant jointly and severally return/cause to be returned all monies as in:-

(i) Account No. 714150001809 (the USD Account); and

(ii) Account No. 514150332181 (the RM Account) in Malaya Banking Berhad to the Plaintiff within twenty four (24) hours from the date this Judgment is allowed by the this Honourable Court, failing which the 2nd Defendant and the 3rd Defendant shall in their personal capacity and/or in their capacity as directors of the 1st Defendant (at the material time) be respectively held in contempt of court;

(2) the Plaintiff claims against the 1st Defendant for :-

(a) the Principal Amount of USD 4,300,000.00 (RM 15,415,500.00);

(b) interest on the Principal Amount as at 22nd November 2007 amounting to USD 58,593.41 (RM 210,057.37);

(c) Facility Fee on the Tranche II amount not released as at 22nd November 2007 amounting to USD 22,216.67 (RM 79,646.76);

(d) late payment charges as at 22nd November 2008 amounting to USD 1,175,116.35 (RM 1,212,792.11) and containing at the rate of 2% per month on the total amount of USD 4,380,810.08 (RM 15,705,204.14) calculated on daily basis based on 360 days per year until full and final settlement;

(3) the Plaintiff claims against the 2nd Defendant and the 3rd Defendant jointly and severally for:-

(d) exemplary damages and aggravated damages to be immediately assessed by this Honourable Court and paid jointly and severally by the 2nd Defendant and the 3rd Defendant to the Plaintiff for the deceitful/fraudulent actions perpetrated by the 2nd Defendant and the 3rd Defendant on the Plaintiff;

(e) interest at the rate of 8% per annum from the date judgment is given by the Hounourable Court on the

(f) amount of damages ordered by this Honourable Court to be paid jointly and severally by the 2nd Defendant and the 3rd Defendant to the Plaintiff for the deceitly/fraudulent actions perpetrated by the 2nd Defendant and the 3rd Defendant on the Plaintiff until full and final settlement thereof;

(4) the Plaintiff claims against the 4th Defendant for:-

(a) the return of the amount of RM 2,718,000.00;

(b) Interest at the rate of 8% per annum on the amount of RM 2,718,000.00 from the date judgment is awarded by this Honourable Court until full and final settlement thereof

(5) the Plaintiff claims against the 5th Defendant for:-

(a) the return of the amount of RM 201,000.00;

(b) Interest at the rate of 8% per annum on the amount of RM 201,000.00 from the date judgment is awarded by this Honourable Court until full and final settlement thereof;

(6) the Plaintiff claims against the 6th Defendant for:-

(c) the return of the amount of RM 120,000.00;

(d) Interest at the rate of 8% per annum on the amount of RM 120,000.00 from the date judgment is awarded by this Honourable Court until full and final settlement thereof;

(7) the Plaintiff claims against the 7th Defendant for:-

(a) a declaration that the 7th Defendant holds all monies received, in any form or manner whatsoever, from Account No. 714150001809 (the USD Account) and/or No. Account 514150331809 (the RM Account) in Malayan Banking Berhad in trust for and on behalf of the Plaintiff : and

(b) the return all of all monies which the 7th Defendant had received, in any form or manner whatsoever, from Account No. 714150001809 (the USD Account) and/or No. Account 514150331809 (the RM Account) in Malayan Banking Berhad, and which remains in the 7th Defendant ‘s possession/control, to the Plaintiff;

(8) the Plaintiff claims against the 8th Defendant for:-

(a) a declaration that the 8th Defendant holds all monies received, in any form or manner whatsoever, from Account No. 714150001809 (the USD Account) and/or No. Account 514150331809 (the RM Account) in Malayan Banking Berhad in trust for and on behalf of the Plaintiff : and

(b) the return all of all monies which the 8th Defendant had received, in any form or manner whatsoever, from Account No. 714150001809 (the USD Account) and/or No. Account 514150331809 (the RM Account) in Malayan Banking Berhad, and which remains in the 8th Defendant’s possession/control, to the Plaintiff;

(9) the Plaintiff claims against the 9th Defendant for:-

(a) a declaration that the 9th Defendant holds all monies received, in any form or manner whatsoever, from Account No. 714150001809 (the USD Account) and/or No. Account 514150331809 (the RM Account) in Malayan Banking Berhad in trust for and on behalf of the Plaintiff : and

(b) the return all of all monies which the 9th Defendant had received, in any form or manner whatsoever, from Account No. 714150001809 (the USD Account) and/or No. Account 514150331809 (the RM Account) in Malayan Banking Berhad, and which remains in the 9th Defendant's possession/control, to the Plaintiff;

(c) in particular for amount of RM1,500,000.00 allegedly 'utilized' for the purchase of the 'Coating Unit' machine which did not exist;

(10)

(a) an order for tracing to be conducted and carried out on all monies withdrawn from:-

(i) Account No. 714150001809 (the USD Account): and

(ii) No. Account 514150331809 (the RM Account) In Malayan Banking Berhad by the 1st Defendant, the 2nd Defendant and/or the 3rd Defendant jointly and severally, in particular but not limited to payments made by the 7th Defendant to UVAT Technology Co. Ltd and

(b) that all persons, individuals and/or Scompanies who had received/traced to have been in receipt of monies from Account No. 714150001809 (the USD Account) and/or No. Account 514150331809 (the RM Account) in Malayan Banking Berhad *via* the 1st Defendant and/or the 2nd Defendant and/or 3rd Defendant are hereby ordered to immediately pay/return all monies so received from the USD Account and the RM Account to the Plaintiff;

(11) all costs of this action including but not limited to costs on a solicitor-client basis; and

(12) any other or futher relief this Honourable Court deems fair and reasonable based on the facts of this action".

1st defendant's pleaded case in Suit 1123

[275]The 1st defendant did not file a statement of defence.

[276]On 16 June 2011, Judgment-in-default of defence was entered against Maple Challenge, the 1st defendant.

2nd and 3rd defendants' pleaded case in Suit 1123

[277]The 2nd and 3rd defendants entered their appearance together with the 1st, 5th, 6th, 7th, 8th and 9th defendants on 31 December 2008 by filing their joint memorandum of appearance dated 31 December 2008, enclosure (4), through their solicitors, Messrs. H. Y. Lee & Co.

[278]In their statement of defence, dated 21 January 2009, filed by their solicitors, Messrs. Krishna Dallumah, the 2nd and 3rd defendants deny that they have breached the terms of the Loan Agreement.

[279]The 2nd and 3rd defendants also deny that the plaintiff had released/caused the release of Tranche I of the loan amounting to USD 4,189,033.00 into the USD Account because the loan monies do not belong to the plaintiff.

[280]The 2nd and 3rd defendants also deny that they had made withdrawals from the USD Account and used the monies for unauthorized purposes without the knowledge of the plaintiff.

[281]The 2nd and 3rd defendants admit that they had opened the USD Account and the RM Account with MBB and that the two accounts would be activated inconsistent with the Subscription Agreement but they plead that the accounts were only activated in early March before the loan moneys were received by the 1st defendant.

[282]In their statement of defence, the 2nd and 3rd defendants plead, *inter alia*, as follows:

(1) The loan was given by the plaintiff to the 1st defendant for the usage of the 1st defendant and related companies ("The Group of Companies") which include the 1st, 7th, 8th, 9th defendants, Maple Strategies and Impulse Talent and the usage of the money also includes the giving of inter-company loans for the purposes of The Group of Companies and this is clear from clause 13.1 of the Subscription Agreement which is related to the Loan Agreement;

(2) It is clearly stated in clause 2.1 of the Loan Agreement dated 15 March 2007 between Maple Chalengge, the 1st defendant, and KJD Glove, the plaintiff, that the total loan is USD 8.6 million and this amount is to

be paid to the 1st defendant in two instalments of USD 4.3 million each, in accordance with the terms of the Loan Agreement;

(3) One of the terms relates to the conditions precedent and clause 3.1 stipulates that the borrower may not make its request for the 1st drawdown until the lender has received the documents listed in Schedule 1 and confirmed that it has found such documents to be satisfactory;

(4) Clause 5.1 stipulates that the interest is to be charged at the rate of 8% per annum or such other rate as the lender may determine at its absolute discretion and such revised rate shall take effect upon notice by the lender to the borrower;

(5) Clause 6A stipulates the manner and time of the repayment of the loan by the borrower to the lender;

(6) In the Loan Agreement, it is stated in clause 17.1 that in the event of any dispute arising between the parties, the party concerned, if requested by the other party, shall attempt in good faith to settle the dispute in the 1st instance by mutual discussions for a period of 21 days calendar days from the day the other party receives the notice;

(7) It is also stated in clause 17.1 of the Loan Agreement, that if the dispute cannot be settled by mutual discussions within 21 calendar days, any party shall submit the dispute to arbitration in accordance with clause 27.11 by notice to the other party and the 2nd and 3rd defendants plead that the proceedings in Court is without prejudice to the right to refer the dispute to arbitration;

(8) The plaintiff's representative by the name of Teo Hun Theng, who was appointed as the Finance Manager in one of the defendants' companies i.e. EPCB, the 8th defendant, had approved the usage of the loan, which was only for a sum of USD 4,189,033.00 (after the deduction of a sum of USD 50,000.00 for the fee and another sum of USD 60,967.00 as the instalment of the interest payment), instead of a sum of USD 4.3 million as stipulated in the Loan Agreement;

(9) The 2nd and 3rd defendants have used the loan proceeds lawfully in accordance with clause 3.1 of the Subscription Agreement;

(10) The loan is illegal because the plaintiff has breached the conditions set by BNM by charging interest on the loan at the rate of 21.9%, which is more than the rate of 8% that is allowed to be charged by BNM, in its letter dated 23 February 2007;

(11) The loan is also illegal because the plaintiff has breached the conditions of BNM as KJD Glove, the plaintiff, is not stated as the lender in the Subscription Agreement;

(12) The loan is also illegal because the plaintiff has breached the conditions of BNM as KJD Glove, the plaintiff, has imposed other fees on the loan i.e. a sum of USD 50,000.00, which was paid by Maple Challenge, the 1st defendant, twice as fees and no bonds were issued prior to the release of Tranche I of the loan;

(13) Hence, the plaintiff, who has contravened the law, is not entitled to appear before the court to oppress the 2nd and 3rd defendants;

(14) The plaintiff cannot raise the non-fulfillment of some of the conditions precedent by the 1st defendant because the plaintiff knew that those conditions precedent were not fulfilled and this is apparent from the letter dated 15 March 2007 but despite that, the plaintiff still allowed the withdrawal of Tranche I of the loan amounting to USD 4,189.033.00 by Maple Challenge, the 1st defendant, on 20 March 2007;

(15) The Guarantee is invalid, null and void because in the month of November 2007, the 2nd and 3rd defendants were threatened that if they did not execute the Guarantee Agreement, the balance of the loan i.e. Tranche II of the loan for a sum of USD 4.3 million, would not be released to the 1st defendant;

(16) The plaintiff's allegation that the 2nd and 3rd defendants have committed fraud was made *mala fide* to enable the plaintiff to acquire all the defendants' assets unlawfully;

(17) The plaintiff has also unlawfully entered the premises of EPCM and EPCB, including the defendants' business office; trespassed into the defendants' office and locked up the defendants' financial office;

(18) It was the plaintiff, who had breached the Loan Agreement and refused to release the balance of the loan i.e Tranche II of the loan for the sum of USD 4.3 million, even though the plaintiff had agreed earlier on that this sum would be released to the 1st defendant on or before 23 December 2007;

(19) If the defendants had intended to take the plaintiff's money wrongfully, they would not have applied for Tranche II of the loan to be deferred until 23 December 2007;

(20) The plaintiff, *via* a Court Order dated 3 January 2008, had also wrongfully acquired the defendants' shares, with a net asset worth exceeding RM 25 million, excluding the defendants' business and the defendants' good name, the value of which exceeds RM 40 million, whereas the amount of the loan, that was received by the defendants, was only USD 4, 189,033.00;

(21) The plaintiff has, with bad intention, deliberately oppressed the 2nd and 3rd defendants, who were operating a legitimate business, and also the 2nd defendant, who is an outstanding businessman, by accusing the 2nd defendant of having committed breach of trust and money laundering;

(22) The act of the plaintiff in transferring the shares of the 1st defendant's company to the plaintiff is clearly *mala fide* since the money does not belong to the plaintiff and the plaintiff has also breached the conditions of BNM as set out in its letter dated 23 February 2007;

(23) Hence, the plaintiff's *locus* to commence this suit is questionable;

(24) Clause 2.2 of the Loan Agreement must be read together with clause 3 of the Subscription Agreement;

(25) The payment to E-Circle was for a coating machine, that was sold by the 7th defendant to the 9th defendant and, subsequently, sold to the 1st defendant on 22 March 2007 and the cheque was signed by the 2nd defendant and YEO and there was no objection from the plaintiff at the material time;

(26) With the knowledge and consent of the plaintiff's representative, Glove Kendall and Kendall Court, had initiated legal action in the Kuala Lumpur High Court through Suit 1728 against the 1st, 2nd and 3rd defendants, Impulse Talent and Maple Strategies and an Order of Court dated 3 January 2008 was obtained to, *inter alia*, freeze the bank accounts of the 1st defendant, Impulse Talent and Maple Strategies;

(27) The plaintiff is the party directly involved in the action but the action was, subsequently, withdrawn by the plaintiff with costs to the 1st , 2nd and 3rd defendants;

(28) The plaintiff, through Glove Kendall, also caused the removal of the 2nd and 3rd defendants as the directors of the 1st defendant and some of the companies in the EPC Group, even though the full loan was used lawfully by the defendants and/or the usage of the full loan was within the knowledge and/or consent of the plaintiff at all material times;

(29) The 2nd and 3rd defendants have never received any objection from the plaintiff regarding the operation of the two accounts or the usage of the loan proceeds by the 1st defendant until November 2007, and there is also no existing fraud or deceit on their part in relation to both the matters;

(30) The plaintiff, at all material times, knew that the companies in the Group of Companies, which were owned by the 2nd and 3rd defendants, in particular, the 7th, 8th and 9th defendants, had obtained several loans and the loans, including those from the 2nd and 3rd defendants, have to be repaid;

(31) Therefore, the payments of monies by the 1st defendant to all the parties concerned including but not limited to all the defendants in this action is valid and legitimate and the full details of the payments are also within the knowledge of the plaintiff;

(32) The acts of the plaintiff in not allowing the release of Tranche II of the loan i.e. the sum of USD 4.3 million and in lodging the police reports, which have caused the bank accounts of the 7th and 8th defendants to be frozen; were done *mala fide,* especially, toward the 7th and 8th defendants; and these acts of the plaintiff had caused the directors of the 7th and 8th defendants, who are the 2nd and 3rd defendants, to be accused of committing breach of trust and money laundering, which has, in turn, caused the following:

(a) Serious damage to the good names and images of the 2nd and 3rd defendants;

(b) The freezing of the accounts of the 2nd and 3rd defendants; and

(c) The losses suffered by the 2nd and 3rd defendants and the obstacles experienced by them.

(33) Therefore, the plaintiff's ill intention in its plan to ruin all the assets of the 2nd and 3rd defendants and the business reputation of the 2nd and 3rd defendants is apparent;

(34) The plaintiff has also failed, neglected and/or refused to take steps to mitigate the damages and loss (which is denied) of the plaintiff and/or failed to take into account the value of the securities that it has against the 2nd and 3rd defendants;

(35) The plaintiff's claim is baseless; it is also an abuse of the process of Court; and it has clear elements to oppress the 2nd and 3rd defendants; and

(36) The plaintiff's prayers are also against the law.

[283]Hence, the 2nd and 3rd defendants pray, in paragraph 41 of their statement of defence dated 21 January 2009, that the Court dismisses the plaintiff's claim with cost.

4th defendant's pleaded case in Suit 1123

[284]On 26 December 2008, the 4th defendant entered its appearance by filing its memorandum of appearance dated 26 December 2008, enclosure (3), through its solicitors, Messrs. Raja, Darryl & Loh.

[285]In its statement of defence dated 20 January 2009, and filed on 21 January 2009, enclosure (8), the 4th defendant denies the plaintiff's allegations.

[286]The 4th defendant pleads that it has no knowledge of the matters pleaded by the plaintiff concerning the Loan Agreement.

[287]The 4th defendant pleads *inter alia*, as follows:

(1) The relationship between the 4th defendant and the 7th defendant is that of banker and customer;

(2) The plaintiff has no cause of action against the 4th defendant; and

(3) The plaintiff's action is frivolous, vexatious and an abuse of the Court's process.

[288]Hence, the 4th defendant prays that the Court dismisses the plaintiff's claim with cost.

5th defendant's pleaded case in Suit 1123

[289]The 5th defendant, who is the mother of the 2nd defendant, entered her appearance together with the 1st, 2nd, 3rd, 6th, 7th, 8th and 9th defendants on 31 December 2008 by filing her joint memorandum of appearance dated 31 December 2008, enclosure (4), through her solicitors, Messrs. H. Y. Lee & Co.

[290]In Suit 1123, in her statement of defence dated 19 January 2009, filed by her solicitors, Messrs. H.Y. Lee & Co., on 9 January 2009, enclosure (5), the 5th defendant denies the plaintiff's allegations, in particular, that she was holding the money under a constructive or resulting trust for the plaintiff.

[291]The 5th defendant pleads, *inter alia*, that she is entitled to receive the repayment of money to her from the 7th defendant, which is owned by the 2nd and 3rd defendants, and to keep the money because it was the repayment by the 7th defendant to her in April 2007 for a friendly loan that she had given in March 2007 to the 7th defendant, at the 7th defendant's request.

[292]Hence, the plaintiff's claim against her is mala ficle, prejudicial and an abuse of the Court process.

[293]Therefore, she prays that the Court dismisses or strikes out the plaintiff's claim with cost.

6th defendant's pleaded case in Suit 1123

[294]The 6th defendant, who is the older brother of the 3rd defendant, entered his appearance together with the 1st, 2nd, 3rd, 5th, 7th, 8th and 9th defendants on 31 December 2008 by filing his joint memorandum of appearance dated 31 December 2008, enclosure (4), through his solicitors, Messrs. H. Y. Lee & Co.

[295]In his statement of defence dated 19 January 2009, filed by his solicitors, Messrs. H. Y. Lee & Co., on 19 January 2009, enclosure (6), the 6th defendant denies all the plaintiff's allegations, in particular, that he was holding the money under a constructive or resulting trust for the plaintiff.

[296]The 6th defendant pleads, *inter alia*, that he is entitled to receive the repayment of money to her from the 7th defendant, which is owned by the 2nd and 3rd defendants, and to keep the money because it was the repayment by the 7th defendant to him in April 2007 for a friendly loan that he had given around the year 2006 to the 7th defendant, at the 7th defendant's request.

[297]Hence, the plaintiff's claim against him is mala ficle, prejudicial and an abuse of the Court process.

[298]Therefore, he prays that the Court dismisses the plaintiff's claim with cost.

7th, 8th and 9th defendants' pleaded case in Suit 1123

[299]The 7th, 8th and 9th defendants entered their appearance on 31 December 2008 by filing their joint memorandum of appearance together with the 1st, 2nd, 3rd, 5th and 6thdefendants dated 31 December 2008, enclosure (4), through their solicitors, Messrs. H. Y. Lee & Co.

[300]In their amended statement of defence and counterclaim re-dated 30 April 2010, filed by their solicitors, Messrs. H. Y. Lee & Co., on 13 May 2010, enclosure (41), the 7th, 8th and 9th defendants deny all the plaintiff's allegations.

[301]They also plead, *inter alia*, as follows:

(1) There was one singular transaction for a loan of USD 8.6 million involving the Loan Agreement dated 15 March 2007, the Subscription Agreement dated 15 March 2007, the 3 Deeds of Charge, all dated 15 March 2007, between Kendall Court and Impulse Talent, Kendall Court and Maple Strategies, and Kendall Court and Maple Challenge, respectively, and the 3 Charges, all dated 15 March 2007, over shares between Kendall Court and the 2nd defendant, Kendall Court and the 3rd defendant and Kendall Court and Impulse Talent, respectively.

(2) The loan is to be released in two tranches of USD 4.3 million each after the conditions precedent have been fulfilled (or waived by the Investor) before the release of the 1st tranche of the loan and the conditions subsequent before the release of the 2nd tranche of the loan;

(3) How the loan proceeds are to be used is specified in clause 3.1 of the Subscription Agreement which provides that the loan to Maple Challenge, the 1st defendant, is to enable Maple Challenge, the 1st defendant, to purchase plant machinery and extend inter-company loans for the purposes of the business of the Group of Companies;

(4) Clause 17.11 of the Loan Agreement provides for the resolution of any dispute or difference of any kind whatsoever that may arise between any of the parties by way of mutual discussion and if the dispute cannot be resolved through mutual discussion, for the submission of the dispute to arbitration but the plaintiff did not take steps to resolve the dispute between the plaintiff and the defendants concerning the loan transaction in accordance with this clause before filing Suit 1728 and this suit;

(5) Clause 21 of the Subscription Agreement also provides for the resolution of any dispute or difference of any kind whatsoever that may arise between any of the parties mutual discussion and if the dispute cannot be resolved through mutual discussion, for the submission of the dispute to arbitration but the plaintiff did not take steps to resolve the dispute between the plaintiff and the defendants concerning the loan transaction in accordance with this clause before filing Suit 1728 and this suit;

(6) Both the Loan Agreement and the Subscription Agreement constitute one loan transaction and the plaintiff is bound by the terms and conditions of the two Agreements which were prepared by the plaintiff's solicitors;

(7) Alternatively, based on the form of the loan transaction and the manner in which the loan is to be given to Maple Challenge, the 1st defendant, the loan transaction is illegal because the terms and conditions of the loan did not comply with the terms and conditions as contained in the letter dated 23 February 2007 from BNM approving the loan;

(8) The plaintiff has breached BNM's terms and conditions because of the following reasons;

  (a) The actual lender of the loan is not the plaintiff as stated in the Subscription Agreement;

  (b) The rate of interest charged is about 21.9% per annum instead of 8% per annum that was fixed by BNM; and

  (c) In contravention of clause 4.4(b) of the Subscription Agreement, which provides that no other fee ought to be paid/charged on the borrower for the loan, the borrower had to pay a fee of USD 50,000.00, twice.

(9) The plaintiff is estopped from raising the issue of the non-fulfillment of the conditions precedent because it was the plaintiff itself, which had allowed the 1st tranche of the loan to be released even though the plaintiff knew that the conditions precedent have not been fully complied with;

(10) Maple Challenge, the 1st defendant, opened two bank accounts in accordance with the terms and conditions of the Subscription Agreement but the 1st tranche of the loan was not released in full to the 1st defendant as only a sum of USD 4,189,033.00 was released, after a sum of USD 50,000.00 was deducted for the fee and a sum of USD 60,967.00 was deducted as the instalment payment for the interest as opposed to a sum of USD 4.3 million as stipulated in the Subscription Agreement ;

(11) The loan proceeds were lawfully used by the defendants' companies in accordance with clause 3.1 of the Subscription Agreement;

(12) Furthermore, the plaintiff's own representative, Teo Hun Theng, who was appointed as the Finance Manager of one of the companies in the defendants' Group of Companies i.e. EPCB, had confirmed that the use of the loan proceeds in the manner that is pleaded by the plaintiff in its statement of claim against the defendants, is lawful;

(13) The plaintiff's representatives, in particular, YEO and Chris Chia, made false accusations againt the defendants, in particular, the 1st, 2nd, 3rd, 6th and 7th defendants, that they have, on or about November 2007, misappropriated the loan proceeds of USD 4,189,033.00;

(14) The 1st defendant's directors, who are the 2nd and 3rd defendants, were threatened by the plaintiff and the plaintiff's representative into signing the Guarantee and Indemnity in the month of November 2007 otherwise the 2nd tranche of the loan would not be released to the 1st defendant;

(15) The plaintiff's allegations that the defendants have breached the loan contract were made *mala fide* and were made with the aim of taking over the defendants' assets wrongfully;

(16) This is evident from the plaintiff's unlawful entry into the 7th defendant's premises on 8 January 2008 at about 11.30 a.m. at No. 2 & 4, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Kuala Lumpur, Malaysia and also the plaintiff's unlawful entry into the 8th defendant's premises on 8 January 2008 at about 11.30 a.m. at No. 14 & 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Kuala Lumpur, Malaysia;

(17) The plaintiff, through Yeo Kar Peng, Chris Chia and the plaintiff's other representatives, had in bad faith informed the employees at the two premises, that the plaintiff had taken over the premises and the defendants' business;

(18) While they were at the two premises, they had also done acts, that were wrongful and these acts, which are set out in the defendants' statement of defence, have caused loss and damage to the 7th and 8th defendants;

(19) The plaintiff, through Hicks-Woode, had issued notices to the defendants' companies with the aim of ruining the good business name of the defendants;

(20) If the defendants had wanted to take the loan proceeds unlawfully, the 1st defendant would not have requested for the deferment of the 2nd tranche of the loan until 23 February 2007;

(21) It was the plaintiff who had breached the loan contract by its refusal to release the 2nd tranche of the loan on or before 23 December 2007;

(22) The plaintiff had, in breach of the terms of the Loan Agreement, lodged police reports against the defendants aimed at oppressing and forcing the defendants to repay the loan together with interest contrary to the terms therein which have been agreed upon by the parties;

(23) The plaintiff also accused the defendants, in particular, the 2nd and 3rd defendants, of having committed breach of trust and money laundering thereby causing the freezing of the defendants' bank accounts, in particular, the bank accounts of the 7th and 8th defendants;

(24) Thereafter, with the knowledge and consent of the plaintiff's representatives, Glove Kendall and Kendall Court, had commenced Suit 1728 against the 1st defendant, the 2nd defendant and the 3rd defendant, Impulse Talent and Maple Strategies and had also clearly in bad faith obtained an injunction Order dated 3 January 2008 which caused the bank accounts of the 1st, 7th and 8th defendants to be frozen;

(25) Even though Suit 1728 has been withdrawn, the acts that were carried out in Suit 1728 were wrongful because of the following reasons:

(a) The companies within the defendants' Group of Companies, in particular, the 7th and 8th defendants, have various credit facilities from the banks, which have priority;

(b) The plaintiff's act in causing the freezing of the defendants' bank accounts, in particular, the 1st, 7th and 8th defendants, has severely jeopardized the defendants' business because it has resulted in the inability of the defendants to pay the salaries of their more than 130 employees and to receive payments of monies from their customers; and

(c) The plaintiff's acts have caused the banks to withdraw and/or to freeze all the credit facilities, which have been given to the defendants' business.

(26) The defendants have used the loan proceeds lawfully and/or the use of the loan proceeds by the defendants are within the knowledge and/or consent of the plaintiff, at all material times;

(27) Further, at all material times, the defendant did not receive any objection from the plaintiff concerning the operation of the two accounts and/or the manner of the usage of the loan monies by the defendants;

(28) Further, at all material times, the plaintiff knew that there were various loans that the companies within the Group of Companies, that were owned by the 2nd and 3rd defendants, in particular, the 7th, 8th and 9th defendants, had obtained and that the loans had to be repaid;

(29) Hence, the various payments of the monies by the 1st defendant to all the parties concerned including but not limited to all the defendants in this action are valid and proper;

(30) The acts of the plaintiff, in refusing to release the 2nd tranche of the loan; in lodging the police reports, in causing the freezing of the defendants, bank accounts, in particular, those of the 7th and 8th defendants and in causing the directors of the 7th and 8th defendants to be charged with breach of trust and money laundering, were done in bad faith and these acts have resulted in the following:

(a) Severe damage to the good name, image as well as the defendants' business and that of the Group of Companies;

(b) The withdrawal of all credit facilities granted by the banks to the defendants;

(c) The defendants' employees have lost their employment;

(d) The appointment of receivers and managers for the 8th defendant by the banks;

(e) The complete destruction of the defendants' business;

(f) The loss of confidence by the defendants' clients in the defendants and their withdrawal from any further business dealing with the defendants; and

(g) Legal actions have been taken or will be taken against the defendants by the other creditors.

(31) It is clear that the plaintiff was motivated by bad faith in its plan to ruin the defendants' assets and the defendants' good business reputation;

(32) The plaintiff's action in refusing to release the 2nd tranche of the loan i.e. the sum of USD 4.3 million and, thereafter, in taking the securities, as agreed upon, in accordance with the terms of the Loan Agreement, is *mala fide* and the plaintiff must bear all its losses, which is denied;

(33) Further, the plaintiff's claim is frivolous, an abuse of the process of Court and is clearly oppressive against the defendants and hence, the defendants are entitled to reject all the plaintiff's losses, which is denied, in the plaintiff's claim;

(34) Hence, based on the reasons as pleaded above, the plaintiff's allegations against the defendants are baseless; and

(35) Therefore, the defendants pray that the plaintiff's claim be dismissed or struck out with cost.

7th, 8th and 9th defendants' counterclaims in Suit 1123

[302]Hence, in their counterclaim, the 7th, 8th and 9th defendants plead as follows:

(1) The plaintiff has failed, neglected and/or refused to pay the balance loan monies amounting to USD 4.3 million to Maple Challenge, the 1st defendant, and this action of the plaintiff is clearly contrary to the terms which have been agreed upon under the contract for the loan of USD 8.6 million;

(2) The action of the plaintiff in replacing the directors and the existing Company Secretary of the 1st defendant and Impulse Talent (who is the shareholder of the 1st defendant) is clearly illegal, invalid and *mala fide*;

(3) The action of the plaintiff as stated above has resulted in severe loss and damage to the defendants as set out in the defendants' counterclaim, the full details of which are within the knowledge of the plaintiff;

(4) The plaintiff's acts are clearly *mala fide* and, therefore, the plaintiff must be punished with an order for aggravated and exemplary damages;

(5) Further, the plaintiff has no right to take any part of the securities that were provided for the loan as long as the plaintiff did not release the loan of USD 8.6 million in full to the 1st defendant, the full details are within the knowledge of the plaintiff; and

(6) The plaintiff also has no right to claim for the repayment of the loan proceeds and is only entitled to the securities for the loan and that is also only after the loan has been released in full to the 1st defendant and the 1st defendant has defaulted in the repayment of the loan to the plaintiff, the full details of which are within the knowledge of the plaintiff.

[303]Therefore, in Suit 1123, EPCM, EPCB and E-Circle, the 7th, 8th and 9th defendants, respectively, are counterclaiming against the plaintiff for the following reliefs in paragraph 45 of its amended defence and counterclaim, redated 30 April 2010, in Bundle 'U', that was filed by Messrs. H. Y. Lee & Co., their solicitors:

"45. Maka Defendan memohon perintah:-

A.

(i) Deklarasi bahawa Plaintif tidak berhak menuntut mengambil sebarang atau mana-mana bahagian sekuriti yang dikemukakan untuk kontrak pinjaman wang USD 8.6 juta tersebut termasuk dan tidak terhad kepada menggantikan mana-mana pengarah, setiausaha syarikat, pemegang-pemegang saham dengan wakil atau wakil-wakil atau lantikan plaintiff;

(ii) Deklarasi bahawa Plaintiff tidak berhak meuntut sebarang bahagian wang pinjaman USD 8.6 juta tersebut daripada Defendant;

B.

(i) Plaintiff membayar gantirugi termasuk dan tidak terhad kepada gantirugi aggravated dan exemplary kepada Defendant-Defendant;

(ii) Gantirugi tersebut di atas ditaksirkan dan dibayar oleh Plaintiff kepada Defendant-Defendant;

(iii) Faedah pada kadar 8% setahun di atas untuk gantirugi tersebut di atas;

(iv) Kos termasuk kos anakguam dan peguamcara;

(v) Perintah dan atau relief lain yang Mahkamah Mulia ini dapati adil dan sesuai manfaat".

[304]On 10 August 2011, EPCM, the 7th defendant, was wound up.

[305]On 9 August 2012, judgment-in-default was entered against EPCB, the 8th defendant.

[306]On 9 August 2012, judgment-in-default was also entered against E-Circle, the 9th defendant.

The full trial for Suit 1123

[307]The full trial for Suit 1123 was conducted after the completion of the full trial for Suit 2256 on 13 September 2014. The full trial for Suit 1123 commenced and concluded on 25 November 2014.

Witnesses in Suit 1123

[308]KJD Glove, the sole plaintiff, adopted and relied on the evidence of the 6 (six) witnesses (PW1 to PW6), who had testified for Glove Kendall and Kendall Court, the 1st and 2nd plaintiffs, respectively, in Suit 2256.

[309]Lim Wan Soon and Leng Khuan Yow (F), the 2nd and 3rd defendants, respectively, called 1 (one) witness. He is Lim Wan Soon, the 2nd defendant himself, who testified as DW1, for himself and also on behalf of his wife, Leng Khuan Yow (F), the 3rd defendant, who was present in Court but who did not testify.

[310]DW1 gave his evidence in the Hakka dialect through Mr. Wong Meng Wai, the Court Hakka interpreter.

[311]Mdm. Choong Foon Lan (F), the 5th defendant, called one witness. She is the 5th defendant herself as DW2. DW2 is also the mother of the 2nd defendant. At the time, she testified in Court she was aged 85 years old. The contents of her witness statement, enclosure (131), filed on 12 November 2014, were interpreted to her in the Hakka dialect by Mr. Wong Meng Wai, the Court's Hakka interpreter, and were confirmed by DW2 to be the truth. The Court admitted her witness statement as her examination-in-chief and marked it as D92.

[312]DW2 testified that she had given a loan to the 7th defendant upon the request of her son, the 2nd defendant. Subsequently, the 2nd defendant repaid her the loan. Since, there was no contemporaneous document to support her evidence concerning the giving of the friendly loan to the 7th defendant, the Court found that the 5th defendant had failed to prove on a balance of probabilities that she had given the alleged friendly loan to the 7th defendant.

[313]Leng Kam Meng, the 6th defendant, called one witness. He is the 6th defendant, himself as DW3. The Court noted that the name in the DW3's Identity Card is "Leng Kam Ming" whereas he is named as "Leng Kam Meng" in the writ, the statement of claim and the 6th defendant's statement of defence. DW3 is also the brother-in-law of the 2nd defendant as he is the brother of the 3rd defendant. DW3 is a quantity surveyor, who is attached to a construction firm. At the time he testified in Court, he was aged 43 years old. He gave his evidence in the English language.

[314]DW3 gave his examination-in-chief in the form of a witness statement, enclosure (132), which was filed on 12 November 2014 (D93). He testified that he had given a loan of RM 120,000.00 to the 7th defendant upon the request of the 2nd defendant. Subsequently, the 2nd defendant repaid him the loan. Since, there was no contemporaneous document to support his evidence concerning the giving of the loan to the 7th defendant, the Court found that the 6th defendant had failed to prove that he had given the alleged friendly loan to the 7th defendant on a balance of probabilities.

[315]Apart from the evidence adduced during the trial of Suit 2256, the plaintiffs and defendants (other than the defendants, who have had judgments-in-default entered against them, the 4th defendant in Suit 1123, against whom the claim has been withdrawn and the 1st, 7th, 8th and 9th defendants in Suit 1123, who have been wound up) in the three related suits also adopted and relied on the evidence led during the trial of Suit 1123, which took place on 25 November 2014, and the full trial of Suit 246, which took place on 26 November 2014 and 27 November 2014.

Statement of issues between the plaintiff and the 2nd and 3rd defendants for the determination of the Court in Suit 1123

[316]The plaintiff and the 2nd and 3rd defendants have framed 2 main issues and a number of subsidiary issues for the determination of the Court in Suit 1123. These are as follows:

"

(1) Whether the 1st defendant had committed the following breaches/defaults of the terms of the Loan Agreement dated 15 March 2007 ("the Loan Agreement") executed between the plaintiff and the 1st defendant (which are all subject to proof):

(a) Withdrawal of the monies from the USD Account in a total amount of USD 3,000,000.00 solely by the 1st defendant, for the purpose of making the following payments to the 7th defendant, the 8th defendant and Freshing Industrial Co Ltd in breach of the terms of the Loan Agreement;

(i) That the total amount of USD 2,500,000.00 withdrawn from the USD Account allegedly as direct payment to Impulse Talent was actually made to the 7th defendant.

The total amount of RM 4,461,000.00 from the aforesaid USD 2,500,000.00 paid to UVAT Technology Co. Ltd. was actually deposited by the 7th defendant into the accounts of the 2nd, 3rd, 5th and 6th defendants without cause and/or any valuable consideration.

The amount of RM 2,718,000.00 from the aforesaid USD 2,500,000.00 was paid by the 7th

defendant to the 4th defendant to settle the 7th defendant's loan with the 4th defendant in breach of the terms of the Loan Agreement.

The amount of RM 620,000.00 from the aforesaid USD 2,500,000.00 was paid by the 7th defendant to the 2nd defendant without cause and/or any valuable consideration.

(ii) That the equipment allegedly purchased by the 1st defendant from the Freshing Industrial Co. Ltd. had been leased out to the 9th defendant in breach of the terms of the Loan Agreement i.e. clause 2.2 of the Loan Agreement.

(iii) That the amount of USD 215,000.00 withdrawn from the USD Account allegedly as direct payment to Impulse Talent was actually made directly to the 8th defendant by depositing the aforesaid amount into the 8th defendant's account with Kuwait Finance House (Malaysia) Berhad.

That in breach of the terms of the Loan Agreement, the amount of RM 1,000,000.00 from the abovementioned USD 215,000.00 was withdrawn by the 8th defendant for the purpose of making payment of RM 500,000.00 each to the 2nd and 3rd defendants.

(b) The opening of the USD Account by the 1st defendant without appointing the plaintiff's representative as a co-signatory;

(c) The withdrawal of the monies exceeding USD 50,000.00 from the USD Account without the knowledge and/or express consent in writing of the plaintiff was provided in the Loan Agreement;

(d) The refusal, neglect and/or failure of the 1st defendant to provide information and/or documentation to the plaintiff despite the plaintiff's request/demand for such information/documentation;

(e) Withdrawal of the monies from the RM Account in a total amount of RM 2,118,000.00 by the 1st defendant on a misrepresentation by the 2nd and 3rd defendants for the following purposes in breach of the terms of the Loan Agreement:

(i) The 1st defendant made payment to the 9th defendant allegedly for the purchase of a "Coating Unit" machine from the 9th defendant which was then discovered does not exist upon inspection by the plaintiff and/or its representatives; and

(ii) The 1st defendant made payments to ASB Machinery (M) Sdn. Bhd. allegedly for the purchase of two (2) units of "Nissei Plastic Injection Moudling Machine" machines from the aforesaid company which was then discovered were not physically located at the 1st defendant's premises.

(f) The failure of the 1st defendant to make repayment of the Loan Amount and all interest accrued thereon in accordance with the Loan Agreement (apart from one (1) payment of the amount of USD 365,000.00 made by the 1st defendant to the plaintiff on 20 September 2007);

(2) If the Honourable Court decides that the 1st defendant committed the abovementioned breaches/defaults of the terms of the Loan Agreement, the issue is whether the 2nd and/or 3rd defendants had perpetrated/intended to perpetrate a fraud on the plaintiff by (all of which are subject to proof):

(a) Making representations to the plaintiff and/or the plaintiff's representative that the plaintiff and/or the plaintiff's representative was a co-signatory to the Accounts despite having contrary knowledge and intent;

(b) Withdrawing monies from the Accounts with a intention to cheat/deceive the plaintiff;

(c) Using the 7th and 8th defendants companies as a 'conduit' to withdraw monies from the USD Account for, *inter alia*, the personal usage of the directors of the 1st defendant i.e. the 2nd and 3rd defendants, and/or the family members of the 2nd and 3rd defendants i.e. the 5th and 6th defendants;

(d) Making payments to the 9th defendant for a 'Coating Unit' machine that does not exist and/or making payments for the machinery not for the specific use of the 8th defendant and/or Maple Strategies as required by the Loan Agreement;

(e) Making payments to ASB Machinery (M) Sdn. Bhd. for the purchase of two (2) units of "Nissei Plastic Injection Moudling Machine" machines which were not physically located at the 1st defendant's premises;

(f) Using and utilizing the Loan Amount to settle the 7th defendant's debts with the 4th defendant in breach of the terms of the Loan Agreement;

(g) Creating payments to UVAT Technology Co. Ltd with an intention to cheat/deceive the plaintiff for the sole purpose of withdrawing monies from the 7th defendant's account for the personal usage of the 2nd, 3rd, 5th and 6th defendants; and

(h) Withdrawing monies from the RM Account based on fraudulent documentation/misrepresentation being presented/made to the plaintiff and/or the plaintiff's representative."

Statement of issue between the plaintiff and the 5th and 6th defendants for the determination of the Court for Suit 1123

[317]The plaintiff and the 5th and 6th defendants have framed the following issue for the deterimination of the Court:

(1) Whether the 5th and 6th defendants are holding the monies on a constructive or resulting trust for the plaintiff?

2nd and 3rd defendants' submissions in Suit 1123

[318]Mr. Krishna Dallumah, the learned counsel for the 2nd and 3rd defendants, submitted that the plaintiff's claims against the 2nd and 3rd defendants ought to be dismissed as the plaintiff has failed to prove its claim against the 2nd and 3rd defendants for fraud beyond reasonable doubt based on the following reasons:

(1) The plaintiff has merely pleaded fraud but it did not adduce an iota of evidence on it;

(2) The Court ought to take into consideration that the 2nd and 3rd defendants have been acquitted of the criminal charges against them for cheating under section 420 of the Penal Code and under section 4(1) of the Anti-Money Laundering Act 2001 ("AMLA") without their defence being called.

(3) The 2nd and 3rd defendants were never parties to the Loan Agreement;

(4) There is also a duplicity in the plaintiff's claim as the same prayers have been set out in Suit 2256;

(5) The plaintiff has failed to prove fraud against the 2nd and 3rd defendants on the standard of beyond reasonable doubt in this suit because there are material contradictions in the evidence adduced by the witnesses for the plaintiff;

(6) The plaintiff, whether by itself or through the plaintiffs in the earlier suit, has not accounted for all the assets of the 2nd and 3rd defendants and of the various companies in the Group of Companies which were transferred out by the plaintiff itself and the plaintiff has also not accounted for all the monies that it had received;

(7) In any event, the quantum which the plaintiff has recovered from the value of the 2nd and 3rd defendants' assets far exceeds the quantum of the loan; and

(8) If the 2nd and 3rd defendants had really intended to cheat the plaintiff, they would have not have asked for a deferment of the Tranche II of USD 4.3 million.

[319]On the issue whether the plaintiff's claim against the 2nd and 3rd defendants for exemplary and aggravated damages ought to be allowed, Mr. Krishna Dallumah submitted that the plaintiff's claim against the 2nd and 3rd defendants as set out in paragraph 3 at page 95 Bundle A, for exemplary and aggravated damages ought not to be allowed by the Court based on the following reasons:

(1) It is trite law that exemplary and aggravated damages will only arise in three (3) situations. These are as follows:

(a) when there has been oppressive, arbitrary or unconstitutional conduct by the servants of the government;

(b) when the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and

(c) when a statute has expressly authorised it.

(See *Rookes v Barnard* [1964] A.C. 1129)

(2) It is only in extremely rare cases that the courts will grant exemplary damages because this type of damages, if granted, is usually to punish the defendant.

(3) The 2nd and 3rd defendants have not profitted at all as the value of their companies and the value of the security provided by them for the loan far exceeds the amount of the loan taken by them.

[320]Therefore, he submitted that the claim by the plaintiff against the 2nd and 3rd defendants for fraud in Suit 1123 ought to be dismissed with cost.

5th and 6th defendants' submissions in Suit 1123

[321]Mr. Krishna Dallumah, the learned counsel for the 5th and 6th defendants, submitted that the plaintiff's claims against the 5th and 6th defendants ought to be dismissed with cost based on the following reasons:

(1) The 5th and 6th defendants have succeeded in proving on a balance of probabilities, based on their evidence, that they had given the friendly loans of RM 200,000.00 and RM 120,000.00, respectively, to EPCM, the 7th defendant (see *Lee Kim Luang v Lee Shiah Yee, supra* ,);

(2) The evidence of the 5th and 6th defendants was supported by the contemporaneous documents;

(3) The 5th defendant relies on the Remittance Application Form of Public Bank at page 684 of Bundle F and the Credit Advice dated 8 March 2007 from Maybank at page 362 of Bundle D;

(4) These two documents clearly show that the 5th defendant had loaned a sum of RM 200,000.00 to the 7th defendant;

(5) The 6th defendant relies on the Credit Advice from United Overseas Bank (M) Bhd dated 14 April 2006 at page 362 of Bundle D; and

(6) This document clearly shows that the 6th defendant had given loaned a sum of RM 120,000.00 to the 7th defendant.

[322]He also submitted as follows:

(1) The documents mentioned above have never been challenged. The only challenge by the plaintiff during cross-examination was that there was never a formal written contract for the two loans that were given by the 5th and 6th defendants to the 7th defendant.

(2) A contract can be oral and the monies have been paid back. There is no allegation of fraud against the 5th and 6th defendants, who are not the constructive trustees of the sums paid back by the 7th defendant, as they had given valuable consideration in terms of the loan.

(3) The plaintiff's claim that the law on constructive trust is that a trust may arise at the outset or later as the circumstances may require and it is an equitable remedy to provide restitution, has no merit; and

(4) This is because the plaintiff must prove the following 2 (two) essential ingredients before it can succeed:

(a) there is a requirement of dishonesty; and

(b) there must be a fixed knowledge of the trust at the time the payment is received.

[323]Mr. Krishna Dallumah cited the decision of Nallini J. (now JCA) in *Ambank (M) Bhd v KB Leisure (M) Sdn Bhd* [2012] 7 MLJ 364 in which the learned Judge had adopted the decision of the English Court in *Lipkin Gorman (a firm) v Karpnale Ltd and Another* [1992] 4 All ER 512 in support of his submissions, that since EPCM has repaid the loans to the 5th and 6th defendants, it would be, substantially, to their detriment if they are now required to refund to the plaintiff the monies credited into their accounts.

[324]Hence, he submitted that the 5th and 6th defendants have altered their positions and the change of position is neither tainted nor invalidated by any act of illegality.

[325]He also submitted as follows:

(1) The plaintiff has failed to impute to the 5th and 6th defendants actual or constructive knowledge of any illegality.

(2) Therefore, the 5th and 6th defendants are *bona fide* participants, who have given good value in exchange for what they received, and they are protected by the doctrine of equity.

Plaintiff's submissions in Suit 1123

[326]Mr. Brendan Siva, the learned counsel for KJD Glove, the plaintiff, informed the Court that the plaintiff did not with to pursue its claim based on fraud against the 2nd and 3rd defendants for the Loan Agreement. Hence, the plaintiff abandoned the reliefs as prayed for in paragraph 33(3) of the plaintiff's statement of claim dated 10 December 2008 against the 2nd and 3rd defendants.

[327]As for the plaintiff's claims against the 5th and 6th defendants for the remedies as prayed for in paragraph 33(5) and (6) of its statement of claim dated 10 December 2008, Mr. Brendan Siva submitted that the plaintiff's claims ought to be allowed because the plaintiff has succeeded in proving its claims against the 5th and 6th defendants on a balance of probabilities based on following reasons:

(1) Clause 2.2(a) of the Loan Agreement does not allow the proceeds of the loan to be used to make the two payments to the 5th and 6th defendants;

(2) The 5th and 6th defendants are trustees of the monies received under a constructive or resulting trust; and

(3) Hence, they must return the monies to the plaintiff.

Conclusion of the Court for Suit 1123

[328]Hence, in Suit 1123, the plaintiff only proceeded with the prayers as set out in paragraphs 33 (5) and (6) of the plaintiff's statement of claim dated 10 December 2008 against the 5th and 6th defendants. These are as follows:

(5) the Plaintiff claims against the 5th Defendant for:-

  (e) the return of the amount of RM 201,000.00;

  (f) Interest at the rate of 8% per annum on the amount of RM 201,000.00 from the date judgment is awarded by this Honourable Court until full and final settlement thereof;

(6) the Plaintiff claims against the 6th Defendant for:-

  (a) the return of the amount of RM120,000.00;

  (b) interest at the rate of 8% per annum on the amount of RM120,000.00 from the date judgement is awarded by this Honourable Court until full and final settlement thereof;

(See pages 95 and 96 Bundle U).

[329]The Court found that the payments to the 5th and 6th defendants of the two sums of RM 201,000.00 and RM 120,000.00, respectively, and which were received by the 5th and 6th defendants, were from monies that had originated from Maple Challenge, the 1st defendant.

[330]The monies that were disbursed by Maple Challenge, the 1st defendant, were proceeds that Maple Challenge, the 1st defendant, received pursuant to the execution of the Loan Agreement between Maple Challenge, the 1st defendant, and KJD Glove.

[331]As stated earlier in this judgment, the manner in which and the purpose for which the proceeds of the loan can be utilized are clearly and distinctly provided in clause 2.2 of the Loan Agreement.

[332]As stated earlier in this judgment, clause 2.2(b) of the Loan Agreement is not applicable to the payments of the two sums of money to the 5th and 6th defendants, as Maple Strategies never became a subsidiary of Impulse Talent, the 9th defendant (see A10.10 at pages 68 and 69 of PW2's witness statement – Exhibit P53). Further, the 2nd defendant confirmed in cross-examination that Maple Strategies had never become a subsidiary of Impulse Talent, the 9th defendant (see Q&A 172 at page 10 of the Notes of Proceedings for 26 November 2014).

[333]As stated earlier in this judgment, clause 2.2(a) of the Loan Agreement is the only clause that stipulates the

purpose for which the loan proceeds may be utilized. Clause 2.2(a) provides clearly that the loan sum can only be used to *purchase plant machinery* to be, subsequently, *leased* to *EPCB and MSSB* for the purposes of *such* Group Companies' business.

[334]Hence, the plaintiff has adduced sufficient evidence before the Court to show that the 5th and 6th defendants were holding the sums of RM 201,000.00 and RM 120,000.00, respectively, on the basis of a resulting and/or constructive trust for and on behalf of the plaintiff.

[335]On this issue, the Court agreed with and accepted the submissions of Mr. Brendan Siva, the learned counsel for the plaintiff, that clause 2.2(a) of the Loan Agreement cannot under any circumstances be construed or interpreted to allow Maple Challenge, the 1st defendant, to pay the moneys concerned to the 5th and 6th defendants as repayment of an alleged loan given to the 7th defendant by the 5th and 6th defendants (see *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2004] 4 MLJ 64).

[336]It is trite law that upon the occurrence of a wrongful act, a constructive trust comes into existence.

[337]Based on the above, it follows that the repayments to the 5th and 6th defendants were in clear breach of clause 2.2 of the Loan Agreement. The wrongful act was committed by Maple Challenge, the 1st defendant. Choong Foon Lan (F) and Leng Kam Meng, the 5th and 6th defendants, respectively, had, therefore, held the sums of RM 201,000.00 and RM 120,000.00, respectively, as constructive trustees for KJD Glove, the plaintiff. Hence, the plaintiff is entitled to the return of these two sums of money.

[338]Therefore, the Court agreed with and accepted the submissions of Mr. Brendan Siva, the learned counsel for the plaintiff, that the plaintiff has succeeded in proving its claims against the 5th and 6th defendants on a balance of probabilities and the Court ought to order the 5th and 6th defendants to return these two sums of money to the plaintiff (see paragraph 26(b) of the plaintiff's statement of claim at page 90 Bundle U).

[339]Hence, the Court rejected the submissions of Mr. Krishna Dallumah, the learned counsel for the 5th and 6th defendants, that the 5th and 6th defendants ought not to be ordered to repay the two sums of monies to the plaintiff since they have proven that the two sums of moneys were originally given by them as friendly loans to the 7th defendant.

[340]Therefore, the Court ordered the 5th and 6th defendants to pay the sums of RM 200,000.00 and RM 120,000.00, respectively, to the plaintiff with cost of RM 15,000.00 (see prayers 33(5) and (6) of the plaintiff's statement of claim at page 96 Bundle U).

Parties in Suit 246

[341]The parties in this suit, which was filed on 13 April 2009 i.e. four months and 4 days after Suit 2256 and Suit 1123 were filed together on 10 December 2008, are as follows:

(1) Lim Wan Soon, the 1st plaintiff, is an individual with a last known correspondence address at No. 17, Jalan SG 8/12, Taman Sri Gombak, 68100 Batu Caves, Selangor Darul Ehsan.

(2) Leng Khuan Yow (F), the 2nd plaintiff, is an individual with a last known correspondence address at No. 17, Jalan SG 8/12, Taman Sri Gombak, 68100 Batu Caves, Selangor Darul Ehsan.

(3) The 1st plaintiff is the husband of the 2nd plaintiff. They were adjudicated as bankrupts on 2 August 2010. Subsequently, on 8 August 2012, they obtained the sanction from the Insolvency Department of Malaysia to proceed with this suit.

(4) The 1st and 2nd plaintiffs were at all material times, prior to 28 November 2008, the two directors of Maple Challenge, the 8th defendant, and the directors and shareholders of Impulse Talent, the 9th defendant.

(5) KJD Glove, the 1st defendant, is a private limited company incorporated in Labuan under the Offshore Companies Act 1990, having its registered address at Level 1, Lot 7, Block F, Saguking Commercial Building, Jalan Patau-Patau, 87000 Labuan, Wilayah Persekutuan, Malaysia.

(6) Glove Kendall, the 2nd defendant, is a private limited company incorporated in the Cayman Islands with a business address at P.O. Box 709 GT, 122 Mary Street, Zephyr House, Grand Cayman, Cayman Islands.

(7) Kendall Court, the 3rd defendant, is a private limited company incorporated in the Cayman Islands with a business address at P.O. Box 709 GT, 122 Mary Street, Zephyr House, Grand Cayman, Cayman Islands.

(8) YEO, the 4th defendant, is an individual with a last known correspondence address at No. 27, Persiaran Salam Serriamas 47000 Sungai Buloh, Selangor Darul Ehsan.

(9) Chris Chia, the 5th defendant, is an individual with a last known correspondence address at No. 26, Jalan Medang, Bukit Bandaraya, Bangsar, 59100 Kuala Lumpur.

(10) Dennis Wuisan, the 6th defendant, is an individual with a last known correspondence address at Jalan H, Gandun 42, Jakarta 12440, Indonesia.

(11) AS Nominees Sdn. Bhd. ("AS Nominees"), the 7th defendant, is a private limited company incorporated under the Companies Act 1965, with a business address at No. 8A, Jalan Sri Semantan Satu, Damansara Heights, Kuala Lumpur.

(12) Maple Challenge, the 8th defendant, is a private limited company incorporated under the Companies Act, 1965, having its registered address at Plaza 138, Suite 18.03, 18th Floor, No. 138, Jalan Ampang, 50450 Kuala Lumpur and its business address at No. 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor.

(13) Impulse Talent, the 9th defendant, is a private limited company incorporated under the Companies Act 1965, having its registered address at Plaza 138, Suite 18.03, 18th Floor, No. 138, Jalan Ampang, 50450 Kuala Lumpur and its business address at No. 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor. At all material times, Impulse Talent, the 9th defendant, holds 100% share ownership of the 8th defendant.

(14) Lee Wai Ngan, the 10th defendant, is an individual with a last known correspondence address at 5-10, Block A, Shang Villa, SS7/15, 47301 Kelana Jaya, Selangor Darul Ehsan. He and the 11th defendants were appointed as the new Company Secretaries for the 8th and 9th defendants by YEO and Chris Chia, after they removed the 1st and 2nd plaintiffs as the directors of the 1st and 7th defendants in exercise of the powers that were given to them under the powers of attorney granted by the 1st and 2nd plaintiffs pursuant to the security documents.

(15) Chai Toye Ying, the 11th defendant, is an individual with a last known correspondence address at No. 18, Jalan UP1C, Taman Prima Ukay, Saujana Melawati, Off Jalan Hulu Kelang, 53100 Kuala Lumpur.

Decision of the Court in Suit 246

[342]On 2 July 2015, after the conclusion of the full trial and after the Court had considered the written and oral submissions of the learned counsels for the parties in the three suits, the Court dismissed the claims of Lim Wan Soon and Leng Khuan Yow (F), the 1st and 2nd plaintiffs, respectively, against KJD Glove, Glove Kendall, Kendall Court, YEO, Chris Chia, Dennis Wuisan, AS Nominees, Impulse Talent, Lee Wai Ngan and Chai Toye Ying, the 1st to the 11th defendants, respectively, with cost.

[343]The Court ordered both Lim Wan Soon and Leng Khuan Yow (F), the 1st and 2nd plaintiffs, respectively, to pay a sum of RM 80,000.00 as costs to KJD Glove, Glove Kendall and Kendall Court, the 1st to the 3rd defendants, collectively.

Reasons for the decision of the Court in Suit 246

[344]The reasons why the Court dismissed the claims of Lim Wan Soon and Leng Khuan Yow (F), the 1st and 2nd plaintiffs, respectively, against the 1st to the 11th defendants, respectively, in this suit with cost are as follows:

Background of Suit 246

[345]The Court shall set out the background of this suit. Based on the parties' statement of agreed facts and the parties' pleadings, the background of this suit is as follows:

(1) Maple Challenge, the 8th defendant, and Impulse Talent, the 9th defendant, were in the group of companies known as the 'Maple Challenge Group of Companies' which, at the material time, consists of the following companies of which the plaintiffs were, prior to 28 November 2008, the directors and/or shareholders:

(a) Maple Challenge, the 8th defendant;

(b) EPCM;

(c) EPCB;

(d) E-Circle;

(e) Impulse Talent, the 9th defendant; and

(f) Maple Strategies.

(collectively referred to as "the Group of Companies").

(2) KJD Glove, the 1st defendant, was subsequently, named, defined and included as part of the Group of Companies in the Subscription Agreement dated 15 March 2007.

(3) The Subscription Agreement dated 15 March 2007 ("the Subscription Agreement") was executed between Kendall Court, the 3rd defendant, and the following parties:

(a) Maple Challenge, the 1st defendant;

(b) The company known as 'WIRA INTERNATIONAL LIMITED' (company No.: 116579), a private limited company incorporated in the British Virgin Islands having its registered address at Trident Chambers, P.O. Box 146, Road Town, Tortola, British Virgin Islands ("Wira International"). At all material times, Wira International was a shareholder of Maple Challenge, the 1st defendant; and

(c) Lim Wan Soon, the 1st plaintiff, and Leng Khuan Yow (F), the 2nd plaintiff.

(4) The security documents that were executed in favour of Kendall Court, the 3rd defendant, for the Subscription Agreement are as follows:

(a) A Deed of Charges dated 15 March 2007 over all of the 8th defendant's assets was executed between the 8th defendant and the 3rd defendant;

(b) A Deed of Charges dated 15 March 2007 over all of the 9th defendant's assets was executed between the 9th defendant and the 3rd defendant;

(c) A Deed of Charges dated 15 March 2007 over all of the assets of Maple Strategies was executed between Maple Strategies and the 3rd defendant;

(d) A charge dated 15 March 2007 over all shares owned by the 1st plaintiff in any of the companies in the Group of Companies (except E-Circle and the 1st defendant) was executed between the 1st plaintiff and the 3rd defendant;

(e) A charge dated 15 March 2007 over all shares owned by the 2nd plaintiff in the 8th defendant, the 9th defendant, Maple Strategies, EPCB, EPCM and all other shares owned by the 2nd plaintiff in any of the companies in the Group of Companies (except E-Circle and the 1st defendant) was executed between the 2nd plaintiff and the 3rd defendant; and

(f) A charge over all shares owned or to be owned by the 9th defendant in the 8th defendant and all other shares owned by the 9th defendant in any of the companies in the Group of Companies (except E-Circle and the 1st defendant) was executed between the 9th defendant and the 3rd defendant (at the relevant time, the 9th defendant only owned shares in the 8th defendant).

(g) (the three Deeds of Charge as referred to in sub-paragraphs (1), (2) and (3) above are collectively referred to as "the three Deeds of Charge" and the three Charges as referred to in sub-paragraphs (4), (5) and (6) above are, collectively, referred to as "the three Charges"),

(5) The Loan Agreement was executed between KJD Glove, the 1st defendant, and Maple Challenge, the 8th defendant;

(6) According to the plaintiffs, the Subscription Agreement and the Loan Agreement constitute 1 (one) singular loan transaction and both the Subscription Agreement and the Loan Agreement are loan agreements, the purpose of which is to grant a loan of USD 8.6 million to the plaintiffs to enable the plaintiffs to, in turn, grant inter-company loans to the companies in the plaintiffs' Group of Companies, and are to be used for the business of the plaintiffs' Group of Companies.

(7) The 8th defendant proceeded to open/cause the opening of Account no. 7141 5000 1809 with MBB, which was subsequently used as the Account in accordance with the terms and conditions of the Subscription Agreement;

(8) On or about 20 March 2007, the 2nd defendant and/or 3rd defendant had, in accordance with the terms of the Subscription Agreement, deposited/caused to be deposited the Tranche I monies amounting to USD 4,189,033.00 in the Account;

(9) The Tranche I amount had been deposited after deducting the transaction expenses and the collateral requirements of the 3rd defendant, the full details of which are within the knowledge of the plaintiffs and the brief details of which are as follows:

Details	Amount USD
Tranche I Amount	4,300,000.00
Less: Withholding of further expenses	(50,000.00)
First month cash collateral	(60,917.00)
Bank Charges	(50.00)
Amount deposited in the Account	4,189,033.00

(10) According to the plaintiffs, the plaintiffs have made withdrawals from the Tranche I monies in accordance with the terms and conditions of the loan agreements for various purposes, including the purchase of machinery and to repay loans that have been obtained by the companies in the plaintiffs' Group of Companies;

(11) On/about the month of September 2007, the 8th defendant (*vide* the 1st plaintiff as the then director) requested from the 2nd defendant and/or 3rd defendant, in writing, for an extension of time of a period of three (3) months for the draw down of the Investment Amount under Tranche II of the Subscription Agreement;

(12) On 20 September 2007, KJD Glove, the 1st defendant, made one (1) payment to Glove Kendall, the 2nd defendant, and/or Kendall Court, the 3rd defendant, for the total amount of USD 365,500.00 as the payment of the interest on the Investment Amount under the Subscription Agreement. Likewise, Maple Challenge, the 8th defendant, made one (1) payment to KJD Glove, the 1st defendant, for the total amount of USD 365,500.00 as the repayment of the Loan Amount under the Loan Agreement;

(13) On 22 November 2007, Messrs. Syed Alwi Ng & Co., the previous solicitors of the 2nd and 3rd defendants, issued a letter of demand to the 1st plaintiff and the 2nd plaintiff, to *inter alia*, give the plaintiffs notice that KJD Glove was in breach of the terms of the Subscription Agreement and to demand from the plaintiffs as covenantors/guarantors under the Subscription Agreement and/or the Guarantee, the Amount Owed including all charges and/or fees on the Amount Owed as well as cost on a solicitor-client basis;

(14) On 3 December 2007, YEO, the 4th defendant (as director of Glove Kendall, the 2nd defendant, and also as director of Kendall Court, the 3rd defendant, and as the representative of KJD Glove, the 1st defendant,) lodged a police report i.e. DANG WANGI/036688/07 Report, against Maple Challenge, the 8th defendant ("the police report");

(15) According to the plaintiffs, YEO was motivated by bad faith when she lodged the police report against them because they had done nothing wrong;

(16) Pursuant to the investigations that were carried out by the relevant authorities based on the police report, the 1st plaintiff and the 2nd plaintiff have been charged by the relevant authorities on/about 23 January 2009, for, *inter alia*, the following offences:

(a) Offences under s 4 (1) of the Anti-Money Laundering Act 2001 ("AMLA");

(b) The offence of cheating under s 420 of the Penal Code; and

(c) The offence of abetment of cheating under s 511 of the Penal Code;

(17) The trial for the criminal charges against the 1st plaintiff and the 2nd plaintiff was held before the Criminal Divison of the Sessions Court of Kuala Lumpur i.e. against the 1st plaintiff, in Kuala Lumpur Sessions Court Criminal Case No: 62-51-2009, and against the 2nd plaintiff, in Kuala Lumpur Sessions Court Criminal Case No: 62-52-2009, respectively;

(18) According to the plaintiffs, the Subscription Agreement is invalid, illegal and a sham because it has breached the conditions imposed by BNM in its letter dated 23 February 2007, which approved the granting of the loan to the plaintiffs;

(19) According to the plaintiffs, the Entry Order was obtained by the 2nd and/or the 3rd defendant, and the 4th to the 6th defendants, on bad faith, with the ill intention to ruin the plaintiffs and the plaintiffs' group of companies;

(20) According to the plaintiffs, the 2nd and/or the 3rd defendant, and the 4th to the 6th defendants have also unlawfully enforced the securities in order to take over the plaintiffs' assets and the assets of the companies within the plaintiffs' Group of Companies, the value of which far exceeds the losses, if any, suffered by the 2nd defendant and/or the 3rd defendant, and the 4th to the 6th defendants;

(21) Pursuant to a Court Order dated 3 January 2008 ("the Entry Order") obtained by the 2nd defendant and/or the 3rd defendant under Suit 1728 that was filed on or about 24 December 2007, by the 2nd and 3rd defendants, the 2nd defendant and/or the 3rd defendant and/or their representatives had proceeded to enter the premises located at No. 2, 4, 14 and 16, Jalan 29/10A, Taman Perindustrian IKS, Mukim Batu, 68100 Batu Caves, Selangor Darul Ehsan;

(22) Subsequently, the Entry Order was set aside and on 28 February 2008, Suit 1728 was withdrawn with cost of RM 30,000.00 to Lim Wan Soon, the 1st plaintiff, and Leng Khuan Yow (F), the 2nd plaintiff, in this Suit, both of whom were among the defendants in that suit;

(23) The Subscription Agreement and the Loan Agreement are the subject matter of the following legal actions, namely:

(a) Suit 1458 was filed on 6 August 2008 by the 2nd defendant and the 3rd defendant against the 1st defendant at the High Court of Malaya in Kuala Lumpur. On 11 November 2008, the 2nd and 3rd defendants obtained Judgment-in-default against the 1st defendant.

(b) Suit 2256 was filed on 10 December 2008 by the 2nd and 3rd defendants against the 1st plaintiff, the 2nd plaintiff, the 8th defendant, the 9th defendant in this suit and Maple Strategies. On 2 February 2012, the 2nd and 3rd defendants obtained Judgment-in-default against the 8th defendant, the 9th defendant and Maple Strategies.

(c) Suit 1123 was filed on 10 December 2008 by the 1st defendant against the 1st plaintiff, the 2nd plaintiff, and the 8th defendant. On 16 June 2011, the 1st defendant, obtained Judgment-in-default against the 8th defendant.

(24) According to the plaintiffs, they have suffered loss and damage as a result of the acts of the 1st to the 11th defendants; and

(25) On 13 April 2009, the plaintiffs filed this suit against the 1st to the 11th defendants to claim for the loss and damage that they have suffered due to the breaches of the Subscription Agreement, the Loan Agreement and the Guarantee Agreement by the 1st to the 11th defendants and their illegal and unlawful acts, which were done in bad faith and in order to acquire the shares and assets of the plaintiffs and the plaintiffs' Group of Companies.

1st and 2nd plaintiffs' pleaded case in Suit 246

[346]Hence, in their statement of claim dated 14 May 2009 and filed on 22 May 2009, enclosure (2), the plaintiffs plead, *inter alia,* as follows:

(1) At all material times, there was one (1) singular loan transaction for the sum of USD 8.6 million involving the loan agreements with the respective parties and the documents as stated in paragraph 15 of the statement of claim;

(2) Based on the terms and conditions in the loan agreements, KJD Glove, the 1st defendant and/or Glove Kendall, the 2nd defendant, and/or Kendall Court, the 3rd defendant, were required to, jointly and/or severally, grant a loan for a total sum of USD 8.6 million to Maple Challenge, the 8th defendant, which is clearly provided in clause 2.1 of the Loan Agreement dated 15 March 2007 entered into between Maple Challenge, the 8th defendant, and KJD Glove, the 1st defendant;

(3) The loan sum of USD 8.6 million was to be released to the 8th defendant in two (2) tranches as provided in the Loan Agreement;

(4) The Subscription Agreement, between Wira International as the existing shareholder of the 1st defendant, the covenantors, who were the plaintiffs, as owners in the group of borrower companies, including the 8th defendant, EPCM and EPCB and Kendall Court, the 3rd defendant, as Investor through their agents/representatives, who were YEO, the 4th defendant, Chris Chia, the 5th defendant and Dennis Wuisan, the 6th defendant, and KJD Glove, the 1st defendant, was actually a means to enable KJD Glove, the 1st defendant, to give a loan of USD 8.6 million to Maple Challenge, the 8th defendant, *via* the issuance of bonds subscribed by Kendall Court, the 3rd defendant;

(5) Further and in the alternative, based on the manner in which the loan of USD 8.6 million was to be given to Maple Challenge, the 8th defendant, by KJD Glove, the 1st defendant, and the construction of the loan agreement, it was apparent that the loan was illegal and unlawful;

(6) All the abovesaid loan agreements were bound by the requirements of BNM including those set out in the letter from BNM dated 23 February 2007 ("the said BNM's requirements");

(7) The 1st defendant and/or the 2nd defendant and/or the 3rd defendant had, jointly and severally, breached the said BNM's requirements in particular, the following:

(a) The loan was not to be given to Maple Challenge, the 1st defendant, as stated in the Subscription Agreement;

(b) The interest rate was fixed at 8% per annum by BNM but the rate of the interest charged was higher, which was approximately 21.9% per annum; and

(c) No further fees were chargeable but in contravention of clause 4.4(b) of the Subscription Agreement, payment of a sum of USD 50,000.00 was made twice by Maple Challenge, the borrower.

(8) Despite being aware that the conditions precedent were not fully complied with *vide a* letter dated 15 March 2007, the 1st defendant allowed the draw down of Tranche I of the loan sum of USD 4,189,033.00 to be carried out on 20 March 2007;

(9) Further, the actual loan sum advanced on 20 March 2007 was only USD 4,189,033.00 (after a deduction of a sum of USD 50,000.00 being the fee from the loan sum of USD 4.3 million and another deduction of a sum of USD 60,967.00 being the interest payments);

(10) The 1st defendant, in particular, its agents/representatives, who were the 4th and 5th defendants, had pressed false charges against the plaintiffs and the plaintiffs' group of companies, in particular, the 8th defendant, EPCM and EPCB, that the plaintiffs and the plaintiffs' group of companies had misused the loan sum of USD 4,189,033.00 sometime in November 2007 (which is strictly denied);

(11) The plaintiffs were threatened by the 1st defendant and or its representatives to sign the Guarantee and Indemnity Agreement in November 2007, failing which the balance loan of USD 4.3 million would not be released;

(12) Further, the 1st defendant and/or the 2nd defendant and/or the 3rd defendant had breached the terms of the loan agreements by lodging a false police report with the intention to prejudice and force the plaintiffs and the plaintiffs' Group of Companies to repay the whole of the loan amount together with the interest, which was contrary to the terms of the loan agreements;

(13) The 1st defendant and/or the 2nd defendant and/or the 3rd defendant had accused the plaintiffs of committing breach of trust and money laundering, which had caused the plaintiffs' bank accounts, in particular, the bank accounts of two of the companies in the plaintiffs' group of companies i.e. EPCM and EPCB, to be frozen;

(14) In addition, the acts of the 2nd and 3rd defendants, with the knowledge and consent of the representatives of the 1st defendant, in initiating legal action in the Kuala Lumpur High Court *vide* Suit 1728 against the plaintiffs, the 8th defendant, the 9th defendant and Maple Strategies and obtaining an Order for an injunction on 3 January 2008 for reliefs among others to freeze the bank accounts of the 8th defendant, EPCM and EPCB were clearly *mala fide* and an abuse of the Court process;

(15) Notwithstanding that Suit 1728, was, subsequently, withdrawn, it had caused serious damage to the plaintiffs' Group of companies, the full particulars of which are set out in paragraph 37 of the statement of claim;

(16) Despite the existence of an arbitration clause in the Loan Agreement and the Subscription Agreement, the 1st defendant and/or the 2nd defendant and/or the 3rd defendant had failed and refused to comply with the arbitration clause in the loan agreements to refer all disputes to arbitration;

(17) Albeit the above, the plaintiffs had used the entire loan sum appropriately and in accordance with the terms and conditions of the loan agreements;

(18) Thus, it is apparent that the 1st defendant and/or the 2nd defendant and/or the 3rd defendant and/or their agents/representatives, who are the 4th defendant, the 5th defendant and the 6th defendant, had *mala fide* intention to destroy all the plaintiffs' assets and business reputation and all the companies in the plaintiffs' group of companies;

(19) Premised on the abovesaid reasons, the following acts of the 1st defendant to the 7th defendants, the 10th defendant and the 11th defendant either, jointly and/or severally, were unlawful, illegal, null and *void ab initio*:

(a) Transferring the plaintiffs' shares in the 9th defendant to the 7th defendant;

(b) Preparing, submitting and registering the transfer forms and documents in relation to the abovesaid transfer of shares including but not limited to Forms PDS 6 and 32A;

(c) Preparing, submitting and utilizing all the resignation forms and/or causing the resignation of the plaintiffs as directors in the 8th and 9th defendants;

(d) Appointing and/or causing the appointment and/or accepting the appointment of:

(i) The 4th defendant, the 5th defendant and/or the 6th defendant, as the directors of the 8th and 9th defendants; and

(ii) The 10th defendant and the 11th defendant, as the Company Secretaries of the 8th defendant and the 9th defendant;

(20) Further and in the alternative, unless and until the full loan amount of USD 8.6 million is released to the plaintiffs and the 8th defendant, the 1st defendant and/or the 2nd defendant and/or the 3rd defendant was not entitled to acquire all the plaintiffs' shares in the 8th and 9th defendants and/or to remove the plaintiffs as directors of the 8th and 9th defendants;

(21) The 1st defendant and/or the 2nd defendant and/or the 3rd defendant has only the right to enforce the securities provided under the security documents upon the full release of the loan amount of USD 8.6 million to the plaintiffs and/or the 8th defendant;

(22) The acts of the 1st defendant and/or the 2nd defendant and/or the 3rd defendant and or through their agents/representatives, namely, the 4th defendant, the 5th defendant and the 6th defendant, as set out above, were wrongful, unlawful and had badly prejudiced the business of the plaintiffs and the plaintiffs' group of companies, the full particulars, whereof are set out in paragraph 43 of the statement of claim;

(23) The plaintiffs, being the directors and shareholders of the 8th and 9th defendants, had suffered and are still suffering loss and damage, physical and mental pain, loss of reputation and image; and

(24) Therefore, the defendants ought to be punished with exemplary and aggravated damages.

1st and 2nd plaintiffs' claims in Suit 246

[347]Therefore, in this suit, Lim Wan Soon and Leng Khuan Yow (F), the 1st and 2nd plaintiffs, respectively, are claiming for the following reliefs from the Court against the 1st to the 11th defendants in paragraph 55 of their statement of claim dated 14 May 2009.

"55. Maka Plaintif-Plaintif memohon perintah:-

Deklarasi bahawa Defendan Pertama, Kedua dan Defendan Ketiga tidak berhak kepada segala saham Plaintif-Plaintif dalam syarikat Defendan Kelapan dan Defendan Kesembilan selagi wang pinjaman US Dollar 8.6 juta tidak dibayar penuh kepada Plaintif-Plaintif dan atau Defendan Kelapan.

Perintah bahawa:-

(a) segala pindahmilik saham milik Plaintif-Plaintif dalam syarikat Defendan Kesembilan kepada Defendan Ketujuh adalah tidak sah, haram, null dan *void ab initio*;

(b) segala borang pindahmilik dan dokumen berkaitan pindahmilik termasuk dan tidak terhad kepada borang PDS 6 dan 32A dalam saham milik Plaintif-Plaintif dalam syarikat Defendan Kesembilan yang tersebut di atas adalah tidak sah, haram, null dan *void ab initio*;

(c) segala borang perletakan jawatan dan atau pemecatan Plaintif-Plaintif sebagai pengarah-pengarah di dalam syarikat Defendan Kelapan dan Defendan Kesembilan adalah tidak sah, haram, null dan *void ab initio*;

(d) perlantikan Defendan Keempat, Defendan Kelima dan Defendan Keenam sebagai pengarah-pengarah di dalam syarikat Defendan Kelapan dan Defendan Kesembilan adalah tidak sah, haram, null dan *void ab initio*;

(e) perlantikan Defendan Kesepuluh dan Defendan Kesebelas sebagai setiausaha syarikat Defendan Kelapan dan Defendan Kesembilan adalah tidak sah haram, null dan *void ab initio*;

Perintah Injuksi terhadap Defendan-Defendan, agen, wakil pengkhidmat dan atau selainnya daripada:-

(a) mengambil dan atau menguruskan apa-apa hal ehwal dalam apa bentuk cara sekalipun dalam syarikat Defendan Kelapan dan Defendan Kesembilan;

(b) melupuskan dan atau mengubah dalam apa cara sekalipun segala harta benda termasuk dan tidak terhad kepada saham-saham dalam syarikat Defendan Kelapan dan Defendan kesembilan;

(c) mengambil sebarang langkah perkara tindakan yang boleh menjejaskan hal ehwal urusan syarikat Defendan Kelapan dan Defendan Kesembilan;

(d) mengambil sebarang langkah perkara tindakan yang boleh menjejaskan apa-apa hak kepentingan faedah Plaintif-Plaintif atas saham-saham milik Plaintif-Plaintif dalam syarikat Defendan Kelapan dan Defendan Kesembilan yang dipertikaikan di dalam tindakan ini sehingga penyelesaian perbicaraan tindakan ini.

Perintah terhadap Defendan-Defendan untuk:-

(a) Gantirugi;

(b) Gantirugi exemplary dan aggravateri; dan

(c) Gantirugi yang tersebut di prayer IV (a) dan (b) di atas ditaksirkan oleh Mahkamah Mulia ini dan dibayar oleh Defendan-Defendan kepada Plaintif.

Faedah atas gantirugi di prayer IV di atas pada kadar 8% setahun dari tarikh Writ Saman ini sehingga tarikh pembayaran penuh.

Kos termasuk kos atas dasar anakguam dan peguamcara.

Perintah dan atau relif lain yang didapati adil dan sesuai manfaat oleh Mahkamah Mulia ini".

1st to 3rd defendants' pleaded case in Suit 246

[348]On 5th June 2009, the 1st, 2nd and 3rd defendants entered their appearance by filing their joint memorandum of appearance dated 4th June 2009, enclosure (4), through their previous solicitors, Messrs. Syed Alwi, Ng & Co.

[349]On 30 June 2009, the 1st, 2nd and 3rd defendants filed their statement of defence, dated 30th June 2009, enclosure (6), through their previous solicitors, Messrs. Syed Alwi, Ng & Co.

[350]Subsequently, the 1st to the 3rd defendants amended their statement of defence.

[351]In their amended statement of defence re-dated 19 November 2014, the 1st, 2nd and 3rd defendants deny the plaintiffs' allegations.

[352]In their amended statement of defence, the 1st, 2nd and 3rd defendants reiterate the averments of the 2nd and 3rd defendants, who are the plaintiffs in Suit 2256, in their statement of claim and in their reply to the 2nd and 3rd defendants defence, in Suit 2256:

[353]In their amended statement of defence, the 1st, 2nd and 3rd defendants also plead, *inter alia*, as follows:

(1) That the deductions that were made to Tranche I of the loan were for the payment of fees as stipulated in the Subscription Agreement;

(2) At all material times, the 1st and 2nd plaintiffs had breached their obligations under the Subscription Agreement and the 3 Deeds of Charge and the 3 Charges and they did not remedy their breaches despite having executed the Guarantee and Indemnity and having agreed therein to remedy their breaches;

(3) Hence, the 2nd defendant and/or the 3rd defendant was left with no alternative but to terminate the Subscription Agreement;

(4) Since Suit 1728 was, by consent of the parties, withdrawn and struck out with cost to the defendants in that Suit, who are the plaintiffs, in this Suit, and the merits of the parties', respective, cases, were not decided by the Court in Suit 1728, and the plaintiffs also did not reserve their rights to claim for damages in respect of the matters raised in Suit 1728, the plaintiffs are estopped from raising the same matters in this Suit;

(5) Hence, the consequences of Suit 1728 to the plaintiffs are irrelevant to this suit;

(6) By filing this suit, the plaintiffs have directly or indirectly submitted to the jurisdiction of the Court and as a result of that, the plaintiffs have waived their rights to refer the dispute to arbitration and/or to utilize the mechanism for dispute resolution as provided under the Subscription Agreement;

(7) Hence, the plaintiffs are no longer entitled to and/or are estopped from referring this action to arbitration;

(8) The plaintiffs have breached the Subscription Agreement by committing fraud and/or by their acts of misrepresentation and/or concealment of material and/or important facts from the 2nd and/or 3rd defendants;

(9) The plaintiffs' unauthorised withdrawal and/or usage of the money *via* the Group of Companies or otherwise constituted clear breaches of the Subscription Agreement;

(10) The plaintiffs have willfully concealed their breaches of the Subscription Agreement from the 2nd defendant and/or the 3rd defendant;

(11) At all material times and until the breaches of the Subscription Agreement by the plaintiffs, the 2nd defendant and/or the 3rd defendant were able, willing and ready to perform their obligations under the Subscription Agreement;

(12) Apart from the payment of a sum of USD 365,500.00 under the Subscription Agreement by the 1st defendant to the 2nd defendant and/or the 3rd defendant, the 1st defendant and/or the plaintiffs have failed and/or neglected to make any repayment of the Investment Amount or to pay the interest for the amount owed and payable under the Subscription Agreement;

(13) The 4th, 5th and/or the 6th defendants as the directors of the 8th defendant and/or the 9th defendant has the duty/responsibility to claim for all the money that is due to the 8th defendant, which the 8th defendant is responsible to pay to the 1st defendant under the Subscription Agreement;

(14) The Charges are valid and are enforceable and the 2nd defendant and/or the 3rd defendant is immediately entitled to enforce them upon the release of the money under Tranche I of the Investment Amount by the 2nd defendant and/or the 3rd defendant;

(15) All the acts of the 2nd defendant and/or the 3rd defendant in enforcing the securities are valid;

(16) The preparation of all the documents for the resignation of the plaintiffs as the directors of the 8th defendant and/or the 9th defendant, respectively, are valid and was done properly, whereby the documents were voluntarily executed by the plaintiffs themselves, and hence the documents are valid and are enforceable;

(17) The appointments of the 4th defendant, the 5th and the 6th defendants, as the directors of the 8th and/or the 9th defendant, together with the appointment of the 10th defendant and the 11th defendant, as the Company Secretaries of the 8th defendant and/or the 9th defendant are valid and are enforceable;

(18) The acts of the 2nd defendant and/or the 3rd defendant in enforcing its rights under the Subscription Agreement, the Guarantee and the Charges and/or the Deeds of Charge were done *bona fide* as a result of the breaches of the Subscription Agreement, the Guarantee and the Charges and/or the Deeds of Charge by the plaintiffs;

(19) The 2nd defendant and/or the 3rd defendant is entitled to enforce its rights under the Subscription Agreement, the Guarantee and the Charges and/or the Deeds of Charge in order to mitigate its losses under the Subscription Agreement as a result of the breaches of the Subscription Agreement, the Guarantee and the Charges and/or the Deeds of Charge by the plaintiffs;

(20) The 1st defendant and/or the 8th defendant was not entitled to the release of Tranche II of the loan based on the following reasons:

(a) The plaintiffs have failed to comply with all the conditions precedent and all the conditions subsequent as stipulated in the Subscription Agreement; and

(b) The 1st defendant and/or the 8th defendant, of which the plaintiffs were the directors, did not request in writing for the release of Tranche II of the loan, as required by the terms of the Subscription Agreement;

(21) Therefore, the 1st, 2nd and 3rd defendants pray that the plaintiffs' claim be dismissed with cost to be paid forthwith.

4th to 11th defendants' pleaded case in Suit 246

[354]On 3rd June 2009, the 4th to the 11th defendants entered their appearance by filing their joint memorandum of appearance dated 3rd June 2009, enclosure (3), through their previous solicitors, Messrs. Wong, Gowry & Yip.

[355]On 26 June 2009, the 4th to the 11th defendants filed their statement of defence dated 25 June 2009, enclosure (5), through their previous solicitors, Messrs. Wong, Gowry & Yip.

[356]In their statement of defence, the 4th to the 11th defendants deny the plaintiffs' allegations.

[357]In their statement of defence, the 4th to 11th defendants plead, *inter alia,* as follows:

(1) By the Loan Agreement and at the request and for the benefit of the 8th defendant, the 1st defendant had, *inter alia*:

(a) agreed to grant and make available to the 8th defendant a term loan up to a maximum aggregate principal amount of USD 8,600,000.00 only (hereinafter referred to as "the Loan Amount") which was to be drawn down in two (2) tranche payments amounting to USD 4,300,000.00 per tranche;

(b) that the drawdown of the Loan Amount *via* the 'tranches' was to be performed within a period of six (6) months;

(c) that the 8th defendant had, expressly and unequivocally, agreed and undertaken to utilize the Loan Amount for the following two (2) specific purposes only:

(i) for the purchase of plant machinery for the purpose of the 8th defendant leasing the plant machinery to two (2) companies only, namely, EPCB; and Maple Strategies to be used by EPCB and Maple Strategies, solely, for the expansion of its keypad and LCD windows business; and

(ii) to lend a portion of the Loan Amount to Maple Strategies for the working capital requirements of Maple Strategies only upon Maple Strategies being made a subsidiary of the 9th defendant;

(d) interest at the rate of 8% per annum would be imposed on the total Loan Amount released by the 1st defendant to the 8th defendant pursuant to the Loan Agreement until full and final settlement thereof; and

(e) a late payment charge at the rate of 2% per month will be imposed on the total Loan Amount which remains due and owing by the 8th defendant to the 1st defendant pursuant to the Loan Agreement from the date the outstanding amount is to be paid until full and final settlement thereof.

(2) The funds of the 1st defendant, which was to be loaned *vide* the Loan Amount, were raised from the proceeds of the 2nd defendant's and/or the 3rd defendants' subscription of the Bonds of the 1st defendant (in the form of USD Convertible Bonds) under the Subscription Agreement;

(3) The Loan Agreement is currently the subject matter of a litigation proceeding under Suit 1123 and is irrelevant to this action because of the following reasons:

(a) It was not secured by any other securities such as the Charges and/or the Deeds of Charge; and

(b) It did not involve the plaintiffs at all in their personal capacity; and

(4) Based on the above, the 4th to the 11th defendants, strictly deny the contents of paragraph 19 of the statement of claim;

(5) The defendants also plead, *inter alia*, that based on the above matters, the following matters are clear and obvious:

(a) the Loan Agreement represents a separate and independent agreement and/or contract from the Subscription Agreement;

(b) the contents and the terms of the Loan Agreement and the Subscirption Agreement are different and remain separate and independent from one another;

(c) the Loan Agreement and the Subscription Agreement have and/or are for different purposes;

(d) the Loan Agreement and the the Subscription Agreement are secured by separate and independent securities/guarantees;

(e) the Loan Agreement and the Subscription Agreement were executed between different parties as follows:

(i) the Loan Agreement had been executed between the 1st defendant and the 8th defendant wherein the plaintiffs are not involved at all in the Loan Agreement other than executing the Loan Agreement as agents and/or representatives of the 8th defendant (in their capacities as the then directors of the 8th defendant);

(ii) the Subscription Agreement had been executed between the 1st defendant, the 3rd defendant, Wira International and the plaintiffs; and

(iii) *vide* the Deed of Accession, the 2nd defendant had proceeded to 'step into the shoes' of the 3rd defendant under the Subcription Agreement.

(f) the Subscription Agreement and the Loan Agreement are the subject matters of separate and independent legal actions, namely:

(i) Suit 1458 that was filed by the 2nd defendant and the 3rd defendant against the 1st defendant, at the High Court of Malaysia in Kuala Lumpur, based on the breach of the terms of the Subscription Agreement by the 1st defendant. The 2nd defendant and 3rd defendant had on 11 November 2008 obtained Judgment-in-default against the 1st defendant for breach of the terms and conditions of the Subscription Agreement by the 1st defendant;

(ii) Suit 2256 that was filed by the 2nd defendant and the 3rd defendant against the plaintiffs, 8th defendant, 9th defendant and Maple Strategies to, *inter alia*, realize and/or enforce the Charges and Deeds of Charge as detailed in paragraph 10 above;

(iii) Suit 1123 that was filed by the 1st defendant against, *inter alia*, the plaintiffs and the 8th defendant for breach of the Loan Agreement and/or fraud committed by the plaintiffs against the 1st defendant;

(g) the cause(s) of action rising from the Loan Agreement and the Subscription Agreement, respectively, remain different, separate and independent from one another;

(h) the plaintiffs lack the required locus standi to commence any action based on the Loan Agreement as the plaintiffs are not signatories to the Loan Agreement, save and except for executing the Loan Agreement as agents and/or representatives of the 8th defendant (in their capacities as the then directors of the 8th defendant);

(i) the Loan Agreement is irrelevant to this action herein; and

(j) that the plaintiffs are clearly and obviously attempting to confuse the purpose and intent of the Loan Agreement and the Subscription Agreement to avoid their legal obligations to the 2nd defendant and the 3rd defendant under the Subscription Agreement.

(6) In addition to above matters, the defendants also plead as follows:

(a) that the Subscription Agreement and all relevant documents relating directly to the Subscription Agreement, in particular but not limited to the Deeds of Charge and Charges, were prepared on the understanding that the plaintiffs had expressly chosen not to be represented by any solicitor(s) despite having the option to do so at all material times;

(b) that the plaintiffs appear to have understood and appreciated the contents of the Subscription Agreement and all relevant documents relating directly to the Subscription Agreement at all material times and had never raised any queries and/or disputes against the same. Indeed, the plaintiffs, as guarantors and/or covenantors of the Subscription Agreement (as per paragraph 9 above) had made interest payments to the Account under the Subscription Agreement from 30 March 2007 to 20 September 2007;

(c) that at all material times, the plaintiffs had negotiated and dealt with the 2nd and 3rd defendants at an arm's length and on the basis/understanding that the plaintiffs had chosen not to be represented in all negotiations and dealings pertaining to the Subscription Agreement (and all relevant documents directly relating thereto);

(d) that the plaintiffs are now estopped from raising the fact that the plaintiffs were represented during the preparation of the Subscription Agreement (and all relevant documents directly relating thereto); and

(e) that a clear and obvious case exists and remains enforceable against the plaintiffs for breach of their obligations under the Subscription Agreement and the Guarantee (as defined herein).

(7) The defendants also plead that the 2nd defendant and/or the 3rd defendant, subsequently, discovered that the 1st defendant and/or the plaintiffs had committed the breaches of/defaults in the terms and conditions of the Subscription Agreement the details of which are as follows:

(a) Withdrawals of monies from the Account without the knowledge/consent of the 2nd defendant and/or 3rd defendant as follows:

(i) an amount of approximately USD 3,000,000.00 had been withdrawn from the Account without the knowledge/consent of the 2nd defendant and/or 3rd defendant, for payments to the following parties:

Date	Party Receiving Payment	Amount (USD)
2/4/2007	EPCM	1,250,000.00
2/4/2007	Freshing Industrial Co Ltd	287,500.00
14/4/2007	EPCM	1,250,000.00
3/8/2007	EPCB	215,000.00

(ii) from the documents of the 8th defendant that the 1st plaintiff had withdrawn the amount of USD 2,500,000.00 (in two (2) parts amounting to USD 1,250,000.00 each part) from the Account, allegedly, for purposes of making direct payment to the 9th defendant;

(iii) However, from the records of the Account, it was discovered that these payments were made directly to the favour of EPCM;

(iv) Thus on record, the plaintiffs as the then directors of the 8th defendant at the relevant time had caused the 8th defendant to disguise the transfer of funds *via* the 9th defendant for the 1st plaintiff's and/or the 2nd plaintiff's (as the then directors of the 8th defendant) own illegal purpose; and

(v) that the equipment allegedly purchased by the 8th defendant from Freshing Industrial Co Ltd had been leased out to E-Circle in breach of the Subscription Agreement as the equipment had not been utilized by EPCB and/or Maple Strategies;

The full trial for Suit 246

[358]The full trial for Suit 246 commenced on 26 November 2014 after the conclusion of the full trial of Suit 2256 on 13 September 2014 and the full trial for Suit 1123 on 25 November 2014.

[359]It was continued on 27 November 2014. It concluded on 27 November 2014.

Witnesses in Suit 246

[360]For Suit 246, Lim Wan Soon and Leng Khuan Yow (F), the 1st and 2nd plaintiffs, called 1 (one) witness. He is Lim Wan Soon, the 1st plaintiff himself, as PW1. The 2nd plaintiff did not testify. The 1st and 2nd plaintiffs conceded that Suit 1728 was withdrawn by consent with cost of RM 20,000.00 and there was no Order for the payment of damages by the plaintiffs in that suit to the defendants in that suit.

[361]The 1st to the 3rd defendants did not call any witness. They adopted and relied on the evidence of the six

witnesses (PW1 to PW6), who had testified during the full trial of Suit 2256 and the evidence of Lee Wai Ngan (DW1), the 10th defendant in Suit 246, who had testified for the 4th to the 11th defendants in the full trial for Suit 246.

[362]The 4th to the 11 defendants in Suit 246 adopted and relied on the evidence of the 6 (six) witnesses (PW1 to PW6), who had testified for the plaintiffs in Suit 2256, and the documentary evidence in Suit 2256. They also called one additional witness. She is Madam Lee Wai Ngan, who is also the 10th defendant and who testified as DW1. DW1 is the new Company Secretary of the 8th and 9th defendants. DW1 was appointed to replace the previous Company Secretary.

[363]DW1 gave evidence on the enforcement of the Charges i.e. the transfer of all the shareholdings of Impulse Talent, the 9th defendant, to AS Nominees Sdn. Bhd., the 7th defendant, the appointment of Chris Chia, YEO and/or Dennis Wuisan as the directors of Maple Challenge, the 8th defendant and/or Impulse Talent, the 9th defendant.

Plaintiff's proven case

[364]Lim Wan Soon (PW1) gave his evidence in his examination-in-chief *vide* a witness statement (P94). PW1 also adopted and repeated all his answers in his witness statement in suit 2256.

[365]In P94, PW1 said as follows:

"

Q4: Are you authorised to give evidence on behalf of the Second Plaintiff?

A4: Yes. I and the Second Plaintiff wish to adopt and reiterate all my answers in my Witness Statement filed for Suit No: D6-22-2256-2008 as evidence in this suit.

Q5: Who prepared the loan and security agreements?

A5: All the loan and security agreements were prepared by the legal firm fixed and appointed by the First and/or Second and/or Third and/or Fourth and/or Fifth and/or Sixth defendants namely Messrs. Zaid Ibrahim & Co. The solicitor in charge was Mr. Loo Tatt King.

Q6: Did the Plaintiffs seek independent legal advice on the loan and security agreements?

A6: No. The Plaintiffs rely on the good faith of the First and/or Second and/or Third and/or Fourth and/or Fifth and/or Sixth Defendants to enter into the loan and security agreements. Actually the whole loan transaction and/or scheme was planned and set up by the Fourth, Fifth and Sixth Defendants. The Plaintiffs were merely obliging to it with the hope that the Fourth, Fifth and Sixth Defendants would not cheat or deceive the Plaintiffs.

Q7: What happened after the loan was released?

A7: The Fourth and/or Fifth and/or Sixth Defendants had appointed Mr. Teo Hun Theng (NRIC No: 760226-07-5681) on 2 May 2007 as the Finance Manager of EPCB to be their ears and eyes and to report everything about the Plaintiffs' Group of Companies to them.

Q8: Anything else?

A8: On 12 November 2007, the Fourth and Fifth Defendants came to the Plaintiffs' premise and threatened Plaintiffs to sign the Guarantee and Indemnity Agreement. The Fourth and Fifth Defendants threatened the Plaintiffs in particular the Second Plaintiff to tears that unless the Plaintiffs sign the Guarantee and Indemnity, they would discontinue the availability and or cancel the remaining facility under the said Loan Agreement dated 15 March 2007. A copy the Guarantee and Indemnity Agreement which was signed by the Plaintiffs under coercion is at page 304 to 319 of Bundle D. however on the next day, the Fourth and Fifth Defendants together with their solicitor, Mr. Loo Tatt King came again and asked the Plaintiffs to sign a fresh Guarantee and Indemnity Agreement in which the Plaintiffs had refused to do so. A copy of the unexecuted Guarantee and Indemnity Agreement is at page 1 – 15 of the Ikatan Dokumen Tambahan Plaintif-Plaintif.

…

Q9: What happened after that?

A9: On or about 28 November 2008, the First Defendant up to the Seventh Defendant, Tenth Defendant and the Eleventh Defendant had proceeded with the enforcement of Charges, Deed of Charges and or other securities by jointly and or severally:

A. Transferred the plaintiffs' shares in the Ninth Defendant to the Seventh Defendant;

B. Prepared, submitted and caused to register the transfer forms and documents in relation to the above transfer of Plaintiffs' shares in including but not limited to Forms PDS 6 and 32A;

C. Prepared, submitted and utilised all the resignation forms and or caused to the resignation of the Plaintiffs as directors in the companies of Eights and Ninths Defendants;

D. Appointed and or caused to the appointment and or accepted the appointment of:

i. The Fourth Defendant, the Fifth Defendant and or the Sixth Defendant as the director of the Eighth Defendant;

ii. The Fifth Defendant and or the Sixth Defendant as the directors of the Ninth Defendant;

iii. The Tenth Defendant and the Eleventh Defendant as the company secretaries of the Eighth Defendant and Ninth Defendant.

Nevertheless, it is the Plaintiffs' contention that the above transfer of Plaintiffs' shares, removal of Plaintiffs as directors and appointment of new directors in the companies of the Eighth Defendant and Ninth Defendant were illegal, unlawful, null and *void ab initio*.

Q10: What do you seek for from this Honourable Court today?

A10: I pray for all the Plaintiffs' prayers and reliefs pleaded under paragraph 55 at page 36 Bundle of Pleadings to be allowed with costs."

[366]Based on PW1's evidence, it was clear to the Court that the plaintiffs are claiming that they were cheated or deceived by the 1st to the 6th defendants. This is because he had said that he had dealt with the 1st to the 6th defendants in good faith, relied on their good faith to enter into the loan and security agreements and did not expect them to cheat or deceive him and his wife. However, the Court noted that he and the 2nd plaintiff did not lodge any police report against the 1st to the 6th defendants for, allegedly, cheating him and the 2nd plaintiff. The Court also noted that PW1 and the 2nd plaintiff also did not plead that they were cheated and deceived by the 1st to the 6th defendants.

[367]PW1 also testified that the loan was an illegal loan as it had breached the conditions that were imposed by BNM in its letter dated 23 February 2007, that it was the defendants, who had breached the terms and conditions of the loan agreements by refusing to release Tranche II of the loan and in lodging the police report against him and his wife, thereby causing him and his wife to face criminal charges, the freezing of the bank accounts of their Group of Companies and the ultimate collapse and destruction of their Group of Companies and that the guarantee was invalid, null and void as he and his wife were threatened into signing the Guarantee and Indemnity. However, the Court noted that PW1 and the 2nd plaintiff did not complain or lodge any report with BNM against the 1st to the 6th defendants, concerning the alleged illegality of the alleged singular transaction for the loan of USD 8.6 million.

[368]PW1 also testified that he was advised by Teo, the Finance Manager of EPCB, who was appointed by the 4th defendant and/or the 5th defendant and/or the 6th defendant, that he (PW1) could use the loan proceeds to give loans to the other companies within the plaintiffs' Group of Companies and to repay to himself and to other individuals the loans that he and the other individuals, had given to the companies within the plaintiffs' Group of Companies.

[369]However, the Court noted that he did not call Teo as a witness to testify in support of his allegations.

1st and 2nd plaintiffs' issues for the determination of the Court in Suit 246

[370]The plaintiffs have framed the following 25 (twenty-five) issues for the determination of the Court:

(1) Sama ada Perjanjian-Perjanjian yang tersebut di perenggan 15, 16, 17 dan 18 di Pernyataan Tuntutan merupakan satu transaksi perjanjian pinjaman yang sama iaitu pinjaman USD 8.6 juta kepada Defendan Kelapan dan bahawa Defendan Pertama dan atau Defendan Kedua dan atau Defendan Ketiga dan atau bersesama dan atau berasingan adalah terikat atas terma dan syarat dalam semua dokumen tersebut?

(2) Sama ada berdasarkan bentuk dan cara pinjaman USD 8.6 juta tersebut kepada Defendan Kelapan, ia adalah jelas transaksi pinjaman wang yang haram?

(3) Sama ada segala perjanjian pinjaman tersebut di atas adalah terikat kepada terma dan syarat Bank Negara Malaysia termasuk di dalam surat Bank Negara Malaysia bertarikh 23 Februari 2007 (selepas ini dirujuk sebagai “Syarat BNM” tersebut)?

(4) Sama ada Defendan Pertama dan/ atau Defendan Kedua dan/ atau Defendan Ketiga dan/ atau bersesama dan/ atau berasingan telah memungkiri Syarat BNM tersebut khususnya:

(a) Pemberian pinjaman sebenarnya bukanlah Defendan Pertama yang nyata dalam Subscription Agreement;

(b) Kadar faedah ditetapkan 8% setahun tetapi sebaliknya dikenakan lebih tinggi kira-kira 21.9%;

(c) Tiada lain-lain yuran dikenakan bertentangan dengan Klausa 4.4(b) Subscription Agreement dan bayaran USD 50,000.00 yang dibuat sebagai fee sebanyak dua kali.

(5) Sama ada Defendan Pertama sememangnya mengetahui bahawa conditions precedent tidak dipenuhi melalui surat-surat bertarikh 15 Mac 2007. Namun begitu, pengeluaran wang pinjaman USD 4,189,033.00 masih terus dilakukan pada 20 Mac 2007?

(6) Sama ada Defendan Pertama adalah diestop daripada membangkitkan isu-isu berkenaan conditions precedent dan isu-isu berkaitannya?

(7) Sama ada Defendan Pertama khususnya wakil-wakil mereka Defendan Keempat dan Defendan Kelima telah membuat pertuduhan palsu terhadap Plaintif-Plaintif dan kumpulan syarikat milik Plaintif-Plaintif khususnya Defendan Kelapan, EPC Technology (M) Sdn Bhd dan EPC Technology (Bangi) Sdn Bhd bahawa Plaintif-Plaintif dan kumpulan syarikat milik Plaintif-Plaintif telah menyalahgunakan wang pinjaman USD 4,189,033.00 tersebut kira-kira pada bulan November 2007?

(8) Sama ada Pengarah Defendan Kelapan iaitu Plaintif-Plaintif juga telah diugut oleh Defendan Pertama dan atau wakilnya untuk menandatangani Perjanjian Jaminan pada bulan November 2007, kalau tidak, maka baki wang pinjaman USD 4.3 juta tidak akan dikeluarkan yang butir-butir penuh adalah dalam pengetahuan Defendan Pertama dan atau Defendan Kedua dan atau Defendan Ketiga?

(9) Sama ada dakwaan-dakwaan Defendan Pertama dan atau Defendan Kedua dan atau Defendan Ketiga yang kononnya Plaintif-Plaintif dan atau Defendan Kelapan telah memungkiri kontrak pinjaman adalah tidak berasas, *mala fide* dan bertujuan untuk mengambil secara salah harta benda milik Plaintif-Plaintif dan atau pemilikan saham Plaintif-Plaintif dalam Defendan Kelapan dan kumpulan syarikat milik Plaintif-Plaintif tersebut?

(10) Sama ada Defendan Pertama dan atau Defendan Kedua dan atau Defendan Ketiga sebenarnya telah memungkiri kontrak pinjaman dengan enggan membayar baki wang pinjaman USD 4.3 juta walaupun dipersetujui terlebih dahulu bahawa wang tersebut akan dikeluarkan pada atau sebelum 23 Disember 2007?

(11) Sama ada Defendan Pertama dan Defendan Kedua dan atau Defendan Ketiga di dalam memungkiri terma perjanjian pinjaman telah juga membuat laporan-laporan polis palsu bagi tujuan menindas dan memaksa Plaintif-Plaintif dan kumpulan syarikat milik Plaintif-Plaintif membayar balik keseluruhan wang pinjaman serta faedah bertentangan dengan terma perjanjian yang telah dipersetujui?

Common issues for the determination of the Court in Suit 246

[371]The parties have framed the following 5 (five) common issues for the determination of the Court:

(1) Whether or not the 2 (two) plaintiffs have the requisite and/or necessary *locus standi* to bring this action against the eleven defendants in light of the following facts:

1.1. Where the plaintiffs, being mere Covenantors/Guarantors of the 1st defendant, have no right to assume the position of the 1st defendant and/or represent themselves as the 1st defendant itself under the Subscription Agreement;

1.2. Where Judgment-in-default has already been entered on 11 November 2008 *vide* Civil Suit No.: D1-22-1458-2008 ("Suit 1458") against the 1st defendant (as the principal under the Subscription Agreement) for breach of its obligations to the 2nd defendant and/or the 3rd defendant under the Subscription Agreement; and/or

1.3. As the plaintiffs are mere Covenantors/Guarantors of the 1st defendant (as the principal under the Subscription Agreement) under the Subscription Agreement and the Guarantee and nothing further?

Provided always that the answer to paragraph (2) above is in the affirmative?

(2) Whether or not the Subscription Agreement dated 15 March 2007 (hereinafter referred to as "the Subscription Agreement") executed between the 3rd defendant and the following parties:

(i) 1st defendant;

(ii) The company known as 'WIRA INTERNATIONAL LIMITED' (Company No.: 116579), a private limited company incorporated in the British Virgin Islands having its registered address at Trident Chambers, P.O. Box 146, Road Town, Tortola, British Virgin Islands (hereinafter referred to as "Wira International"). At all material times, Wira International was a shareholder of 1st defendant; and

(iii) The 1st plaintiff and the 2nd plaintiff

And the Loan Agreement dated 15 March 2007 (hereinafter referred to as "the Loan Agreement") executed between the 1st defendant and the 8th defendant:

(a) Was a singular transaction?; or

(b) Did the Subscription Agreement and the Loan Agreement represent separate and independent transactions involving different parties, different obligations and/or different terms and condition?

(3) If the answer to paragraph (2) above is in the affirmative, whether or not such 'singular transaction' was illegal and/or invalid between the 1st defendant, the 2nd defendant, the 3rd defendant and the 8th defendant?

(4) If the answer to paragraph (2) above is in the negative, whether or not:

4.1. Such 'singular transaction' was invalid between the 1st defendant, the 2nd defendant, the 3rd defendant and the 8th defendant for one or more of the following reasons:

(a) By the 1st defendant, the 2nd defendant and/or the 3rd defendant agreeing to the deferment of the conditions precedent of the Subscription Agreement at the request of the 1st defendant; and/or

(b) By the 1st defendant, the 2nd defendant and/or the 3rd defendant not releasing the full Investment Amount to the 1st defendant *via* the Account pursuant to the terms and conditions of the Subscription Agreement?;

4.2.

(a) Whether or not any terms and conditions were imposed by the relevant authorities, namely Bank Negara Malaysia and/or the Labuan Offshore Authorities, on the Subscription Agreement?;

(b) If there were in fact terms imposed by the relevant authorities on the Subscription Agreement, whether or not the 1st defendant, the 2nd defendant and/or the 3rd defendant were in breach of any of such terms and conditions?; and

(c) If there was in fact a breach by the 1st defendant, the 2nd defendant and/or the 3rd defendant of the terms and conditions imposed by the relevant authorities on the Subscription Agreement, whether or not such breach would have the effect of invalidating the alleged 'singular transaction'?; and/or

4.3. By the plaintiffs breaching their obligations, as covenantors/guarantors of KJD Glove, the 1st defendant, to the 2nd defendant and/or the 3rd defendant, under the terms and conditions of the Subscription Agreement, the Loan Agreement and/or the Guarantee.

(5) Whether or not, in light of the breach by KJD Glove, the 1st defendant, of the Subscription Agreement, the 2nd defendant and/or 3rd defendant was entitled to proceed with the enforcement of the Charges, Deeds of

Charge and/or the other securities provided by the 1st plaintiff and the 2nd plaintiff, the 8th defendant, the 9th defendant and Maple Strategies?

1st to 3rd defendants' submissions in Suit 246

[372]In his written submissions dated 9 January 2015, Mr. Brendan Siva, the learned counsel for the 1st to the 3rd defendants, submitted that the plaintiffs' suit and claim against the 1st to the 3rd defendants ought to be dismissed with cost on the ground that the plaintiffs have failed to prove their suit and claim against the 1st to the 3rd defendants on a balance of probabilities, based on the reasons which have been accepted by the Court and adopted in this Judgment.

4th to 11th defendants' submissions in Suit 246

[373]In his written submissions dated 9 January 2015, Mr. H. W. Yip, the learned counsel for the 4th to the 11th defendants, submitted that the plaintiffs' suit and claim against the 4th to the 11th defendants ought to be dismissed with cost, as the plaintiffs have failed to prove their suit and claim against the 4th to the 11th defendants on a balance of probabilities, based on the reasons which have been accepted by the Court and adopted in this Judgment.

1st and 2nd plaintiffs' submissions in Suit 246

[374]In his written submissions dated 15 January 2015, Mr. Krishna Dallumah, the learned counsel for the 1st and 2nd plaintiffs, reiterated and adopted the written submissions dated 8 January 2015 that he had put in earlier for the 2nd and 3rd defendants in Suit 2256 and also the written submissions also dated 8 January 2015 that he had put in earlier for the 2nd and 3rd defendants in Suit 1123, who are the plaintiffs in this suit.

[375]In reply to the issues raised by the 1st to the 3rd defendants in their written submissions dated 9 January 2015, Mr. Krishna Dallumah submitted as follows:

(1) The fact that the 2nd plaintiff did not testify is not a ground to dismiss the 2nd plaintiff's claim;

(2) Furthermore, the 1st plaintiff, who is the husband of the 2nd plaintiff, has duly testified and given evidence for both the plaintiffs;

(3) Hence, no adverse inference should be drawn from the failure of the 2nd plaintiff to testify in the full trial (see *Motorola Malaysia Sdn Bhd v. Ng Thien Keong & Anor* [2011] 5 CLJ 564. In that case the Court held, at "Held 4") as follows:

> "The non-production of the SOP cannot give rise to an adverse presumption and s. 114(g) of the Evidence Act 1950 was not applicable. An adverse inference under s. 114(g) can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. There was no withholding or suppression of evidence."

(4) It is a fact that only Tranche I, which is 50% of the total loan amount of USD 8.6 million, was released;

(5) The plaintiffs had asked for a deferment of Tranche II, which is the balance 50% of the total loan of USD 8.6 million, and Tranche II has not been released until to-date;

(6) The defendants are estopped from raising non-compliance of the conditions precedent, if any, which is denied. This is because at the plaintiffs' own request only half of the loan sum was released (see exhibit P-21 and exhibit P-22 at pages 179 to 182 Bundle H). The defendants have also waived the non-compliance of the conditions precedent, if any, which is denied;

(7) Krishna Dallumah cited the following excerpt from the decision of the Court of Appeal in *Bank Pertanian Malaysia Bhd v. MCI BIO Tech Sdn Bhd* [2013] 9 CLJ 29, at p 30, in support of his submission:

> "The bank submitted that the High Court had erred when it held that the bank was not justified to withhold the release of the final draw down sum of RM 3,000,000 on the ground that MCI had not fulfilled the condition precedent. The High Court held that because the bank had previously disbursed RM 15,000,000 to MCI without the issue of non-fulfilment of the condition precedent pursuant to s. 11.1 of the loan agreement, the bank had waived their rights. The bank relied on cl. 6.3 of the loan agreement which provided that any waiver

> shall not preclude the bank from insisting on MCI's compliance with such waived or varied terms and conditions."

and as follows at page 41:

> "Now, if there had been departures and such non-compliance had been accepted without complaint or reservation, a party can ordinarily say the requirement of compliance has been waived."

(8) The submissions of the 1st to 3rd defendants from paragraphs 16 to 45 thereto must be rejected because the 2nd and 3rd defendants are not entitled to enforce the securities under the Subscription Agreement. This is especially so when the whole loan sum of USD 8.6 million was not released to the borrowers;

(9) The enforcement of securities and the Judgment-in-default obtained in Suit 1458 and in Suit 2256 (against the defendants therein who are the plaintiffs in this suit), were as a result of the defendants' own illegal acts or wrongdoings as testified to by the plaintiffs (see answers 13 to 27 of the 1st plaintiff's witness statement and answers 4 to 10 of the 1st plaintiff's revised witness statement) and also pleaded by the plaintiffs in paragraphs 31 to 54 of the statement of claim at pages 28 to 36 of Bundle X;

(10) The 1st plaintiff's evidence on the matters mentioned in the preceding sub-paragraph (9) has not been rebutted by the defendants and, hence, the plaintiffs clearly have the *locus standi* to file and maintain the claim against the defendants in this suit;

(11) The submissions in paragraphs 52 to 60 of the 1st to the 3rd defendants' written submissions are without basis because there is only one (1) loan transaction of USD 8.6 million but the defendants have created numerous "loan documents" which are "sham" documents;

(12) The 4th to the 11th defendants' written submissions which can be summarized under "*locus standi*" and "damages" have no merit because as submitted above, there is only 1 (one) loan transaction of USD 8.6 million and the plaintiffs are the named parties to the said USD 8.6 million loan transaction;

(13) Hence, the plaintiffs have the necessary *locus standi* to commence this action against all the 11 defendants;

(14) The plaintiffs have clearly shown that it was the wrongdoings and illegal acts of the defendants, which have resulted in the total collapse of the plaintiffs' business and group of companies;

(15) Hence, the plaintiffs are clearly entitled to damages against the defendants;

(16) The issue of agency-principal does not arise simply because each of the defendants has acted on its/his own;

(17) The issue of non-compliance of the conditions precedent that was raised by the 1st to the 11th defendants is without merits as submitted above;

(18) The plaintiffs have been adjudicated bankrupt as a result of the illegal acts and wrongdoing of the defendants;

(19) Hence, the plaintiffs are entitled to judgment as prayed; and

(20) Therefore, the plaintiffs pray for judgment against the defendants in paragraph 55 of their statement of claim at page 36 of Bundle of Pleadings (Bundle X) with cost.

1st to 3rd defendants' submissions-in-reply in Suit 246

[376]In reply to the plaintiffs' submissions, the 1st to the 3rd defendants in their written submissions dated 23 January 2015 referred to and adopted their earlier written submissions dated 9 January 2015, the 4th to the 11th defendants' written submissions dated 9 January 2015, the plaintiffs' written submissions dated 9 January 2015 in Suit 2256 and the plaintiff's written submissions dated 9 January 2015 in Suit 1123.

[377]In the same reply, the 2nd and 3rd defendants also submitted that the plaintiffs' suit against the 1st to the 3rd defendants ought to be dismissed with cost based on the following reasons:

(1) The plaintiffs' contention that no adverse inference ought to be drawn against the plaintiffs for their failure to call the 2nd plaintiff to testify is wholly misconceived;

(2) Since the 2nd plaintiff, who, at all material times, was available to testify, did not testify, she has not discharged her burden of proof in respect of her allegations against the defendants;

(3) The 1st to the 3rd defendants are not estopped from raising the issue of non-compliance of the conditions precedent by the plaintiffs because firstly, the request for the postponement of the fulfillment of the conditions precedent was made by the plaintiffs. This was admitted by the plaintiffs at paragraph 9 of their written submissions. The plaintiffs had requested for the postponement of the fulfillment of the conditions precedent pursuant to their request for the Investment Amount to be disbursed on an urgent basis to the USD Account of the 8th defendant;

(4) In their request for the said postponement, the plaintiffs covenanted that the remaining conditions precedent would be fulfilled within 2 weeks (see Exhibit P3). This was not done. In particular, the USD Account was not set up as per its joint account requirements of operation;

(5) Further, the plaintiffs and/or the 1st defendant and/or the 8th defendant committed breaches of the terms and conditions of the Subscription Agreement as referred to earlier as set out in paragraph 40 of the 1st to 3rd defendants' written submissions;

(6) Secondly, in an event of breach, there was no need for Tranche II of the monies to be released before the 1st and 3rd defendants can enforce their rights pursuant to the Subscription Agreement;

(7) As a result of the breaches; the 1st to the 3rd defendants had lawfully and validly enforced its rights pursuant to the express terms and conditions of the Subscription Agreement and in accordance with the terms and conditions of the security documents;

(8) It is not true that the enforcement of the securities were a result of the illegal acts and wrongdoings of the defendants;

(9) It is trite law that the plaintiffs must adduce evidence to substantiate its claim for damages. The plaintiffs cannot just throw general damages at the feet of the Court. It must be proved by leading evidence. The plaintiffs cannot say that they are claiming for this and that, without proving their claim by way of documentary evidence (see *Ban Chuan Trading Co Sdn. Bhd. v Ng Bak Guan* [2004] 1 MLJ 411 and *Popular Industries Limited v Eastern Garment Manufacturing Sdn. Bhd.* [1989] 3 MLJ 360).

(10) The plaintiffs have no *locus standi* to initiate this suit because the rights of the plaintiffs (as covenantors) are as provided under clause 8 of the Subscription Agreement and the plaintiffs' rights do not extend beyond the provisions of clause 8 of the Subscription Agreement;

(11) The transaction is valid and legal and the transaction documents are not "sham" documents;

(12) The Subscription Agreement and the Loan Agreement are two separate documents, involving separate parties for separate purposes;

(13) The manner in which the Tranche I proceeds was disbursed did not in any way alter the structure of the transactions as set out in the Subscription Agreement and Loan Agreement or the obligations thereunder. They remain intact;

(14) The plaintiffs had never taken issue with regard to the legality of the Agreements. In fact, the plaintiffs had taken a benefit of the monies;

(15) Further, no evidence, whatsoever, was led by the plaintiffs to substantiate their claim that the Agreements are indeed illegal; and

(16) The plaintiffs have failed to prove their claim on a balance of probabilities, as many of their contentions are without any corroborative evidence, whatsoever, and the plaintiffs have also failed to adduce any documentary evidence before this Court to substantiate their claim.

Finding of the Court

[378]The findings of the Court on the various issues raised by the parties for the determination of the Court in this suit are as follows:

[379]In this suit, the plaintiffs have alleged, *inter alia*, as follows:-

(1) that the 1st to 11th defendants had either, jointly, colluded and/or conspired to usurp the plaintiffs' business, in particular, that of the 8th defendant and the 9th defendant;

(2) that despite the Subscription Agreement and the Loan Agreement, involving different parties and being executed for different purposes with different terms and conditions, both the Subscription Agreement and the Loan Agreement were, in fact, a 'singular loan transaction', which was illegal;

(3) that due to the purported 'illegal nature' of such alleged 'singular loan transaction', the plaintiffs are under no obligation to return any monies received by the plaintiffs under the Subscription Agreement and/or Loan Agreement to the 1st to 3rd defendants;

(4) that the 1st to 3rd defendants had not complied with the requirements of the relevant regulating authorities, namely, BNM and LOFSA;

(5) that all transactions carried out by the plaintiffs involving the usage of Tranche I of the Investment Amount, amounting to USD 4,300,000.00 were, at all material times, valid and in accordance with the terms and conditions of the Subscription Agreement and/or Loan Agreement;

(6) that the 1st defendant, and/or the 2nd defendant, and/or the 3rd defendant had waived the requirements of the fulfilment of the conditions precedent and conditions subsequent at the time Tranche I of the Investment Amount (totalling USD 4,3000,000.00) was released to the plaintiffs *vide* Maple Challenge, the 8th defendant;

(7) that the 1st defendant, and/or the 2nd defendant, and/or the 3rd defendant with *mala fide* intent failed to fulfill their obligations to release the balance of the Investment Amount, amounting to USD 4,300,000.00, to the plaintiffs;

(8) that the 1st defendant, and/or the 2nd defendant, and/or the 3rd defendant had pre-maturely enforced the Charges and Deeds of Charge on/about 28 November 2008;

(9) that the enforcement of the Charges and the Deeds of Charge by the 1st to 3rd defendant was invalid, illegal, null and *void ab initio*;

(10) that as a result of the defendants' acts, the plaintiffs have suffered losses and/or damages; and

(11) Therefore, the plaintiffs are entitled to judgement for their claims as prayed for in paragraph 55 of their statement of claim.

Agreed and undisputed facts

[380]The agreed and undisputed facts are as follows:

(1) Pursuant to the Subscription Agreement, at the request of the 1st and 2nd plaintiffs, the 3rd defendant agreed to invest in the 1st defendant by applying and subscribing to the bonds of the 1st defendant up to the Investment Amount i.e. USD 8,600,000.00, subject to the terms and conditions as set out in the Subscription Agreement;

(2) Subsequent to the execution of the Subscription Agreement, the 2nd defendant and the 3rd defendant then proceeded to execute a Deed of Accession dated 16 March 2007 with the 1st defendant, Wira International, the plaintiffs ("the Deed of Accession") whereby the 2nd defendant had, *inter alia*, acceded its role in the Subscription Agreement to the 3rd defendant, wherein this accession of roles had been ratified by the parties to the Subscription Agreement i.e. the 1st defendant, Wira International and the plaintiffs;

(3) The Subscription Agreement had provided for a number of conditions precedent to be fulfilled prior to the completion of the subscription of the Bonds by Kendall Court, the 3rd defendant;

(4) The Subscription Agreement had also provided for a number of conditions subsequent to be fulfilled following the release of Tranche I by the 3rd defendant pursuant to the terms of the Subscription Agreement;

(5) In consideration of the 3rd defendant executing the Subscription Agreement, the plaintiffs had, irrevocably and unconditionally, guaranteed and covenanted as principal debtors, and not merely as sureties, jointly and severally, with the 3rd defendant as follows:

(a) that the 1st and 2nd plaintiffs shall ensure that all the companies in the Group of Companies shall fulfill their, respective, obligations properly and within the time frame(s) as provided under the Subscription Agreement;

(b) that the 1st and 2nd plaintiffs shall indemnify and keep indemnified the 3rd defendant for all losses and liabilities incurred as a result from or relating to the breach of any obligations, undertakings, representations, warranties, indemnities and/or confirmation provided by any of the companies in the Group Companies including all costs and expenses which may be incurred by the 3rd defendant as a result thereof;

(6) The definition of "Group Companies" was explained to differ from the companies in the Group Companies, in which the 3rd defendant was to be investing in. The term "Group Companies" was defined as "the Relevant Investee Group of Companies";

(7) As security for the 3rd defendant executing the Subscription Agreement and/or investing in the Bonds, the plaintiffs and the 9th defendant, as the legal and beneficial owners of the shares in the 8th defendant, the 9th defendant, Maple Strategies, EPCB and EPCM, respectively, agreed to charge, assign and transfer to the 3rd defendant, *inter alia*, all stocks and shares respectively held in the 8th defendant, the 9th defendant, Maple Strategies, EPCB and EPCM (collectively referred to as "the Charges") as well as 3 Deeds of Charge over all the assets of the 8th defendant, 9th defendant and Maple Strategies (collectively referred to as "the Deeds of Charge");

(8) The plaintiffs and the 9th defendant have, respectively, provided the securities under the Charges and the Deeds of Charge as principal debtors and not just as mere sureties;

(9) Pursuant to the terms of the Subscription Agreement, the plaintiffs also executed two Charges both dated 15 March 2007 over all shares owned/to be owned by the plaintiffs in, *inter alia*, the 8th defendant and the 9th defendant, respectively, as security for the Investment Amount in the Subscription Agreement as well 3 (three) Deeds of Charge, all dated 15 March 2007, over the assets of the 8th defendant, 9th defendant and Maple Strategies, respectively; and

(10) On 15 March 2007, the 1st defendant and the 8th defendant executed the Loan Agreement, whereby the 1st defendant had, from the funds raised in the Subscription Agreement, agreed to grant and make available to the 8th defendant, a term loan up to a maximum aggregate principal of the Loan Amount i.e. USD 8,600,000.00, which was to be drawn down in two tranche payments, amounting to USD 4,300,000.00 per tranche.

Whether the plaintiffs have succeeded in proving their case on a balance of probabilities?

[381]The law in relation to the burden of proof in civil cases is trite. The plaintiff in every case bears the burden of proving its case against the defendant on a balance of probabilities. This is because he who asserts must prove (see sections 101 and 103 of the Evidence Act 1950, *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; *Malaysia Building Society Bhd v Sentiasa Harum Sdn Bhd & Ors* [2003] 5 MLJ 328; and *UN Pandey v Hotel Marco Polo Pte Ltd.* [1980] 1 MLJ 4).

[382]Based on the evidence before the Court and the authorities cited by the 1st to the 3rd defendants and the 4th to the 11th defendants in their written submissions, the Court found that the plaintiffs have failed to prove their pleaded case against the defendants on a balance of probabilities.

[383]The 2nd plaintiff has opted not to give evidence during the trial of this suit and, hence, there is no evidence whatsoever on all the assertions made by her in her statement of claim, in particular, the alleged threat made by the 1st defendant for the 2nd plaintiff to sign the Guarantee and Indemnity dated 12 November 2007, the tarnishing of the 2nd plaintiff's good will, good name and reputation, the alleged loss of customers' trust towards the 2nd plaintiff and the allegation that the 2nd plaintiff had and is still suffering physical and mental pain and suffering.

[384]These allegations of the 2nd plaintiff are, therefore, not supported by any form of evidence. The burden of proof rests on the 2nd plaintiff to establish her case and this burden remains on the 2nd plaintiff throughout the trial as the party who asserts must, accordingly, prove the allegation. Premised on the authorities cited above, it follows that the 2nd plaintiff has not discharged her burden in respect of the allegations aforementioned and her claim for these items of damages must fail.

[385]As for the 1st plaintiff, the Court found that the 1st plaintiff has failed to prove his pleaded case based on the following reasons which are placed under the following captions:

Whether the plaintiffs have the ***locus standi*** to initiate this suit?

[386]The Court agreed with and accepted the 1st to the 11th defendants' main contention that the plaintiffs do not have the requisite and/or necessary *locus standi* to initiate this suit against the 1st to the 11th defendants. This is because the plaintiffs have failed to prove that there is a sufficient legal relationship that exists between the defendants and the plaintiffs to give rise to a cause of action between the 1st to the 11th defendants and the plaintiffs in relation to the plaintiffs' claim against the 1st to the 11th defendants.

[387]On the other hand, the 1st to the 11th defendants have proven on a balance of probabilities that there is no sufficient legal relationship that exists between the defendants and the plaintiffs so as to give rise to a cause of action between the 1st to the 11th defendants and the plaintiffs in relation to the plaintiffs' claim against the 1st to the 11th defendants based on the following reasons:

(1) Save and except that the plaintiffs had executed the Loan Agreement in their capacities as the directors of the 8th defendant, the plaintiffs are not parties to the Loan Agreement, which had in fact been executed between the 1st defendant and the 8th defendant;

(2) Under the Subscription Agreement, the plaintiffs are mere covenantors/guarantors of the 1st defendant, wherein the plaintiffs had, *inter alia*, covenanted to ensure that every member of the Group Companies would fulfil its obligations and undertakings as contained in the Transaction Documents and nothing more;

(3) As mere covenantors/guarantors of the 1st defendant under the Subscription Agreement, the plaintiffs have no right to assume the position of the 1st defendant and/or represent themselves as the 1st defendant under the Subscription Agreement to present arguments which rightly ought to be presented by the 1st defendant i.e. as to the allegations of the breaches of the Subscription Agreement by the 1st defendant, the usage of the Investment Amount by the 1st defendant, etc. as contained in paragraphs 19 to 28 of the statement of claim. The obligations and rights of the covenantors are as provided for under clause 8.4 of the Subscription Agreement and do not extend beyond the scope of that clause;

(4) Judgment-in-default had already been obtained by the 2nd and/or the 3rd defendants against the 1st defendant in Suit 1458 on 11 November 2008 for breach of the Subscription Agreement. As the main parties under the Subscription Agreement had already exercised their rights against the 1st defendant, the plaintiffs herein, who are mere covenantors, do not have any right or *locus standi* to commence this suit to argue that the 2nd and/or 3rd defendants, let alone the 4th to 11th defendants have wrongly acted to enforce their rights under the Subscription Agreement, Charges and Deeds of Charge (which in any event is denied by them) especially since the 1st defendant had not presented such arguments;

(5) In addition, the 2nd and 3rd defendants had on 2 February 2012 also obtained Judgment-in-default against the 8th defendant, 9th defendant and Maple Strategies to enforce the Charges and Deeds of Charge against the 8th defendant, 9th defendant and Maple Strategies *vide* Suit 2256 for the 1st defendant's breach of the Subscription Agreement. As the parties providing the Charges, the plaintiffs lack the requisite *locus standi* to challenge the basis of the enforcement of the Charges and/or Deeds of Charge by the 2nd and/or 3rd defendants i.e. the breaches of the Subscription Agreement and the Loan Agreement alleged to have been committed by the 1st defendant (which is the subject matter of Suit 2256), as that is a matter between the 1st defendant and the 2nd and/or 3rd defendants, who are the direct parties to the Subscription Agreement;

(6) On the other hand, the 1st defendant had on 16 June 2011, obtained Judgment-in-default against the 8th defendant for breach of the terms and conditions of the Loan Agreement by the 8th defendant *vide* Suit 1123 at the High Court of Malaya in Kuala Lumpur;

(7) At all material times, the Subscription Agreement, Loan Agreement, Deeds of Charge, and Charges are all separate documents, containing separate terms and conditions, involving separate parties and were for separate purposes wherein:

   (a) the purpose of the Subscription Agreement was for the 1st defendant to raise the Investment Amount to be loaned out whereas on the other hand;

   (b) the Loan Agreement governed the terms of the loan of the Investment Amount (as raised under the Subscription Agreement) provided by the 1st defendant to the 8th defendant; and

   (c) The Deeds of Charge and the Charges were, at all material times, the security provided for by the plaintiffs pursuant to the Subscription Agreement to secure the Investment Amount raised for the 1st defendant. No security was required under the Loan Agreement.

(8) Likewise, for the Loan Agreement, the plaintiffs lack the required *locus standi* to commence any action based on the Loan Agreement as the plaintiffs were neither parties nor signatories in their personal

capacities to the Loan Agreement and the 1st plaintiff had only executed the Loan Agreement on behalf of the 8th defendant, in his capacity as the Director of the 8th defendant. This fact was admitted by the 1st plaintiff in the course of the trial;

(9) Even if there had been a breach with regard to any of the obligations under the Transaction Documents, the appropriate party to bring any action against the 2nd defendant or the 3rd defendant (under the Subscription Agreement) or the 1st defendant (under the Loan Agreement) for such breach is the 1st defendant or the 8th defendant, respectively, as the party directly involved in the Subscription Agreement and/or the Loan Agreement and not the plaintiffs as mere covenantors;

(10) The plaintiffs have no claim for damages against the defendants because the plaintiffs have expressly admitted in paragraph 14 of their statement of claim that the 4th to the 7th defendants and the 10th and 11th defendants were merely, at all material times, the nominees and/or agents and/or representatives and/or servants of the 1st defendant and/or 2nd defendant and/or 3rd defendant and/or for them all;

(11) The above fact has not been denied by the plaintiffs and in fact, the 1st plaintiff had admitted this fact as well during his testimony;

(12) Based on the above, the rule of agency would apply against the plaintiffs in this suit i.e. that any act done by a party in pursuance of his/her duty as agent to a principal within the scope of that authority, would afford the agent an indemnity from the principal; and where one person at the request of another does an act and thereby involves himself in liability, a right to indemnity will arise (see *In re Famatina Development Corporation, Limited* [1914] 2 Ch. 271; *Naviera Mogor SA v Socieìteì Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA; and *Birmingham & District Land Co v North Western Railway Co* (1888) 40 Ch D 268.);

(13) Therefore, at all material times, as the 4th to 6th defendants as well as the 10th and 11th defendants were merely acting based on the instructions of the 2nd defendant and the 3rd defendant as nominees, agents, representatives and/or servants of the 2nd defendant, and the 3rd defendant, the 4th to 6th defendants as well as the 10th and 11th defendants ought not to be held liable for any damages that are claimed by the plaintiffs;

(14) The plaintiffs, instead, ought to direct such claim for damages, if any, against the 2nd and 3rd defendants only especially since the plaintiffs were, at all material times, aware and had express knowledge that the 4th to 6th defendants, as well as the 10th and 11th defendants were mere nominees, agents, representatives and/or servants for the 2nd to 3rd defendants (having expressly pleaded the same in paragraph 14 of the statement of claim);

(15) Furthermore, it also remains settled law that a company, in law, remains as an independent legal entity of its own wherein the company is separate and distinct from its members who constitute the company. In general, a company cannot act on its own and may only act through the agency of natural persons (see *Aron Salomon (Pauper) v A. Salomon And Company, Limited* [1897] A.C. 22);

(16) By applying the *Salomon Principle* to the facts in this suit, as the directors of the 2nd and 3rd defendants, no liabilities and damages ought to be imposed on the 4th to the 6th defendants as, the 2nd and 3rd defendants were, at all times, correct in enforcing the Charges and Deeds of Charge when the plaintiffs were in breach of the terms and conditions of the Subscription Agreement and the Loan Agreement;

(17) On the other hand, if the plaintiffs wish to disregard the *Salomon Principle*, the plaintiffs would have to apply to 'lift the corporate veil' to impose liability on the directors of the 2nd and 3rd defendants, namely, the 4th to 6th defendants but in this suit, 'lifting the corporate veil' is not an issue which had been specifically pleaded by the defendants and neither have the Plaintiffs shown or attempted to show that any of the legal exemptions required for the Court to lift the corporate veil against the 4th to 6th defendants as directors of 2nd and 3rd defendant would apply in this suit e.g. where the company is being used as an instrument of fraud by its directors or where the company is being used to avoid its legal obligations;

(18) Hence, there is absolutely no basis on which any personal liability for damages, as claimed by the plaintiffs, can be imposed on the 4th to the 6th defendants (see *Ong Thean Chye & Ors v Tiew Choy Chai & Anor* [2011] 4 MLJ 616);

(19) Furthermore, no direct contractual relationship exists between the defendants and the plaintiffs as none of the Agreements, Charges or Deeds of Charge involve the 4th to the 6th defendants and the 10th and 11th defendants personally;

(20) Therefore, the plaintiffs would have no legal basis to justify their claims for damages against the defendants. Based on this fact alone, the plaintiffs' claim against the defendants ought to be dismissed with costs; and

(21) Be that as it may, the defendants were, at all times, correct in enforcing the Charges and Deeds of Charge as the plaintiffs were in clear breach of the terms and conditions of the Subscription Agreement and/or the Loan Agreement.

Whether the plaintiffs have fulfilled all the conditions precedent of the Subscription Agreement and whether the defendants have waived the full compliance of the conditions precedent by the plaintiffs?

[388]The Court found that the plaintiffs failed to fulfill all the conditions precedent of the Subscription Agreement based on the following reasons:

(1) At all material times, the plaintiffs were under an obligation to fulfil all the conditions precedent that were set out in the Subscription Agreement. However, the plaintiffs had, *vide* the letter of 15 March 2007, requested for the postponement (and not for a waiver) of the fulfilment of the said conditions precedent as the plaintiffs had informed the 3rd defendant that the plaintiffs required the Investment Amount from the Agreements for purposes of their businesses on an urgent basis and on the plaintiffs' undertaking that they would fulfill the conditions precedent within two (2) weeks from the date of the said letter. The 3rd defendant had agreed to the plaintiffs' request;

(2) However, the plaintiffs have, in breach of the Subscription Agreement, never fulfilled the conditions precedent as per the terms of the letter; and

(3) The plaintiffs have also, in breach of the Subscription Agreement, never fulfilled the conditions subsequent as required under the terms of the Subscription Agreement as set out above.

Whether the usage of the Loan Amount by the plaintiffs was in breach of the terms of the Loan Agreement?

[389]The Court found that the usage of the Loan Amount by the plaintiffs was in clear breach of the terms of the Loan Agreement based on the following reasons:

[390]Pursuant to clause 2.2 of the Loan Agreement, the Loan Amount could only be utilized by the 8th defendant for very specific purposes and these are as follows:

(1) For the 8th defendant to purchase plant machinery to enable to the 8th defendant to lease the plant machinery to EPCB and Maple Strategies, for purpose of the Group Companies Business; and

(2) To on-lend a portion of the Loan Amount to Maple Strategies for its working capital requirements when Maple Strategies becomes a subsidiary of Impulse Talent.

[391]It was put to the 1st plaintiff that Maple Strategies never, until the day of the conclusion of the trial of this suit, became a subsidiary of Impulse Talent and the 1st plaintiff confirmed that the plaintiffs were the only shareholders of Maple Strategies.

[392]After the monies from Tranche I i.e. USD 4,189,033.00, had been deposited into the USD Account, the following took place:

(1) On 23 March 2007, the plaintiffs transferred an amount of USD 1,189,029.00 from the USD Account to the RM Account;

(2) An amount of USD 2,500,000.00 had been transferred from the USD Account to the Account of EPCM in 2 payments amounting to USD 1,250,000.00 (approximately RM 4,307,500.00) each payment; and

(3) In his testimony, the 1st plaintiff (PW1) had sought to justify the transfer by stating that the transfer was a loan from the 8th defendant to EPCM;

[393]However, this alleged loan was in clear breach of clause 2.2 of the Loan Agreement, because that clause only permitted the 8th defendant to on-lend a portion of the Loan Amount to Maple Strategies (and not to EPCM).

[394]In addition thereto, when questioned, the 1st plaintiff was unable to provide a single iota of evidence of any loan agreement or arrangement between the 8th defendant and EPCM to support his statements.

[395]From the USD 2,500,000.00 that was transferred from the USD Account to EPCM, the 8th defendant had further breached clause 2.2 of the Loan Agreement, when the plaintiffs had proceeded to do the following:-

(1) pay a sum of RM 120,000.00 to Leng Kam Meng (the brother of the 2nd plaintiff) on 4 April 2007 for a purported loan despite the absence of any loan documentation;

(2) pay a sum of RM 201,000.00 to Choong Foon Lan (the mother of the 1st plaintiff) on 4 April 2007 for a purported loan despite the absence of any loan documentation;

(3) pay a total sum of RM 2,718,000.00 (in 3 payments of RM 2,518,000.00 on 20 April 2007 and RM 30,000.00 and RM 170,000.00, both, on 25 April 2007, respectively,) to UOB to settle EPCM's loan with UOB, in breach of clause 2.2. of the Loan Agreement;

(4) pay an amount of RM 120,000.00 on 4 April 2007 to the 1st plaintiff himself without cause, reason and/or valuable consideration; and

(5) pay themselves an amount of RM 3,000,000.00 (in 2 payments of RM 500,000.00 on 4 April 2007 and RM 2,500,000.00, on 5 April 2007,) purportedly, as a 'repayment' to the plaintiffs as, allegedly, agreed to by the 4th to the 6th defendants.

[396]The Court found that there is no provision in any of the Transaction Documents which allows the plaintiffs to take the sum of RM 3,000,000.00 as a purported 'repayment' to themselves and neither is there any evidence that the same has ever been agreed to by the 1st to the 3rd defendants and the 4th to the 6th defendants. Hence, the plaintiffs have failed to discharge their burden of proof because they have presented no evidence to support their allegation with regard to the purported RM 3,000,000.00 repayment to themselves.

[397]Therefore, based on the fact that the Subscription Agreement and the Loan Agreement have not provided, expressly or otherwise, for a sum of RM 3,000,000.00 to be 'repaid' to the plaintiffs from the Loan Amount, it would mean that the allegation of the plaintiffs to justify their unlawful taking of RM 3,000,000.00 from the Loan Amount, was false and untrue.

[398]The only evidence sought to be produced by the plaintiffs to justify the existence of this 'repayment' amount was a purported statement by one Chua Wei Min to the plaintiffs, who was never called as a witness by the plaintiffs. Hence, the Court drew an adverse inference pursuant to section 114 (g) of the Evidence Act 1950 against the plaintiffs for their failure to do so.

[399]The testimony of the 1st plaintiff (PW1) to justify the plaintiffs 'taking' of the sum of RM 3,000,000.00 from the Loan Amount for the alleged repayment to themselves becomes more ludicrous and inherently incredible when the 1st plaintiff proceeded to testify that the alleged repayment of RM 3 million was 'important' to him, and that 'he would not have executed the Subscription Agreement and the Loan Agreement' if the repayment term was not included as part of the Subscription Agreement and also the Loan Agreement. This is because the 1st plaintiff himself had admitted that he did not take any precaution whatsoever to ensure that the repayment term was included as a term in the Subscription Agreement and/or the Loan Agreement.

[400]Therefore, the Court was satisfied that there never was any agreement between the parties for the alleged repayment of the sum of RM 3 million to the plaintiffs. This is because if the alleged repayment of the sum RM 3 million was indeed to form part of the terms of the Transaction Documents, the plaintiffs would definitely have ensured or insisted that such a term was included in the Transaction Documents before they executed them, which the plaintiffs had clearly failed and/or neglected to do.

[401]It remains a well established legal principle that where the contract is in writing, the intention of the parties must be found within the four walls of the contractual document and a contract must be constructed as at the date the contract was entered into. A contract cannot be constructed in light of what happened, years or even days later. In addition, the contract must be constructed as a whole, and also, so far as practicable, the contract must be contructed in order to give effect to every part of it (see *National Coal Board v Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555; *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357; and *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn. Bhd.* [1990] 2 MLJ 163).

[402]It is also trite law that when the terms have been reduced to writing, no evidence shall be given in proof of the terms therein as provided in section 91 of the Evidence Act 1950.

[403]Section 91 of Evidence Act 1950 states as follows:

> "CHAPTER VI
>
> EXCLUSION OF ORAL BY
>
> DOCUMENTARY EVIDENCE
>
> **Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**
>
> **91. When the terms of a contract** or of a grant or of any other disposition of property **have been reduced by** or by consent of **the parties to the form of a document**, and in all cases in which any matter is required by law to be reduced to the form of a document, **no evidence shall be given in proof of the terms of the contract**, grant or other disposition of property or of the matter **except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained"**.
>
> (Emphasis added).

[404]Hence, no oral evidence can be adduced to contradict and/or to explain the terms of the written contract. The terms must be taken on its own. Where an agreement has been reduced to writing, it is the writing that must be looked at for the whole of the terms made between the parties (see *Dunlop Pneumatic Tyre Company, Limited v Selfridge And Company, Limited* [1915] A.C. 847; *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129; and *Birmingham & District Land Co v North Western Railway Co* (1888) 40 Ch D 268).

[405]It follows, therefore, that since the term regarding the purported repayment of RM 3,000,000.00 to the plaintiffs was not specifically provided for in any of the Transaction Documents, the term cannot be taken to form part of the transaction.

[406]In any event, the usage of the Loan Amount from the account of EPCM as stated above remains in clear breach of clause 2.2 of the Loan Agreement, which specifically disallows the use of the Loan Amount to be on-lent to any party, save and except to Maple Strategies. In breach of clause 2.2, the plaintiffs had utilized the Loan Amount for their own personal purposes based on their own reasons.

[407]The report that was prepared by the 1st to the 3rd defendants' consultant, Hicks-Woode, noted that EPCM had stated that the payments amounting to RM 4,461,000.00 in their records were made to a Taiwanese company named "UVAT Technology Co. Ltd" ("UVAT"). However, Hicks-Woode discovered that the payment of the entire amount of RM 4,461,000.00 had actually been made by EPCM into the accounts of the plaintiffs and their relatives, namely, Choong Foon Lan, and Leng Kam Meng, without good cause, reason and/or any valuable consideration.

[408]Throughout the trial, the accuracy and the validity of the Hicks-Woode's Report and the evidence given by PW6 were not challenged by the plaintiffs and/or the plaintiffs' learned counsel. Therefore, the Hicks-Woode's Report stands uncontested and the findings must be deemed accurate.

[409]The Court found that the 1st plaintiff had withdrawn the amount of USD 215,000.00 from the USD Account to make payment to the finance company known as "Kuwait Finance House (Malaysia) Berhad" ("KFH") to settle a loan taken by EPCB from KFH.

[410]This again was in clear breach of clause 2.2 of the Loan Agreement, which does not permit the 8th defendant to use the Loan Amount to settle the debts of EPCB with KFH.

[411]On April 2007, the 8th defendant had also, allegedly, purchased equipment i.e. lens arching and cleaning autosystem, from "Freshing Industrial Co Ltd" for a sum of USD 287,500.00, which the 8th defendant then proceeded to lease out to E-Circle.

[412]The Court found that this was also in clear breach of the Loan Agreement as clause 2.2 of the Loan Agreement expressly stipulates that the 8th defendant could only lease equipment to EPCB and/or MSSB i.e. Maple Strategies.

[413]However, from the accounts of the USD Account, it was discovered that the payments were made directly to EPCB's account. Once again, the plaintiffs had disguised the withdrawal of the Investment Amount *via* UOB for the plaintiffs' own unlawful purposes; and

[414]The Court found that from the USD 1,189,029.00 (approximately RM 4,114,040.34) that was transferred from the USD Account to the RM Account, on 23 March 2007, the 8th defendant had utilized the said sum in breach of the Loan Agreement as follows:

(1) the 8th defendant had on 23 March 2007 withdrawn the amount of RM 1,500,000.00 to make payment to E-Circle, purportedly, for the purchase of a "Coating Unit" machine from E-Circle. However, upon Hicks-Woode inspecting the 8th defendant's premises in January 2008, it was discovered that the "Coating Unit" machine did not exist; and

(2) the 8th defendant had, on 23 March 2007, withdrawn the amount of RM 618,000.00 to make payment to ASB Machinery (Malaysia) Sdn Bhd ("ASB Machinery"), purportedly, for the purchase of 2 units of "Nissei Plastic Injection Molding Machine" machines but upon Hicks-Woode inspecting the 8th defendant's premises in January 2008, it was discovered that the 2 machines were not at the 8th defendant's premises and the 8th defendant had to transport the machines from another location upon being questioned by Hicks-Woode.

[415]The payments from the RM Account as detailed above were again in breach and/or default of the Loan Agreement as they were not used for the specific purposes of the Loan Agreement;

[416]The Court found that the USD Account had been opened and operated, without the appointment of the 2nd defendant's and/or the 3rd defendant's representative as a co-signatory, in breach of the following terms and conditions of the Loan Agreement:

(1) One of the major requirements in the Loan Agreement is for the 8th defendant to open two (2) operational accounts, namely, a USD Account and a RM Account, wherein both the RM and the USD Accounts were to be operated together with the representative of the 1st defendant. The 4th defendant (PW2) was appointed as the representative of the 1st defendant;

(2) As the only directors of the the 8th defendant at the relevant time, the plaintiffs had proceeded to open/cause the opening of the USD Account and the RM Account with MBB;

(3) In breach of their express obligations under the Loan Agreement, the plaintiffs had proceeded to open the USD Account without appointing the 4th defendant, who was the representative of the 1st defendant, as a co-operator or co-signatory of the Account despite the RM Account having been opened with the 4th defendant as a co-signatory of the RM Account;

(4) It was important to the 1st defendant to ensure that the 4th defendant was appointed as a joint signatory of both the USD Account and RM Account before Tranche I of the Investment Amount was released into the USD account as that was the main safeguard for the 2nd and/or 3rd defendant to ensure the proper usage of the monies by the plaintiffs in accordance with clause 2.2 of the Loan Agreement;

(5) By excluding the 4th defendant from being a joint-signatory of the USD Account, the plaintiffs, being the two sole directors of the 8th defendant at that time, had a free hand to use the Investment Amount at their own discretion without the 4th defendant to act as a 'check and balance' on the usage of the funds in the USD Account, for and on behalf of the 1st defendant;

(6) This omission by the plaintiffs had enabled the plaintiffs to use the monies in the USD Account willy-nilly in breach of clause 2.2 of the Loan Agreement, which specifically provided for limited circumstances for which the Loan Amount could be utilized;

(7) At all material times, the 4th defendant was informed by the 1st plaintiff (PW1) that Foong was 'a friend' of his. In fact, the 1st plaintiff had also testified that he trusted Foong a lot and he even allowed Foong to send emails on his (PW1's) behalf. Hence, even at that point in time when Foong was employed by the 3rd defendant, Foong has already colluded with the 1st plaintiff to, falsely, represent to the 2nd defendant and/or the 3rd defendant that the 4th defendant had been appointed as a co-signatory;

(8) Subsequently, on/around April 2007, after the 3rd defendant decided not to confirm Foong's employment, Foong then joined the plaintiffs in the EPC Group of Companies as a Manager and this was confirmed by the 1st plaintiff during the trial. The conspiracy between the 1st plaintiff and Foong concerning the non-

implementation of the appointment of the 4th defendant as a co-signatory of the USD Account constituted a breach of the Subscription Agreement; and

(9) At all material times, the 8th defendant and/or the plaintiffs had falsely represented to the 2nd defendant and/or the 3rd defendant that the 4th defendant had been appointed as a co-signatory of the USD Account, with the knowledge that this representation was not true.

Whether monies had been withdrawn from the USD Account, which was treated as the Cash Collateral Account ("CCA"), exceeding USD 50,000.00, without the knowledge and/or consent of the 2nd defendant and/or the 3rd defendant?

[417]The Court found that monies had been withdrawn from the USD Account, which was treated as the Cash Collateral Account ("CCA"), exceeding USD 50,000.00 without the knowledge and/or consent of the 2nd defendant and/or the 3rd defendant based on the following reasons:

(1) As the Tranche I monies had been deposited into the USD Account at the request of the plaintiffs, in order to postpone the requirement for the opening of a CCA as required under the Subscription Agreement, the USD Account for all intents and purposes had been treated as the CCA by the 2nd defendant and/or the 3rd defendant based on the definition of the CCA as per clause 1.1 of the Subscription Agreement, which provides that the CCA shall be the account "into which the proceeds from the subscription of the bonds shall be paid into";

(2) As monies had been withdrawn from the USD Account, which was treated for all intents and purposes by the parties, as the CCA, exceeding USD 50,000.00, without the express knowledge and/or consent of the 2nd defendant and/or the 3rd defendant, in writing as provided for in clause 4.4(c) of the Subscription Agreement, the plaintiffs were in breach of their duties as covenantors under the Subscription Agreement in failing to ensure that the 8th defendant would only withdraw monies exceeding USD 50,000.00 with the express knowledge and/or consent of the 2nd defendant and/or the 3rd defendant in writing; and

(3) This breach has not been satisfactorily explained or justified by the plaintiffs.

[418]The Court found that the 8th defendant and/or the plaintiffs had neglected and/or refused to provide information and/or documentation to the 2nd defendant and/or the 3rd defendant despite requests and/or demands having been made by the 2nd defendant and/or the 3rd defendant for such information and/or documentation

[419]The Court found that the 1st defendant, the 8th defendant and/or the plaintiffs had refused, neglected and/or failed to ensure that there is a minimum balance in the USD Account, at all relevant times, from 20 September 2007 until the date of the filing of this action, as stipulated in Schedule 4D of the Subscription Agreement.

[420]The Court found that on/about 28 November 2008, the 2nd and/or the 3rd defendant had proceeded to enforce the Charges and Deeds of Charge provided by the plaintiffs, the 8th defendant and the 9th defendant, as securities to guarantee the Investment Amount under the Subscription Agreement, as a result of the following breaches of the Transaction Documents by the plaintiffs:

(1) the failure of the 8th defendant to comply with the terms of the Loan Agreement, in particular, clause 2.2 with regard to the proper usage/utilization of the Loan Amount; and

(2) the failure of the plaintiffs as covenantors (and as the then directors of the 8th defendant) to ensure that the 8th defendant complies with its obligations under the Loan Agreement as stipulated in clause 8 of the Subscription Agreement.

[421]As a result of the enforcement of the Charges and Deeds of Charge, the following events had occurred:

(a) the entire shareholdings of the 9th defendant had been transferred from the plaintiffs to the 7th defendant;

(b) the entire shareholdings of the 8th defendant, was at all material times, held by the 9th defendant;

(c) 4th to 6th defendants were appointed (by the 2nd and/or 3rd defendant) as nominee directors of the 8th defendant;

(d) 4th to 6th defendants were appointed (by the 2nd and/or 3rd defendant) as nominee directors of the 9th defendant;

(e) 10th and the 11th defendants were appointed (by the 2nd and/or 3rd defendant) as the nominee company secretary(ies) of both the 8th and 9th defendants, replacing the individual known as "Low Paik Yoke" and to

execute and perfect the transfer of the shares and removal and appointment of directors for the 8th and 9th defendants; and

(f) the plaintiffs' letters of resignation from the 8th and 9th defendant dated 28 November 2008 were duly accepted.

[422]The 2nd and/or the 3rd defendants had only proceeded to enforce the securities under the Subscription Agreement i.e. the Charges and Deeds of Charge, upon obtaining the Judgment-in-default against the 1st defendant in Suit 1458 on 11 November 2008.

[423]Prior to enforcing the securities under the Subscription Agreement, the 2nd and/or the 3rd defendant had obtained a legal opinion from ZICO on the legality of such action.

[424]At all material times, the 4th to the 6th defendants, together with the 10th and 11th defendants, had executed the Charges and the Deeds of Charge based on the instructions of the 2nd defendant and the 3rd defendant.

[425]The 10th defendant (DW2), in her testimony, had confirmed that all the actions taken in the enforcement of the Charges and Deeds of Charge as stated above were done properly and in accordance with all the necessary administrative procedures and legal procedures.

[426]The plaintiffs produced no rebuttal evidence i.e. by calling another company secretary, to contradict the evidence of the 10th defendant and to prove that the actions taken by the 10th defendant were illegal, null and void. In the absence of any contrary evidence or documents to state otherwise, and based on the Court's construction of the Transaction Documents, the Court found that the actions that were taken by the defendants in the enforcement of the Charges and Deeds of Charge as a result of the plaintiffs' breaches of the Transaction Documents were properly, validly and legally done in accordance with the terms of the Transaction Documents.

[427]Therefore, the Court found that the plaintiffs are not entitled to recover any damages against the defendants because the defendants were at all times entitled to proceed with the enforcement of the Charges and Deeds of Charge as a result of the many breaches of the Transaction Documents committed by the plaintiffs, both as covenantors under the Subscription Agreement and also as the only directors of the 8th defendant under the Loan Agreement (as the plaintiffs were at all material times until 28 November 2008, the only shareholders and directors of the 8th defendant).

[428]With regard to the plaintiffs' claim in this suit against the 4th to the 11th defendants for damages for the loss/damage that was suffered by the plaintiffs and the plaintiffs' Group of Companies as a result, allegedly, of the *ex-parte* Injunction dated 3 January 2008 that was obtained by the 2nd and 3rd defendants in this suit (who were the plaintiffs) in Suit 1728 ("the *ex-parte* Injunction") against the plaintiffs (who were the defendants in that suit), the Court found as follows:

(1) The 4th to the 11th defendants were not involved in Suit 1728 and played no role in obtaining the *ex-parte* Injunction. It was the 2nd and 3rd defendants, who had successfully applied for and enforced the *ex-parte* Injunction;

(2) It is not in dispute that the *ex-parte* Injunction had been obtained on 3 January 2008 and that it was only enforced by the 2nd and 3rd defendants on 8 January 2008. The *ex-parte* Injunction was, subsequently, set aside, on an *ex-parte* basis on 25 January 2008. Therefore, at the most, the *ex-parte* Injunction was only in force for a period of fifteen (15) days i.e. between 8 January 2008 until 25 January 2008;

(3) The period of fifteen (15) days was too short a time for the *ex-parte* Injunction to have caused any damage/loss to the plaintiffs;

(4) In setting aside the *ex-parte* Injunction, the learned Judge had awarded cost to the defendants therein (who are the plaintiffs herein, the 8th defendant, the 9th defendant and Maple Strategies) and ordered for all issues of costs and damages to be heard before the learned Judge during a mention which was then fixed on 30 January 2008. However, the plaintiffs had never proceeded with the assessment of damages, if any, against the 2nd and 3rd defendants in Suit 1728 pursuant to the Order of Court dated 25 January 2008 setting aside the *ex-parte* Injunction;

(5) Subsequently, on 28 February 2008, by consent between the parties, Suit 1728 was withdrawn wherein cost of RM 30,000.00 was awarded to the plaintiffs therein. In the said withdrawal Order, the plaintiffs had failed and/or neglected to reserve their rights to claim damages against the 2nd and/or 3rd defendants for the loss/damage, allegedly, suffered as a result of the *ex-parte* Injunction;

(6) Premised on the principle of *res judicata*, the plaintiffs cannot now reopen the matter in this present suit especially against the 4th to 11th defendants, who were not parties to Suit 1728. Any claim for damages suffered as a result of the *ex-parte* Injunction ought to have been dealt with in Suit 1728; and

(7) The plaintiffs must be taken to have waived their right, to any claim for damages as a result of the *ex-parte* Injunction in Suit 1728 when they agreed to the withdrawal of Suit 1728 without reserving their rights to claim damages, allegedly, resulting from the *ex-parte* Injunction (See *Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; and *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143).

[429]The plaintiffs have alleged that the freezing of the bank accounts of the 8th defendant, EPCM and EPCB by the *ex-parte* Injunction had caused the plaintiffs' Group of Companies to default in loan repayments and had resulted in the inability of the companies to operate. The companies could not pay for purchase of raw materials, pay suppliers, workers' salaries and contributions to the Employees Provident Fund (EPF) and SOSCO, pay income tax, the cost of staff training and maintenance of office equipment. The companies also could not accept payments from their customers for goods delivered and services rendered. Hence, the plaintiffs have claimed for loss and damage arising from the freezing of the bank accounts of the plaintiffs' Group of Companies. However, the Court found as follows:

(1) Since the *ex-parte* Injunction had only lasted for a period of 15 days (as the same had only been executed on 8 January 2008 until 25 January 2008), the period the *ex-parte* Injunction was in force was too short a time to cause any damage to the plaintiffs and/or their Group Companies;

(2) There was also no documentary evidence that was presented or shown by the plaintiffs during the trial to substantiate the plaintiffs' allegations that the plaintiffs' Group of Companies could not make payments for loan instalments, raw materials purchased, suppliers, workers' salaries, contributions to the Employees Provident Fund (EPF) and SOSCO, payments for income tax, staff training and/or maintenance of office equipment, all of which had, allegedly, fallen due and/or payable during the relevant 15 days period e.g. a letter of demand or a notice to, etc. Hence, the allegations of loss/damage suffered by the plaintiffs remain bare allegations and ought to be rejected by the Court;

(3) The Court also drew an adverse inference pursuant to section 114 (g) of the Evidence Act 1950 against the plaintiffs for their failure to call any witness to support their claim for damages due to the *ex-parte* Injunction e.g. a Bank officer, a representative from their supplier, a former employee, an EPF officer, a SOCSO officer, etc.;

(4) Furthermore, s 103 of the Evidence Act 1950 is also applicable to defeat the plaintiffs' claim for damages for any loss/damage suffered because the plaintiffs failed to discharge their burden of proving their allegations and claim;

(5) Any payment that was required to be made by the plaintiffs could have been made by the plaintiffs after the setting aside of the *ex-parte* Injunction on 25 January 2008;

(6) Be that as it may, even if the *ex-parte* Injunction had prevented the plaintiffs' Group of Companies from making the payments as alleged, it is still the duty of the plaintiffs to mitigate their losses. As the plaintiffs had in fact taken RM 3,000,000.00 from the Loan Amount in April 2007, (as mentioned earlier in this Judgment), the plaintiffs could have used that amount to make payment for any expenses for their Group of Companies. Unfortunately, the plaintiffs failed to do so without good reason, thus further negating their allegations that their Group of Companies had in fact suffered such losses; and

(7) Based on the above, the Court found that the plaintiffs have failed to prove their claim for damages against the 1st to the 11th defendants on a balance of probabilities.

[430]The 1st plaintiff also alleged that the 4th defendant (PW2), who was the representative of the 2nd defendant and/or the 3rd defendant had, wrongly, and with bad faith lodged a police report against the 8th defendant, accusing the plaintiffs of committing breach of trust and money laundering and that this had caused them to be charged for money laundering under the Anti-Money Laundering Act 2001 ("AMLA") and the freezing of the assets and/or accounts of the plaintiffs and those of the plaintiffs' Group of Companies. However, the Court rejected the 1st plaintiff's contention based on the following reasons:

(1) The 4th defendant was entitled to lodge the police report ("the police report") because of the unauthorized withdrawals of the Tranche I monies by the plaintiffs and, consequently, it was left to the Public Prosecutor whether to prefer charges against the plaintiffs for criminal breach of trust or cheating based on the outcome of the investigations that were conducted by the police on the the allegations in the police report

and the plaintiffs were, subsequently, charged by the Public Prosecutor for cheating after the police had carried out their investigations on the allegations in the police report;

(2) The plaintiffs were also, subsequently, charged for money laundering under AMLA after the police had carried out their investigations on the allegations in the police report;

(3) It is trite law that it is the Attorney General, in his role as the Public Prosecutor, who has the power and prerogative to prefer a criminal charge against anyone in the country if he is satisfied that there is sufficient evidence that the person has committed a criminal offence (see Art 145(3) of the Federal Consitutiton and section 376 of the Criminal Procedure Code);

(4) In the exercise of his powers of prosecution, the Public Prosecutor is assisted by the officers of the Prosecution Division of the Attorney General's Chambers. Hence, the defendants cannot be held liable to the plaintiffs just because they were charged by the Public Prosecutor for the various offences, after the 4th defendant, who was the 2nd defendant's and/or the 3rd defendant's representative, had lodged the police report against the plaintiffs;

(5) It is also significant that at all material times, the 4th defendant, was never charged for the making of a false police report under section 182 of the Penal Code in relation to the police report that was lodged by her;

(6) The fact that the Public Prosecutor had decided to charge the plaintiffs based on the investigations that were carried out by the police arising from the contents of the police report shows that at that point in time the Public Prosecutor was satisfied that there was sufficient evidence that the plaintiffs had committed criminal offences under the Penal Code and under AMLA;

(7) The Public Prosecutor had only proceeded to freeze the assets and/or the accounts of the plaintiffs or the plaintiffs' Group Companies on 21 April 2008;

(8) This meant that the plaintiffs and/or the plaintiffs' Group Companies were free to utilize their assets and/or access their bank accounts between 26 January 2008 and 21 April 2008, which is a period of 2 months and 26 days;

(9) This also means that after the *ex-parte* Injunction was set aside on 26 January 2008, any order to freeze the assets and/or accounts of the plaintiffs or the plaintiffs' Group Companies was a result of the charges preferred against them by the Public Prosecutor and it was not due to any action of the defendants;

(10) The fact that the Public Prosecutor has appealed against the acquittal of the plaintiffs in the criminal charges for cheating and money laundering shows that the Public Prosecutor still hold the belief that there is a strong case against the plaintiffs for the charges that were preferred against them; and

(11) Therefore, based on the above, any allegation of loss/damage caused by the *mala fide* lodging of the police report by the 4th defendant remains unsubstantiated and any claim that is founded on the allegation must be rejected.

[431]The Court found that the defendants' acts did not cause the appointment of the Receiver and Manager for EPCB. The reasons are as follows:

(1) The appointment of the receiver, namely, Price Waterhouse Coopers ("PWC"), by KFH over EPCB, was not the result of anything done by the defendants. It was due to the fact that the plaintiffs had been charged by the relevant authorities for offences under AMLA, which had led to the freezing of the plaintiff's assets and bank accounts on 21 April 2008;

(2) The fact that the *ex-parte* Injunction was set aside about 3 months before the appointment of PWC as the Receiver and Manager for EPCB is sufficient to establish the defendants' defence that the *ex-parte* Injunction was not the cause of the appointment of PWC as the Receiver and Manager for EPCB, contrary to the plaintiffs' allegations;

(3) In any event, the plaintiffs have also failed to call any witness from PWC or KFH to corroborate the allegations of the plaintiffs to the contrary. Hence, once again, the Court drew an adverse inference under section 114 (g) of the Evidence Act 1950 against the plaintiffs for their failure to do so;

(4) Further, it was confirmed by the 1st plaintiff (PW1) that the employees of EPCB were laid off by PWC and not by any of the defendants;

(5) In addition, at all material times, EPCB was not part of the "Relevant Investee Group of Companies" as defined in the Subscription Agreement and, hence, it remains irrelevant to the Transaction Documents;

(6) The machines belonging to EPCB, except those which were seized under AMLA, were sold by PWC on behalf of KFH;

(7) Further, it was admitted by the 1st plaintiff (PW1) that all the machines, which were seized under AMLA, remain in the possession of the plaintiffs and/or in the possession of the plaintiffs' daughter's company, namely, YUFU Technologies Sdn Bhd;

(8) Hence, there is no loss to the plaintiffs as they are still able to use/utilize the machines for their business purposes, subject to the requisite approval from the relevant authorities; and

(9) Therefore, since the plaintiffs have failed to adduce any evidence, whatsoever, to support their alleged claim for damages for any loss and/or damage suffered, the plaintiffs' claim for damages for such loss and/or damage must, necessarily, fail.

[432]The plaintiffs have claimed for damages for their loss of good name, reputation, image and the businesses of the plaintiffs' Group Companies. However, the Court was satisfied that on the facts and circumstances of this suit, the defendants cannot be held liable/responsible for the plaintiffs' loss, if any, and their claim cannot succeed because the plaintiffs have failed to adduce any evidence, whatsoever, to support their claim for damages for these items.

[433]Based on the facts and circumstances of this suit, it is more probable that the plaintiffs' loss of good name, reputation, image and the businesses of the plaintiffs' Group Companies were as a result of the plaintiffs' mismanagement and/or poor running of their Group Companies and the businesses of their Group Companies, wherein at all material times, the plaintiffs were, after 26 January 2008, free to utilize their bank accounts (until they were frozen again but this time by the relevant authorities under AMLA on 21 April 2008).

[434]The Court found that the defendants are not liable for the plaintiffs' bankruptcies. The reasons are as follows:

(1) Each of the plaintiffs was declared a bankrupt by RHB Bank Berhad ("RHB") because both the plaintiffs had failed to repay their loans to RHB. The bankruptcy actions taken by RHB against the plaintiffs have nothing, whatsoever, to do with the action taken by the defendants pursuant to this suit; and

(2) The Court drew an adverse inference under section 114 (g) of the Evidence Act 1950 against the plaintiffs for their failure to call an officer from the RHB Bank to testify that the *ex-parte* Injunction in Suit 1728 was the cause of the plaintiffs' failure to repay their loans to the RHB Bank and also that it was because of the *ex-parte* Injunction in Suit 1728 that their loans have become due and payable to the RHB Bank.

[435]The plaintiffs have claimed for the loss in value of their Group Companies based on the values as stated in the Corporate Information obtained from the CCM. However, the Court rejected the plaintiffs' claim based on the following reasons:

(1) Those values are unreliable and, hence, unacceptable to the Court because the Corporate Information on which they are based are all dated between 2006 and 2007, which is more than a year before the 2nd and 3rd defendants exercised their rights under the Charges and the Deeds of Charge on 28 November 2008;

(2) The plaintiffs had failed to adduce any evidence in respect of the alleged value of the plaintiffs' Group Companies at the time the 1st to the 3rd defendants took over the Group Companies i.e. on 28 November 2008;

(3) Throughout the trial, the plaintiffs relied only on the values as stated in the Summary of Share Capital and the Summary of Financial Information in the Corporate Information from the Companies Commission of Malaysia ("CCM"), which is merely an estimate and hence, speculative, in nature to asses the values of the plaintiffs' Group Companies;

(4) Since, the plaintiffs are the claimants, it is trite law that the burden is on the plaintiffs to prove their claim under this head. The plaintiffs ought to have obtained and adduced, as evidence, an independent valuation report to determine the accurate value of the Group Companies;

(5) Due to the absence of an independent valuation report, the Court was inclined to agree with and to accept the contention of the defendants that, at the material time, when the 2nd and 3rd defendants exercised their rights under the Charges and the Deeds of Charge on 28 November 2008, the companies were of no value, as they were no longer in operation and/or they were under the control of PWC as the Receivers and Managers;

(6) In addition, the plaintiffs' Group Companies no longer had any worker and/or machine;

(7) The 1st plaintiff also testified that prior to 15 March 2007 i.e. the date of the Transaction Documents, only EPCM and EPCB were in active business. The other companies i.e. the 8th defendant, the 9th defendant, Maple Strategies and E-Circle, were just investment holding companies and/or were not in business at all and/or were sub-contractors for EPCM and EPCB;

(8) When the defendants took over the companies of the plaintiffs, the 8th defendant was no longer carrying out any active investment business, the 9th defendant was a mere holding company, and EPCM and EPCB were under receivership and/or not in business; and

(9) At all material times, the shares and assests of E-Circle and Maple Strategies were not part of the securities realized by the defendants.

[436]The plaintiffs also alleged that the defendants had 'threatened' the plaintiffs to sign the Guarantee and Indemnity Agreement dated 12 November 2007 ("the Guarantee Agreement"). However, the Court found that the plaintiffs had executed the Guarantee Agreement voluntarily. The reasons are as follows:

(1) During cross-examination, the 1st plaintiff (PW1) failed to justify his allegation and the allegation of his wife, the 2nd plaintiff, of being 'threatened' by the 4th and 5th defendants and in fact gave a very weak explanation stating that the alleged 'threats' made by the defendants during the signing of the Guarantee Agreement was that the 2nd and 3rd defendants would not release Tranche II of the Investment Amount and nothing more;

(2) During cross-examination, the 1st plaintiff (PW1) also confirmed as follows:

(a) that the 4th and 5th defendants made no threat of violence against the plaintiffs;

(b) that the 1st plaintiff neither felt threatened nor fear and that he was 'ok' with the statements made by the 4th and 5th defendants; and

(c) that the 1st plaintiff (PW1) did not lodge any police report against the 4th and 5th defendants for the alleged threats as the 1st plaintiff did not feel that the threats were 'sufficiently serious' to justify him lodging a police report.

(3) It is trite law that in the absence of any fear or where the threat is not deemed to be serious in nature, then there can be no threat at all;

(4) The testimony provided by the 1st plaintiff (PW1) during cross-examination was in direct contradiction to the earlier evidence given by the the 1st plaintiff (PW1) in his examination-in-chief, whereby the 1st plaintiff confirmed that he understood threats as being serious criminal offences;

(5) Hence, based on the failure of the plaintiffs to lodge or produce any police report to indicate the seriousness of the threats, the Court found that the plaintiffs have failed to prove the existence of the threats as alleged by the plaintiffs in paragraph A8 on page 4 of Exhibit P96 on a balance of probabilities;

(6) Furthermore, the 1st plaintiff's averment (paragraph A8 on page 4 of Exhibit P96) that the 4th and 5th defendants had "threatened the 2nd plaintiff to tears" remains a bare averment as the 2nd plaintiff was never called to testify on this pleaded fact. Hence, the Court drew an adverse inference under section 114 (g) of the Evidence Act 1950 against the plaintiffs for their failure to call the 2nd plaintiff to testify and the Court made the presumption that had the 2nd plaintiff taken the witness stand, the 2nd plaintiff would have given testimony in contradiction to the evidence presented by the 1st plaintiff;

(7) Based on the facts and the circumstances of the instant case, the Court was of the considered view that it is more likely that the reason why the 2nd plaintiff had cried was because she had felt guilty that the plaintiffs had used the Loan Amount in breach of the Transaction Documents and the 2nd plaintiff had urged the 1st plaintiff to sign the Guarantee Agreement in order to avoid having a police report lodged against the plaintiffs by the 4th and 5th defendants;

(8) The only logical conclusion that can be drawn by the Court from the matters that have been set out above is that the plaintiffs had executed the Guarantee Agreement voluntarily with full understanding of the terms and effect of the Guarantee Agreement;

(9) That at the time the plaintiffs executed the Guarantee Agreement, they had the intention to rectify their breaches of the Transaction Documents in order that Tranche II of the loan could be released by the 2nd and 3rd defendants;

(10) However, the plaintiffs failed to carry out their intention by taking the necessary steps and hence, they did not request for the release of Tranche II of the loan; and

(11) Therefore, the plaintiffs' claim against the defendants must fail.

[437]On the issue of credibility, the Court found that the 1st plaintiff is not a credible witness, that he had lied to the Court on the key issues and that his testimony is, therefore, unreliable and ought to be rejected in favour of the testimonies of the defendants, based on the following reasons:

(1) The 1st plaintiff informed the Court that he did not understand the English Language and that he required a Chinese Hakka Interpreter to be present for the duration of his testimony. Throughout his testimony in the Chinese Hakka dialect, the 1st plaintiff testified that he only had a Standard 6 level of education but his evidence turned out to be false because the defendants were able to show that the 1st plaintiff has a Diploma in Mechanical Engineering;

(2) In the course of the trial, however, the 1st plaintiff agreed with the suggestion of Mr. Brendan Siva, the learned counsel for the 1st to the 3rd defendants, during cross-examination, that he understood English. Furthermore, during his re-examination, the 1st plaintiff once again confirmed that he understood English;

(3) The 1st plaintiff also agreed with the suggestion of Mr. Brendan Siva, the learned counsel for the 1st to the 3rd defendants, during cross-examination, that most of the negotiations between him and the 4th to the were carried out in the English language and only a minor part of the negotiations was conducted in the Mandarin language and/or the Cantonese dialect;

(4) The Court observed that in the course of the trial, the 1st plaintiff replied in English to questions from Mr. H. W. Yip, the 4th to the 11th defendants' learned counsel, and that he also managed to answer a number of questions that were posed to him in English, before the questions were translated to him by the Chinese Hakka Interpreter;

(5) It is interesting to note that the 1st plaintiff has, in this suit, alleged that the plaintiffs are entitled to damages against the defendants as a result of the defendants' alleged unlawful enforcement of the Charges and Deeds of Charge, especially, since the 1st plaintiff had repeatedly, during the course of the trial, admitted that he did not understand the terms and conditions of the Transaction Documents and had merely relied on the advice provided by ZICO, the defendants' solicitors, and his own lawyer, Mr. H. Y. Lee of Messrs. H. Y. Lee & Co. in relation to the contents of the Transaction Documents;

(6) The 1st plaintiff had failed to explain how he was able to specify the terms and conditions of the Subscription Agreement and the Loan Agreement, which were allegedly breached by the defendants, when the defendants enforced the Charges and Deeds of Charge, despite not having a full and detailed understanding or knowledge of the terms and conditions of the Transaction Documents;

(7) From the testimony of the 1st plaintiff (PW1), the Court noted that the 1st plaintiff constantly attempted to present his own 'understanding' of the terms and conditions of the Transaction Documents e.g. that he was entitled to take a sum of RM 3,000,000.00 from the Loan Amount for his own personal use, that he could use the Loan Amount in whatever manner that he wished for e.g. to pay off his personal debts, etc, despite not presenting any corroborative evidence, whatsoever, to support the same e.g. calling Chua Wei Min of ZICO and/or H.Y. Lee of Messrs. H. Y. Lee & Co. and/or Teo as a witness in this action;

(8) The 1st plaintiff's allegation of *non est factum* i.e. that the Subscription Agreement is not the plaintiffs' deed, because the plaintiffs did not understand or have knowledge of the contents of the terms and conditions of the Transaction Documents, has already been ruled by the Court to be not an issue for the determination of the Court as *non est factum* has never been pleaded by the plaintiffs. Therefore, the plaintiffs' allegations that the plaintiffs remained unaware and/or did not understand the terms of the Transaction Documents prior to signing the same ought to be rejected by the Court from the very outset;

(9) It is trite law that *non est factum* remains a legal issue which needs to be specifically pleaded and in this suit, the plaintiffs have never raised the issue of *non est factum*, until this suit (and Suit 2256) came up for trial and hence, it ought not to be considered as an issue in this suit;

(10) Be that as it may, it remains well established that a person who has signed a document differing fundamentally from what he believed it to be, would be disentitled from successfully pleading *non est factum* if his signing of the document was due to his own negligence;

(11) In every case, the person who signs the document must exercise reasonable care to read and understand the document prior to signing the same wherein it is reasonable to expect that more care should be exercised if the document is thought to be of an important character than if it is not (see *Saunders (Executrix of the estate of Rose Maud Gallie (deceased)) v Anglia Building Society (formerly Northampton*

Town and County Building Society) [1970] 3 All ER 961; *Thong Guan Co (Pte) Ltd v Lam Kong Co Ltd (No 2)* [1998] 7 MLJ 720; *and Goh Jong Cheng v MB Melwani Pte Ltd* [1991] 1 MLJ 482);

(12) In this suit, it was admitted by the 1st plaintiff that the Subscription Agreement and the Loan Agreement involved an amount larger than any amount that the plaintiffs have ever borrowed, and that the receipt of the Loan Amount was important to the plaintiffs and the business of their Group Companies;

(13) Yet, if what the 1st plaintiff said about not understanding English is true, the plaintiffs had not taken reasonable precautions prior to executing the same i.e. the Subscription Agreement and the Loan Agreement, and had proceeded to execute the Subscription Agreement and the Loan Agreement, allegedly, without a proper understanding or appreciation of the terms and conditions contained therein;

(14) In fact, the 1st plaintiff, when cross-examined, had stated that for loans involving much lesser sums than the Investment Amount, the plaintiffs would normally rely on advice, which the 1st plaintiff received from his employees i.e. his finance managers and interpreters;

(15) Yet, for an amount purportedly 'the largest that he has ever borrowed', the plaintiffs failed and/or neglected to seek any assistance from their finance managers and/or interpreters prior to executing the Transaction Documents, which was an act contrary to the plaintiffs' purported 'usual practice' when taking loans with banks/financial institutions;

(16) The plaintiffs must have understood the contents of the Transaction Documents based on what was told to him by the 4th and 5th defendants and also the explanation by Loo Tatt King (PW5) of ZICO. This is because if the plaintiffs had not understood what he, the 2nd plaintiff and their Group Companies could do under the Subscription Agreement and Loan Agreement, then the plaintiffs would have taken the requisite precautionary measures to safeguard their own interests in the matter e.g. by relying on their trusted financial managers and interpreters and even retaining a firm of solicitors to act for them and to advise them in line with their own alleged 'usual business practice' of utilizing the assistance of financial managers and interpreters prior to executing the Transaction Documents. This is so especially in light of the amount of loan involved in the Transaction Documents being 'the largest' that the plaintiffs have ever borrowed;

(17) It remains, wholly, unreasonable that the 1st plaintiff, having represented himself as a successful businessman, with over 20 (twenty) years of experience, would have relied solely on the advice of ZICO, who the plaintiffs were aware at all times, were and remained the solicitors for the 1st to the 3rd defendants, without seeking any independent legal advice or assistance, prior to executing the Transaction Documents;

(18) Coupled with the fact that the plaintiffs derived a direct benefit from the Subscription Agreement and the Loan Agreement since their Group Companies received the Loan Amount, it remains highly unlikely that the plaintiffs were not aware of the terms and effect of the Transaction Documents (see *Wee Lian Construction Sdn Bhd v Ingersoll–Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425, H.C./; [2005] 1 MLJ 162, C.A.);

(19) If the 1st plaintiff's testimony was true that he could not understand the contents and/or the meaning of the terms of the Subscription Agreement and the Loan Agreement, then the plaintiffs were in fact negligent in executing the Transaction Documents but would remain bound by the terms of the same;

(20) Based on the legal principle established in *L'estrange v F. Graucob, Limited* [1934] 2 K.B. 394 that when a document containing contractual terms is signed, then, in the absence of fraud or misrepresentation, the party signing it is bound; and it is wholly immaterial whether the party has read the document or not, the Court finds that the plaintiffs remain bound by the terms and conditions of the Subscription Agreement and the Loan Agreement, regardless of their allegations that they have not read the same or understood the contents of the same, especially, where fraud and misrepresentation in respect of the execution of the Transaction Documents were never pleaded by the plaintiffs in this suit;

(21) During the trial, it was established by the defendants that the 2nd plaintiff, was a graduate of the London Chamber of Commerce and Industry (LCCI) and that the 1st plaintiff was a very experienced person in his field of expertise i.e. plastic moulding, which the 1st plaintiff has admitted to as being a very specialized industry;

(22) The evidence presented before the Court shows that both the plaintiffs were well educated and experienced individuals in the field of business, wherein the 1st plaintiff had confirmed that he had received a proper education i.e. a Diploma in Mechanical Engineering before he ventured into his specialized field of work i.e. plastic moulding. Therefore, as the issue of *non est factum* was never pleaded by the plaintiffs, the court found no merit in the plaintiffs' argument that they did not understand the terms of the Transaction Documents, which were prepared in the English language;

(23) Furthermore, the 2nd plaintiff failed to take the stand to substantiate the 1st plaintiff's contentions. Hence, the Court drew an adverse inference against the plaintiffs pursuant to s 114(g) of the Evidence Act 1950 that had the 2nd plaintiff taken the witness stand, her testimony would have been in favour of the defendants;

(24) The Court found that the 1st plaintiff was at all times aware of the emails which were sent and received from his email address. The 1st plaintiff had failed to provide any explanation, let alone a good or satisfactory one, as to why the 1st plaintiff has an email account if he, allegedly, "had never used computers before";

(25) The 1st plaintiff then alleged that Foong was the individual, who was sending out the emails on his behalf. If this is to be believed, it would lead to a ridiculous situation where Foong had issued an email to himself when the email to confirm the MBB Account number was sent out;

(26) In addition thereto, it was confirmed by the 1st plaintiff that Foong could only use the 1st plaintiff's email account when the 1st plaintiff provided Foong with the password for the 1st plaintiff's email account, which would mean that the 1st plaintiff, at all material times, remained aware of all emails that were issued out from his email account by Foong;

(27) In any event, the 2nd plaintiff had also sent emails to the 5th defendant and this is contradictory to the 1st plaintiff's evidence that the plaintiffs are not well versed with the use of the computer and/or in exchanging correspondences using email. Therefore, the Court was inclined to believe that, at all material times, the plaintiffs knew how to use emails and computers and were fully aware of all the contents of the correspondences that were exchanged between the plaintiffs and the defendants by emails;

(28) The 1st plaintiff testified in Court that he relied on anything that was told to him by his employees. On the same note, he also testified that he did not believe them with a 100% certainty. These 2 statements are contradictory. The 1st plaintiff also testified that he had entrusted his company's cheque books to his employee, Ms. Tan, and that he, also allowed Foong to issue out emails using his email account by giving Foong his account password. However, since the 1st plaintiff has called neither Ms. Tan nor Foong as a witness to support his testimony, the Court drew on adverse inference against him pursuant to s 114(g) of the Evidence Act 1950; and

(29) Therefore, the Court found that the evidence of the 1st plaintiff clearly flies in the face of common sense. It is contradictory with the contemporaneous documents that have been adduced by the defendants in this case and, hence, it is unreliable and ought to be rejected by the Court.

Alleged report to BNM

[438]The 1st plaintiff has alleged that the plaintiffs had lodged a report with BNM in respect of the breach of BNM's requirements i.e. that the 1st defendants had imposed a higher interest rate under the Loan Agreement than had been permitted by BNM. However, the Court found that it is more probable that the 1st plaintiff did not lodge such a report with BNM as alleged or that if such a report had indeed been lodged, it was a report without merit and/or was false. The reasons are as follows:

(1) The plaintiffs failed to adduce any documentary evidence before the Court to support their contention that a report was, actually, made;

(2) The 1st plaintiff, admitted that he knew of no action being taken against the 1st defendant based on his complaint in respect of the Loan Agreement being in breach of BNM's requirements; and

(3) The 1st plaintiff had also failed and/or neglected to follow up on his complaint with BNM.

Whether the transaction was illegal?

[439]The plaintiffs contended that the entire transaction was illegal and as such *void ab initio*. However, the Court found that the plaintiffs' contentions were devoid of any merit. The reasons are as follows:

(1) The actions of the plaintiffs are in direct contradiction to their allegations as the plaintiffs have neither taken any action to set aside the Transaction Documents nor have the plaintiffs ever lodged a police report over the purported illegality of the Transaction Documents;

(2) Conversely, the plaintiffs had received Tranche I of the Loan Amount without any complaint or protest, whatsoever, and had proceeded to utilise the said portion of the Loan Amount received as the plaintiffs

saw fit despite being in clear breach of the terms of the Loan Agreement. Hence, at all material times, the plaintiffs were the parties who had benefitted from the entire transaction;

(3) Be that as it may, even assuming that the transaction was indeed illegal as alleged by the plaintiffs and *void ab initio*, the plaintiffs, who had received an advantage under the two Agreements, still remain under a legal duty to restore the parties to their original positions prior to the plaintiffs having received such monies, which would still entail the plaintiffs having to pay back or restitute all monies received from the 3rd defendant to the 3rd defendant (see section 66 of the Contracts Act 1950; and *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301);

(4) S 66 of the Contracts Act 1950 states as follows:

(5) **"Obligation of person who has received advantage under void agreement, or contract that becomes void**

> **66.** When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.
>
> *ILLUSTRATIONS*
>
> (a) A pays B RM1,000 in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the RM 1,000.
>
> (b) A contracts with B to deliver to him 250 gantangs of rice before the 1st of May. A delivers 130 gantangs only before that day, and none later. B retains the 130 gantangs after the 1st of May. He is bound to pay A for them.
>
> (c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her RM 100 for each night's performance. On the sixth night A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.
>
> (d) A contracts to sing for B at a concert for RM 1,000, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the RM 1,000 paid in advance."

(6) Loo Tatt King (PW5) had testified in Court for the defendants. He expressed his opinion that the transactions that were covered under the Transaction Documents were not illegal and that it was the normal manner in which offshore investments were performed in Malaysia. However, the plaintiffs did not seek or produce any contradictory legal opinion to rebut the legal opinion of PW5; and

(7) The Court agreed with and accepted PW5's legal opinion based on the reasons given by PW5 that the Subscription Agreement and the Loan Agreement are legal contracts and that they are valid and binding on all the contracting parties including the plaintiffs, who are parties to the Subscription Agreement.

Whether the plaintiffs' failure to call Teo Hun Theng is fatal to the plaintiffs' case?

[440]The plaintiffs had alleged that they were advised by Teo, who was, allegedly, employed by the defendants as the Finance Manager of EPCM, that the usage of Tranche I of the loan monies by the plaintiffs was proper and in accordance with the terms of the Loan Agreement. But the plaintiffs failed to call Teo to take the stand to support these allegations of the plaintiffs.

[441]With regard to the 1st allegation, the 1st plaintiff (PW1) has expressly admitted that Teo was an employee of the plaintiffs' company. The Court found that the failure of the plaintiffs to call Teo is fatal to the plaintiffs' case. The reasons are as follows:

(1) It is trite law that he who asserts must prove;

(2) In this case, since it is the plaintiffs, who assert that Teo was working for the defendants at all material times and that Teo had advised them that the usage of Tranche I of the loan monies by the plaintiffs was

proper and in accordance with the terms of the Loan Agreement, the burden is on the plaintiffs to call Teo, who is a very material witness for the plaintiffs, to support their pleaded case; and

(3) Therefore, the Court drew an adverse inference under s 114(g) of the Evidence Act 1950 against the plaintiffs for their failure to call Teo as a witness in the trial.

Whether the evidence of the defendants' witnesses is credible?

[442]The defendants' witnesses had testified at length in Court as to the background of the transactions i.e. the investment transaction, the security transactions and the loan transaction, and the purpose of each of the Transaction Documents. The Court found that the evidence of the defendants' witnesses is credible and reliable based on the following reasons:

(1) The evidence of the defendants' witnesses (PW1, PW2, PW3 and PW4) and Mdm. Lee Wai Ngan, was not inherently incredible, was consistent throughout the trial and also corroborated each other's evidence;

(2) Their evidence was also corroborated by the contemporaneous documents produced by the defendants before the Court; and

(3) Their evidence was also supported and substantiated by the evidence of independent third parties (PW5 and PW6), who are members of professional bodies and their conduct and the manner in which they practise their, respective, professions are subject to the prevailing laws and regulations governing their, respective, professions; and

(4) PW5 and PW6 have no reason to lie to the Court.

[443]It is trite law that the findings of fact during trials are to a large extent determined by the credibility of the witnesses. Once the credibility of a witness is suspect the court ought to reject such evidence (see *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 385; and *Chandrakandan s/o Munusamy Pemborong Pentex Sdn. Bhd. v Sasitharan a/i Neelamegam* [1991] 2 ILR 730). In the instant case, the Court found that the credibility of the 1st plaintiff, whose evidence was neither corroborated by the evidence of another witness nor the contemporaneous documents presented by the plaintiffs before the Court, is suspect based on the reasons already set out in this Judgment.

[444]Hence, on a balance of probabilities, the Court found that the factual findings of the instant suit favored the defendants.

Conclusion of the Court for Suit 246

[445]Based on the reasons as stated above, the Court concluded as follows:

(1) The plaintiffs do not have the required *locus standi* to initiate this suit against the 4th to the 11th defendants;

(2) The 4th to the 11th defendants are not the proper parties to this suit because the plaintiffs have expressly admitted that the 4th to the 11 defendants are the mere nominees, agents, representatives and/or servants of the 2nd and 3rd defendants;

(3) The Court was satisfied based on the evidence of the defendants' witnesses that the defendants had enforced their rights lawfully and in accordance with the provisions of the Subscription Agreement, Loan Agreement, Charges and Deeds of Charge as a result of the plaintiffs' many breaches of the terms and conditions of the Subscription Agreement and Loan Agreement;

(4) Furthermore, the plaintiffs have never challenged the validity of the terms and conditions of any of the Transaction Documents prior to the filing of Suit 2256 by Glove Kendall and Kendall Court, who are the 2nd and 3rd defendants in this suit, and Suit 1123 by by KJD Glove, who is the 1st defendant in this suit;

(5) At all material times, the Transaction Documents have not breached any of the rules, regulations and/or requirements of BNM or LOFSA, as no action has ever been taken by either BNM or LOFSA against the 1st, defendant and/or the 2nd defendant and/or the 3rd defendant in respect of the Subscription Agreement and/or the Loan Agreement;

(6) The plaintiffs have failed to prove their claim, on a balance of probabilities, against all the defendants as many of their allegations, contentions and/or accusations are the products of self-serving statements riddled with inconsistencies and contradictions, which remain unsubstantiated and uncorroborated;

(7) The factual and legal findings of this suit by the Court favoured the defendants; and

(8) Therefore, the plaintiffs' suit and claim cannot succeed and ought to be dismissed by the Court with costs.

Conclusion of the Court for the three suits

[446]In the premises, the Court granted judgment in favour of Glove Kendall, the 1st plaintiff, and Kendall Court, the 2nd plaintiff, in Suit 2256 against Lim Wan Soon, the 2nd defendant, and Leng Khuan Yow (F), the 3rd defendant; judgment in favour of KJD Glove, the sole plaintiff, in Suit 1123 against Choong Foon Lan (F), the 5th defendant, and Leng Kam Meng, the 6th defendant with costs; and dismissed the claims of Lim Wan Soon, the 1st plaintiff, and Leng Khuan Yow (F), the 2nd plaintiff, in Suit 246 against KJD Glove, the 1st defendant, Glove Kendall, the 2nd defendant, Kendall Court, the 3rd defendant, YEO, the 4th defendant, Chris Chia, the 5th defendant, Dennis Wuisan, the 6th defendant, AS Nominees, the 7th defendant, Maple Challenge, the 8th defendant, Impulse Talent, the 9th defendant, Lee Wai Ngan, the 10th defendant, and Chai Toye Ying, the 11th defendant, with costs.
