# Riders Lodge Sdn Bhd
# v
# Tropik Sentosa Sdn Bhd & Anor

**High Court**, Johor Bahru – Suit No. 22NCvC-129-08/2015
Ahmad Kamal Md Shahid J

August 31, 2020

***Contract*** *– Breach – Lease agreement – Claim for specific performance and damages – Refusal by defendants to renew lease in accordance terms of agreement – Counterclaim for declarations that second lease agreement had naturally lapsed or expired by effluxion of time and/or lawfully terminated and for immediate repayment of loan purportedly granted to plaintiff – Whether loan due and payable immediately by plaintiff – Whether termination of agreement invalid and unlawful – Whether plaintiff's right to remain on land protected by equity – Whether defendants having admitted to agreeing to 30 years' lease and by its conduct in continuing to receive monthly rentals and gross revenue sharing, estopped from claiming lease not extended or renewed – Whether plaintiff has caveatable interest – Whether caveat lodged by plaintiff ought to remain to maintain status quo – Balance of convenience – Whether plaintiff entitled to order for specific performance and damages as prayed for – National Land Code 1965, s 206(i)(b) – Specific Relief Act 1950, ss 11, 21(3)*

The plaintiff is the owner of the horse ranch resort known as "Riders Lodge" located in Sedenak, Johor. On or about February 13, 2003, the plaintiff entered into a tripartite lease agreement ("the first lease agreement") with the first and second defendants in respect of a piece of land owned by the second defendant in Mukim Sedenak, Daerah Kulaijaya, Johor ("the lease land") for a period of five years from May 21, 2004 to May 20, 2009. Prior to the expiry of the first lease agreement, the plaintiff by way of a letter dated January 6, 2009 requested for a five year extension of the said lease and thereafter for each renewal due until year 2034. Subsequent thereto and prior to the expiry of the second lease agreement, the plaintiff again issued a written notice dated March 10, 2014 pursuant to clause 4.1(m)(i) of the said second lease agreement, notifying the defendants of its intention to renew the lease for another five years upon expiry of the said agreement and thereafter for each renewal.

By way of a letter dated September 1, 2014, the defendants informed the plaintiff that as a result of the plaintiff's failure to pay the property assessment, the second lease agreement had therefore expired and consequent thereto, the plaintiff is deemed to be a monthly tenant.

The plaintiff commenced the instant proceedings seeking specific performance and renewal of the said second lease agreement. The plaintiff contended inter alia that, the defendants' conduct of refusing to renew the lease and/or terminating the said second lease agreement is unlawful, invalid and in breach of clause 4.1(m) of the said agreement bearing in mind that it had given notice of its intention to renew the said second lease agreement for the entire duration up to the expiration of 30 years. The plaintiff further also contended that the issue of short notice as raised by the defendants is an afterthought and had been waived given the fact that notice of its intention to renew the lease had been served on the defendant and that the defendant is estopped from denying that the said agreement has been renewed by its conduct of continuing to receive the monthly rentals and gross profits from the plaintiff even after May 21, 2014.

By way of counterclaim, the defendants sought a declaration that the second lease agreement had naturally lapsed or expired and/or had been lawfully terminated. The defendants also sought repayment of the loan of RM300,679.75 ("the loan") which was a debt payable by the plaintiff to one Legends Golf & Country Resort Bhd ("Legends") for works done for the plaintiffs and which debt Legends had assigned to the first defendant. Additionally, the defendants sought the removal of the caveat that the plaintiff had lodged over the said land.

**Issues**

1. Whether there was a concluded agreement between the parties for the grant of a 30 years' lease subject to renewal of every five years and whether the defendants termination of the second lease agreement is wrongful, invalid and in breach of the said agreement.
2. Whether the lease period should begin from April 1, 2000 and end on March 31, 2030 as alleged by the defendants.
3. Whether the loan is due and immediately payable by the plaintiff to the defendants.
4. Whether the caveat lodged by the plaintiff ought to be removed.
5. Whether the plaintiff is entitled to an order of specific performance and damages as prayed for.

**Held**, allowing the plaintiff's claim as set out in paragraph 51 of the amended statement of claim and dismissing the defendants' counterclaim with costs of RM50,000 subject to allocatur

1. (a) On the facts and the evidence adduced, the agreement for a 30 years' lease to be granted to the plaintiff in the form of five years for each

term had been clearly spelt out in clause 4.1(m)(i)-(v) of the first lease agreement and clause 4.1(m)(i)-(iv) of the second lease agreement and had been admitted to by the defendants through their letter dated October 1, 2014 as well as the testimony of their witness ("DW1"). The defendants cannot go against their own admission since the admission of DW1 is the strongest possible evidence. In the premises the defendants are estopped from denying that they have indeed granted the 30 years' lease to the plaintiff with six terms of five years each. Based on the wordings of clause 4.1(m) of the second lease agreement, the defendants are bound to renew the said second lease agreement until 2034 so long as notice of renewal is given by the plaintiff not less than three months prior to the expiration of the agreement. [*see p 297 para 42 - p 300 para 51*]

(b) The grounds relied on by the defendants to justify their refusal to renew the second lease agreement are unreasonable and/or unlawful and thus, the defendants are in breach of the said agreement by not renewing the same. The issue of short notice is merely an afterthought as it was only raised three years and a half after the said agreement had expired and the filing of the instant suit. Based on *United Overseas Bank (Malaysia) Berhad v Ocean Avenue Sdn Bhd* [2009] 2 AMR 625, the plaintiff had clearly shown its intention to continue with the renewal of the second lease agreement not just for the next five years but also for each of the following four renewable terms until year 2034 via its notice dated January 6, 2009. By their conduct in not raising any issues pertaining to the purported short notice at the earliest opportunity, the defendants are therefore deemed to waive the plaintiff's purported breach of clause 4.1(m)(i) by giving short notice to the defendants. [*see p 300 para 53 - p 301 para 59; p 301 para 62; p 302 para 67 - p 303 para 69*]

(c) On the facts, the plaintiff has validly exercised its option to renew the second lease agreement according to clause 4.1(m)(i) of the said agreement. The defendants thus have breached the said clause by failing to renew the second lease agreement for at least an extended term of five years despite them continuing to receive gross revenue sharing and monthly rental from September 1, 2014 onwards until the trial date. In the circumstances, the doctrine of estoppel would operate against the defendants and accordingly they are estopped from alleging that the lease has not been extended or renewed for

at least a further term of five years from May 21, 2014 until May 20, 2019. [*see p 304 para 73 - p 305 para 80*]

(d) Based on the evidence, the payments made by the plaintiff towards the monthly rentals and gross revenue sharing, were made on the basis that the lease was renewed and not on the basis of an oral agreement for monthly tenancy as contended by the defendants. The defendants' conduct in not disputing or replying to any of the plaintiff's letters which clearly refer to the extension of the lease and calculation of gross revenue sharing and that the payments made were for monthly rental inclusive of gross revenue sharing, is an admission of the contents of the said letters and is an acquiescence to the said renewal. The defendants have thereby treated the said second lease agreement as if the same is still in effect and/or has been renewed and consequently are estopped from justifying the non-renewal of the same. [*see p 306 para 83 - p 308 para 92; p 313 para 117 - p 315 para 124*]

(e) On the facts and the evidence adduced, there is no contractual basis for the defendants not to renew the lease by reason of the alleged non-payment of property assessment by the plaintiff. The lease can only be determined if there has been non-payment of the rental or gross revenue sharing and any non-performance or non-observance of covenants therein, as stipulated under clause 8.1 of the second lease agreement. It is illogical for the defendants to rely on the issue of non-payment of the assessment to justify its refusal to renew the lease as it would mean that the first lease agreement should not have been renewed as well. In the premises, the defendants having conceded that such issue has got nothing to do with the non-renewal of the lease, there is therefore no basis to justify the said non-renewal. [*see p 309 paras 95-100*]

(f) Following the failure to discharge the burden of proving that the plaintiff had received the proper and relevant documentation for the payment of the property assessment pursuant to s 103 of the Evidence Act 1950 (the EA), allegation that the plaintiff had breached clause 3.1(f) of the second lease agreement, is devoid of merit. [*see p 310 paras 103-105*]

2. (a) By virtue of s 206(i)(b) of the National Land Code 1965, the first lease agreement only took effect from the date of the registration i.e. from May 21, 2004 when the relevant Form 15A was executed between the plaintiff and the second defendant. Since there was no dispute as to the date of the commencement of the lease prior to the

registration of the first and second lease agreements at the Land Office, in 2003 and 2010 respectively, the defendants' dispute as regards the date of the commencement of the lease, is merely an afterthought to justify their decision not to renew the lease. [*see p 310 para 107 - p 311 para 109*]

(b) The defendants' decision whether to "grant a new lease" i.e. renewal of the term, should be based on inter alia the agreements that had been entered into with the plaintiff. The defendants cannot impose any new conditions or terms which are beyond or outside the scope of what were agreed upon. [*see p 312 para 112 - p 313 para 114*]

3. Based on *Kathryn Ma Wai Fong (f) v WTK Realty Sdn Bhd* [2015] MLJU 361, it is untenable for the first defendant to demand for the immediate repayment of the loan all at once from the plaintiff as the loan being unsecured, interest-free with no fixed repayment terms is not repayable immediately but within a reasonable time from when such request for the repayment is made. Given the circumstances of the instant case and the fact that the first defendant is a shareholder of the plaintiff, it is unreasonable for the first defendant to demand such immediate repayment, on the basis that the loan is unsecured and interest-free with no fixed repayment terms. In this regard, the defendants' contention that there should not be any difference between the working capital advanced under the JVA and the loan, is unsubstantiated and inconsistent with the contemporaneous evidence. In the circumstances, the defendants' counterclaim for the whole outstanding loan sum is untenable and ought to be dismissed. [*see p 319 para 144 - p 323 para 155*]

4. In view of the fact that the plaintiff has satisfied the three requirements laid down in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 AMR 969 its caveat ought to remain on the land to preserve among others, the status quo and the plaintiff's caveatable interest in the said land. The balance of convenience is in favour of the plaintiff in that if the caveat is removed, the defendants will be at liberty to deal with the land, rendering the relief for specific performance sought by the plaintiff redundant in the event the plaintiff's claim is allowed. [*see p 323 para 156 - p 324 para 159*]

5. Given that the plaintiff's right to remain on the lease land for a period of 30 years is protected by equity and as the defendants have acted wrongly in refusing to renew the lease, the plaintiff is thus entitled to an order for a specific performance against the defendants. In this regard, the requirements as envisaged in ss 11 and 21(3) of the Specific Relief

Act 1950 have been fulfilled by the plaintiff. In addition, given the evidence of the damage that had been caused to the plaintiff, the plaintiff is also entitled to an order for damages to be assessed and payable by the defendants. [*see p 316 paras 126-132*]

**Cases referred to by the court**

*David Wong Hon Leong v Noorazman b Adnan* [1996] 1 AMR 7; [1995] 3 MLJ 283, CA *(foll)*

*Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 AMR 601; [2015] 2 MLJ 441, FC *(foll)*

*Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & 2 Ors* [1993] 2 AMR 3525; [1994] 1 MLJ 740, HC *(foll)*

*Global Indian Education Sdn Bhd v Neeta's Herbal International Sdn Bhd* [2016] 4 AMR 843; [2016] 6 MLJ 109, CA *(ref)*

*Juahir b Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 AMR 2984; [1996] 3 MLJ 627, CA *(ref)*

*Kathryn Ma Wai Fong (f) v WTK Realty Sdn Bhd* [2015] MLJU 361, HC *(foll)*

*Kuwait Finance House Malaysia Bhd v Obnet Sdn Bhd & 2 Ors (and Another Suit)* [2017] AMEJ 1400; [2016] MLJU 1843, HC *(foll)*

*Lee Kok Heng & Anor v De Garden Development Sdn Bhd* [2014] AMEJ 0991; [2014] 1 LNS 898, HC *(ref)*

*Lim Chong Watt v Wawasan Sinmaland Properties Sdn Bhd & 2 Ors* [2003] AMEJ 0103; [2003] MLJU 198, HC *(foll)*

*Lim Lay Sooi & Anor v Merah Rubber Estates* (1931) Ltd [1951] 1 MLJ 246, CA *(foll)*

*Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 AMR 969; [1995] 3 CLJ 520, CA *(foll)*

*Magespare @ Mageswary a/p Muthukrishnan v YB Dato' Anpalagan a/l Ramiah & Anor (Moses @ Moses Pillai a/l R Susayan & Anor – Interveners)* [2009] 1 MLJ 403, HC *(foll)*

*Tan Boo Seng v Ria Realiti Sdn Bhd* [2011] AMEJ 0330; [2011] 1 LNS 1405, HC *(foll)*

*United Overseas Bank (M) Bhd v Ocean Avenue Sdn Bhd* [2009] 2 AMR 625; [2008] 5 MLJ 500, HC *(foll)*

**Legislation referred to by the court**

*Malaysia*
Companies Act 1965
Evidence Act 1950, ss 103, 114(g)
National Land Code 1965, s 206(1)(b), Form 15A
Specific Relief Act 1950, ss 11, 21(3)

*Justin Voon Tiam Yu* and *Chiam Jia Yann* (Justin Voon Chooi & Wing) for plaintiff
*Adi Radlan Abdul Rahman* (Adi Radlan & Co) for defendants

*Judgment received: October 21, 2020*

**Ahmad Kamal Md Shahid J**

**Introduction**

**[1]** This is a case on the issues of lease and loan in respect of a piece of land.

**[2]** Pursuant to a consent order dated October 17, 2017 entered between the parties in the Federal Court Civil Application No. 08-319-07/2017(J), the parties have agreed amongst others for:

(1) Counterclaim be reinstated save that paragraphs on oppression and the reliefs in paragraphs 35(g) to (j) of the counterclaim remain struck out.

**[3]** On November 23, 2017, the defendants had filed an amended defence and counterclaim following the said Federal Court consent order.

**[4]** On May 14, 2018 which is the first day of the trial date, the plaintiff had dropped prayers (iv) and (v) in its statement of claim in relation to the issues of assignment and shares which are as follows:

iv) A declaration that the said December 29, 2000 letter from the first defendant to the plaintiff is not a valid assignment of debt to the first defendant and there is no debt due from the plaintiff to the first defendant;

v) An order that the 50,993 ordinary shares in the name of the first defendant in the plaintiff company be cancelled and/or returned to the plaintiff.

**[5]** The plaintiff further sought leave from the court to amend prayer (iii) of the statement of claim which was allowed by the court as follows:

(iii) A declaration that there is *currently* no sum due from the plaintiff to the first defendant in respect of any purported loan.

**[6]** The plaintiff had then filed an amended statement of claim dated May 14, 2018 to reflect the amendment of the prayers in the statement of claim.

**[7]** Hence, the plaintiff's amended statement of claim sought against the defendants are for the following reliefs:

(i) A declaration that the defendants are bound by the second lease agreement (i.e. the lease annexure dated June 9, 2010) and ought to

renew the lease on a land held under HSD 57318, Lot No. PTD 57854, Mukim Sedenak, Daerah Kulaijaya ("the said lease land") for a further 20 years in accordance with clause 4.1(m) of the said second lease agreement until May 20, 2034, or such other time frame decided by the court;

(ii) An order that the first defendant specifically perform clause 4.1(m)(i) of the second lease agreement (i.e. lease annexure June 9, 2010) and renew the lease for the said lease land for the period from May 21, 2014 until May 20, 2019 and thereafter in accordance with the same clause 4.1(m)(ii)-(iv) of the said second lease agreement until May 20, 2034 (or such other date to be determined by the court);

(iii) A declaration that there is currently no sum due from the plaintiff to the first defendant in respect of any purported loan;

(vi) Pending prayer (i) above, the plaintiff is entitled to proceed to remain on the said lease land and operate the Horse Ranch Resort ("Riders Lodge") on the said lease land upon payment of the rental of RM3,500.00 per month and gross revenue sharing and any property assessment due (provided the relevant official receipts are first given to the plaintiff by the defendants to consider whether to pay or to dispute the sum under the term of clause 3.1(f) of the second lease agreement).

(vii) General damages to be assessed by the registrar to be paid by the defendants to the plaintiff;

(viii) Interest at the rate of 5% per annum on the sum assessed in paragraph (vii) above from the date of the writ with full settlement to be paid by the defendants to the plaintiff;

(ix) Costs to be fixed and paid by the defendants respectively to the plaintiff; and

(x) Such further and/or other reliefs to the plaintiff as this honourable court thinks fit.

**[8]** In response, the defendants filed a counterclaim against the plaintiff for the following orders:

(a) The sum of RM300,679.75 to be paid by the plaintiff to the first defendant;

(b) A declaration against the plaintiff that the second lease agreement has naturally lapsed or expired by effluxion of time;

(c) Further or alternatively, a declaration against the plaintiff that the second lease agreement is lawfully terminated;

(d) Damages for breach of contract to be paid by the plaintiff;

(e) The caveat lodged by the plaintiff bearing presentation No. 27230/2015 on August 26, 2015 on all that piece of land held under HS(D) 57318 PTD 57854 in the Mukim of Sedenak, Daerah Kulaijaya, Johor be removed;

(f) The plaintiff is ordered to pay the first defendant compensation or damages for wrongfully or without reasonable cause entering or securing the entry of the said caveat;

(g) The said second defendant or his nominee be ordered to buy and takeover all the first defendant's shares registered in the plaintiff's company amounting to 50,993 shares at RM1.00 each, or at the price per share as reflected in audited statement of accounts of the plaintiff for the year 2013, within 30 days from the date of judgment;

(h) Alternatively, the said second defendant or his nominee be ordered to buy and takeover all the first defendant's shares registered in the plaintiff company the first defendant amounting to 50,993 shares at a price to be determined by a valuer who is a chartered accountant appointed by this court and paid for by the said second defendant;

(i) Further and still in the alternative, the said valuer appointed by this court be directed to value the shares of the first defendant by reference to the assets, profitability and future prospects of the plaintiff as at the date of this action, and without discount for the fact that the shareholding of the first defendant is a minority shareholding;

(j) Further and/or still in the alternative, the plaintiff be wound up by the court under the provisions of the Companies Act 1965;

(k) Liberty to apply;

(l) Interest;

(m) Costs; and

(n) Such further or other reliefs as this honourable court deems fit.

**Background facts**

**[9]** The plaintiff is a company incorporated in Malaysia under the Companies Act 1965 with a registered address at 10th Floor, Menara Hap Seng, No. 1 & 3, Jalan P Ramlee, 50250 Kuala Lumpur. The plaintiff is the

owner of the Horse Ranch Resort named "Riders Lodge" located in Sedenak, Johor.

**[10]** The first defendant is a company incorporated in Malaysia under the Companies Act 1965 with a registered address at Suite 1301, 13th Floor, City Plaza, Jalan Tebrau, 80300 Johor Bahru, Johor.

**[11]** The second defendant is a company incorporated in Malaysia under the Companies Act 1965 with a registered address at Suite 1301, 13th Floor, City Plaza, Jalan Tebrau, 80300 Johor Bahru, Johor.

**[12]** The plaintiff is the lessee of a piece of land owned by the second defendant now subdivided and held under individual title of HSD 57318 Nombor Lot PTD 57854, Mukim Sedenak, Daerah Kulaijaya, Negeri Johor ("the said lease land") which was previously a portion of a land held under a master title of Geran 42459, Lot 1302, Mukim of Sedenak, District of Johor Bahru ("the said land").

**[13]** On or about February 13, 2003, the plaintiff, the first defendant and the second defendant entered into a tri-partite lease agreement ("the said first lease agreement"). However, the commencement of the said first lease agreement was deferred as there were some difficulties experienced by the defendants in obtaining the approval of the Johor State Government for the creation of the said lease.

**[14]** On May 21, 2004, the said first lease agreement was registered on the said land pursuant to the said first lease agreement dated February 13, 2003 vide Nombor Perserahan No. 34591/2004 for the specified period of the initial five years of lease from May 21, 2004 until May 20, 2009.

**[15]** Prior to the expiration of the said first lease agreement, the plaintiff requested for an extension of the said lease for the next five years and thereafter for each renewal due as early as January 6, 2009 pursuant to clause 4.1(m)(i) of the said first lease agreement vide the plaintiff's then solicitor's letter dated January 6, 2009.

**[16]** Subsequently, after the said first lease agreement had expired on May 21, 2009, the plaintiff and the defendants continued with the second lease agreement from May 21, 2009 until May 20, 2014 in respect of the said lease land ("the said second lease agreement") vide a lease annexure dated June 9, 2010. The said second lease agreement was registered on the title of the said land on July 12, 2010 vide Nombor Perserahan 52445/2010.

**[17]** Prior to the expiration of the said second lease agreement on May 20, 2014, the plaintiff had vide its then solicitor issued a letter dated March 10, 2014 to give a written notice to the defendants' solicitor of its intention to

renew the lease for another five years upon expiry of the said second lease agreement and thereafter for each renewal due. The said notice was issued pursuant to clause 4.1(m)(i) of the said second lease agreement.

**[18]** In response to the said notice, the first defendant's solicitor issued a letter dated September 1, 2014 informing that the plaintiff had failed to pay the property assessment and hence the said second lease agreement has expired on May 21, 2014. As a result of the expiration of the said second lease agreement, the plaintiff is therefore deemed as a "monthly tenant" with a monthly rental of RM25,000.00.

**The plaintiff's case**

***The lease issues***

**[19]** It is the plaintiff's contention that there is an agreement between the parties that the defendants are to grant the plaintiff a lease for 30 years which was broken down to six terms of five years each and the option to renew the said lease lies solely and absolutely on the plaintiff alone.

**[20]** The plaintiff submitted that the said agreement of the lease for 30 years which was broken down to six terms of five years each has been incorporated specifically in clause 4.1(m)(i)-(v) of the said first lease agreement dated February 13, 2003 and at clause 4.1(m)(i)-(iv) of the said second lease agreement dated June 9, 2010.

**[21]** Hence, the plaintiff submitted that the defendants' conduct in not renewing the said lease and/or terminating the said second lease agreement is unlawful, wrongful and invalid and thus in breach of inter alia clause 4.1(m) of the said second lease agreement.

**[22]** Further, it is the plaintiff's contention that the plaintiff had already notified the defendants of its intention to renew the said second lease agreement for the entire duration up to the expiration of the 30 years' lease vide the plaintiff's then solicitor's letter dated January 6, 2009. Thus, the plaintiff submitted that it is unjust for the defendants to refuse the renewal of the said second lease agreement.

**[23]** It is also the plaintiff's contention that the defendants had waived the issue of short notice when the plaintiff had earlier issued a letter dated March 10, 2014 to the defendants' solicitor of its intention to renew the lease for another five years upon expiry of the said second lease agreement and thereafter for each renewal due.

**[24]** Further, the reason given by the defendants by way of a letter dated September 1, 2014 for the non-renewal of the said second lease agreement is

due to the failure of the plaintiff to pay the assessment promptly and not due to the issue of short notice. Hence, the plaintiff submitted that the issue of short notice is merely an afterthought.

**[25]** It is also the plaintiff's contention that the defendants are estopped by its conduct to deny that the said second lease agreement has been renewed as the defendants have continued to receive the monthly rental and gross revenue profit from the plaintiff even after May 21, 2014.

***The loan issues***

**[26]** It is the contention of the plaintiff that the said loan is not currently due from the plaintiff to the defendants as the said loan was an advance by the first defendant based on the express basis and terms that it is unsecured, interest free with no fixed repayment terms.

**The defendants' case**

***The lease issues and counterclaim***

**[27]** The defendants had filed a counterclaim against the plaintiff inter alia for a declaration that the second lease agreement has naturally lapsed or expired by effluxion of time and/or that the second lease agreement is lawfully terminated and an order of damages for breach of contract against the plaintiff.

**[28]** It is the defendants' contention that there were no such representations or assurances given by the defendants to the plaintiff for an automatic lease of 30 years without the plaintiff having to express in writing its intention to renew the lease three months before the end of the five-year term.

**[29]** It is the defendants' contention that the said second lease agreement came to an end or expired by effluxion of time due to the plaintiff's failure to exercise its option to renew the lease within time i.e. three months before the expiration of the said second lease agreement.

**[30]** It is also the contention of the defendants that the plaintiff had breached clause 3.1(f) of the said second lease agreement when it failed to pay the property assessment from 2008 to 2013 despite the first defendant delivered or forwarded the relevant documents regarding the property assessment to the plaintiff.

**[31]** It is also the defendants' contention that as a result of the expiration of the said second lease agreement, the plaintiff is therefore deemed as a "monthly tenant" with a monthly rental of RM25,000.00.

***The loan issues and counterclaim***

**[32]** It is the defendants' contention that the loan sum of RM300,679.75 which was initially part of the debt due by the plaintiff to the Legends Golf & Country Resort Bhd ("the Legends") in respect of the works done by the Legends for the plaintiff on the said lease land and subsequently assigned by the Legends to the first defendant vide a letter dated December 29, 2000 is to be paid by the plaintiff to the first defendant.

**Issues to be tried**

**[33]** Each party had filed its respective lists of issues to be tried which are as follows:

*Plaintiff's issues to be tried*

(a) Whether the said Agreement as pleaded in paragraph 6 of the Statement of Claim, especially the assurance by the Defendants of a 30-year lease given vide an initial 5 years terms of lease with another 5 extended terms of 5 years each exists and/or has been incorporated and/or evidenced in the Lease Agreement entered between parties?

(b) In respect of the payment of the property assessment for the said Lease Land by the Plaintiff, whether there is an understanding and/or agreement and/or implied terms between the parties that the official receipts and/or notification from the authorities for payment of assessment for the whole said Land plus the calculation for the apportionment ought to be provided and explained and/or justified to the Plaintiff by the Defendants before the Plaintiff is obliged to pay for the same?

(c) Whether the 1st Defendant's termination of the lease vide a letter dated 1.9.2014 is unlawful, wrongful, invalid and/or in breach of the said Agreement pleaded in paragraph 6 of the Statement of Claim and/or the 2nd Lease Agreement?

(d) Whether the Defendants ought to specifically perform Clause 4.1(m)(i) of the 2nd Lease Agreement and to renew the lease for the said Lease Land for the period from 21.5.2014 until 20.5.2019 and thereafter in accordance with the same Clause 4.1 (m)(ii)-(iv) of the said 2nd Lease Agreement until 20.5.2034?

(e) Whether there is a valid assignment of the debt of RM351,672.75 from Legends to the 1st Defendant vide a letter dated 29.12.2000 from the 1st Defendant to the Plaintiff?

(f) Whether there is a real or valid "loan" between the Plaintiff and the 1st Defendant?

(g) Without derogating from the aforesaid, whether in any event the 1st Defendant is entitled to demand for the immediate repayment of the purported outstanding loan sum of RM300,679.75 from the Plaintiff in view that, amongst others, the advancement of RM300,679.75 to the Plaintiff is subject to the following specific express terms:

i) The loan will be given to the Plaintiff as interest free;

ii) There will be no terms of repayment; and

iii) It will be an unsecured loan.

(h) If it is established that there is no valid assignment of the debt of RM351,672.75 from Legends to the 1st Defendant, whether the 50,993 ordinary shares of the Plaintiff in the name of the 1st Defendant as purported part settlement of the alleged "loan" in the Plaintiff ought to be cancelled and/or returned to the Plaintiff?

*The Defendants' issues to be tried*

(a) Whether the 2nd Lease Agreement of 9.6.2010 came to an end on 21.5.2014 or subsists automatically and/or uninterrupted until 20.5.2034.

(b) Whether Plaintiff's caveat ought to be removed.

(c) Further or alternatively, whether Plaintiff breached a condition of 1st and/or 2nd Lease Agreements with respect to payment of Property Assessment charges in clause 3.1(f) in both.

(d) Whether assignment from Legends to the 1st Defendant valid and enforceable.

(e) Whether the 1st Defendant's 50,993 shares in Plaintiff ought to be cancelled and returned to Plaintiff.

(f) Whether debt of RM300,679.75 repayable by Plaintiff to the 1st Defendant.

**The trial**

**[34]** The plaintiff had called the following witness:

a) Mr Sennett Edward Tzinberg (Managing Director and shareholder of the plaintiff) (PWI) (witness statement – PWS1 and PWS1A).

**[35]** The defendants had called the following two (2) witnesses:

a) Mr Oh Chee Eng (Director of both defendants) ("DW1") (witness statement – DWS1 and DWS1A); and

b) Mr Mohd Rasheed bin Hassan (advocate and solicitor) (DW2) (witness statement – DWS2).

**Findings of the court**

**[36]** Having fully and carefully considered the plaintiff's as well as the defendants' case and issues raised in the written submissions, I have decided to allow the claim by the plaintiff and dismiss the defendants' counterclaim. This is my judgment setting out the full reasons of my decision.

**[37]** The issues set out by the parties in this case can be divided into two main issues which are as follows:

(a) The lease issue; and

(b) The debt/loan issue.

***The lease issue***

**[38]** The plaintiff is claiming for inter alia a declaration that the defendants are bound by the second lease agreement and an order for a specific performance against the first defendant to renew the said second lease agreement until May 20, 2034 and for an order of general damages to be assessed by the court.

**[39]** The defendants on the other hand had filed a counterclaim against the plaintiff inter alia for a declaration that the second lease agreement has naturally lapsed or expired by effluxion of time and/or that the second lease agreement is lawfully terminated and an order of damages for breach of contract against the plaintiff.

**[40]** Therefore, it is important for this court to consider the following:

(a) Terms of the said lease entered between the plaintiff and the defendants;

(b) Whether the plaintiff had validly exercised its option to renew the said lease; and

(c) Whether the non-renewal of the said lease is wrongful.

**[41]** In this case, the plaintiff had contended that the defendants had assured the plaintiff for a 30 years' lease to operate the Horse Ranch Resort (Riders Lodge). However, the defendants had denied there were such assurances given by the defendants to the plaintiff and also had denied that the plaintiff will be given an automatic lease renewal of 30 years or five years each.

**[42]** Upon perusal of the lease agreements, I find that the 30 years' lease has been clearly spelt out in clause 4.1(m)(i)-(v) of the said first lease agreement dated February 13, 2003 (see p 208 common bundle of documents ("COBD")

Vol 1) and clause 4.1(m)(i)-(iv) of the second lease agreement dated June 9, 2010 (see p 240 COBD Vol 1).

**[43]** I find that the agreement for a 30 years' lease has been admitted by the first defendant in a letter dated October 1, 2014 (see p 272 COBD Vol 1) at paragraph 1 which stated: "Both parties agreed the lease term is 30 years with leases of five years each term".

**[44]** Mr Oh Chee Eng (DW1) had also admitted that the defendants have indeed granted a lease of 30 years to the plaintiff in the form of five years each.

(See p 27 notes of evidence dated May 28, 2018.)

JTV And you agree with me that I see even in your additional witness statement, the addendum, that basically what was discussed between Mr Sennett and yourself and what was understood was that there's a 30-year lease given to him, which is a long term plan for him to do his hotel, horse ranch, provided of course you mentioned that he wants to renew it, agree?

OH The, this is on the basis that he has the option to renew. There was no oral agreement that I would give him a straight 30-year lease.

JTV *As long as he wants it, he will have the full 30 years, am I right*?

OH *If he renew it according to the terms of the lease agreement that he signed.*

(See pp 73-74 notes of evidence dated May 28, 2018.)

JTV You see Mr Oh, if you can't recall say you can't recall. If you can which you are answering now, I will suggest to you then that you give a direct answer. Is there or is there not a 30 years?

OH *There is a 30 years with six years, six terms of five years subject to option to renew. That is very clear. I'm not denying that, but it has to be renewed.*

(See p 76 notes of evidence dated May 28, 2018.)

JTV If I read the paragraph 1, somewhere in the middle, "both parties agreed the lease term is 30 years with leases of five years each term". So there is a main agreement for 30 years and then subsidiary of course is broken up to five years each term, depending on the renewal. Agree?

OH *Yes, we have never object to that.*

(Emphasis added.)

**[45]** Based on the above, I am of the view that the defendants cannot go against their own admission since the admission of the DW1 is the strongest possible evidence.

**[46]** In *Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & 2 Ors* [1993] 2 AMR 3525; [1994] 1 MLJ 740, in construing the effect of an admission to the affidavit evidence, Idris Yusuff J (as he then was) had this to say at p 752 of the report.

> What is more damaging in this case is that the defendants go to the extent of admitting paragraphs 3 and 4 of the plaintiffs' affidavit – thereby obviating the necessity for the plaintiffs to provide further proof to substantiate their averment.
>
> *Admissions are the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission.*
>
> (Emphasis added.)

**[47]** Based on the above authority, I am of the opinion that the defendants are estopped from denying that the defendants have granted a 30 years' lease to the plaintiff with six terms of five years each.

**[48]** Evidence presented before the court has also shown that despite the said lease is subject to renewal, the option to renew the said lease remains solely with the plaintiff.

(See pp 70-71 notes of evidence dated May 28, 2018.)

> OH There was a negotiation on-going negotiation going on and 30 years was mentioned but how the 30 years was going to come about was never concluded. And there was a very clear exchange of legal letters between our lawyer and their lawyers and myself and plaintiff, between defendant and plaintiff about the structure of the 30 years. *And finally the plaintiff was very happy that it was given to be given 30 years with a six term of five years, option of them to renew according to the lease agreement. They were very happy because even it was reflected in their email that they have the power to decide to renew or not to renew, not me.* For many reason if they decide to quit they can basically not renew and walk away from the resort and has no binding agreement from me. So it was very clear that there was no agreement on how the 30 years going to be structured and *I think the final agreement between the defendant and the plaintiff was very clearly stated in the email by the lawyer that it was going to be by way of option to renew and the option is with the plaintiff.*
>
> (Emphasis added.)

**[49]** Further, I find from the wording used in clause 4.1(m)(i) of the said second lease agreement, it gives the defendants with no choice but to renew the said second lease agreement for a further five years upon the plaintiff giving a written request to the defendants not less than three months before the expiration of the said lease.

**[50]** Clause 4.1(m)(i) of the said second lease agreement states as follows:

(See p 240 COBD Vol 1)

(m)(i) *Tropik and/or the Landowner shall at the written request of the Lessee* made not less than three (3) months before the expiration of the term herby created and at the Lessee's expense *grant to the Lessee a further term for the lease of the said Premises* and the renewed term shall be for the period of another five (5) years subject to the like covenants and provisions as are herein contained and upon the same rental as stated herein.

(Emphasis added.)

**[51]** Based on the above, it clearly shows that the plaintiff has the right to determine whether to renew the said second lease agreement or not for a maximum of 30 years and the defendants are bound to renew the said second lease agreement until 2034 as long as the plaintiff has given a notice of renewal of the said second lease agreement to the defendants.

**[52]** The next question to be decided is whether the defendants' refusal to renew the said lease is valid and/or lawful.

**[53]** Upon scrutiny of the evidence and contemporaneous documents tendered in court, I find that the grounds given by the defendants to justify its decision not to renew the said second lease agreement were unreasonable and/or unlawful and thus the defendants have breached the said agreement and/or the said second lease agreement in not renewing the lease.

**[54]** The defendants through the testimony of DW1 had testified that the reason the defendants refused to renew the said lease for the remaining term is due to the plaintiff's failure to give the three months' notice to renew the said lease prior to expiration of the said second lease agreement on May 21, 2014. Hence, the plaintiff had breached clause 4.1(m)(i) of the said second lease agreement.

**[55]** I find that the issue of short notice given to the defendants was only brought up for the first time in three and a half years after the said second lease agreement had expired on May 21, 2014.

**[56]** I noticed that the defendants had never raised the issue of short notice to the plaintiff at any material times, not even the first defendant's letters dated September 1, 2014, October 1, 2014 and October 10, 2014 (see pp 268, 272 and 288 COBD Vol 1).

**[57]** To me, if the issue of short notice is the reason for the non-renewal of the said lease, the defendants ought to have replied the plaintiff's then solicitor's letter dated March 10, 2014 to inform the plaintiff that the renewal had been rejected.

**[58]** I find the defendants took five months to reply through a letter dated September 1, 2014 (see p 268 COBD Vol 1) but the reply did not state the issue of short notice as the reason for the non-renewal of the said lease.

**[59]** Therefore, I am of the opinion that the short notice of renewal served by the plaintiff is merely an afterthought by the defendants as it was never raised at the material time and only raised after the suit was filed.

**[60]** In *Kuwait Finance House Malaysia Bhd v Obnet Sdn Bhd & 2 Ors (and Another Suit)* [2017] AMEJ 1400; [2016] MLJU 1843, Asmabi Mohamad J (as she then was) had this to say:

> [61] The defendants and/or their solicitors had not at the earliest possible opportunity disputed the various letters issued by the plaintiff to dispute the legality and/or the existence of the so-called collateral agreement. Nowhere it is stated that the defendants were under no obligation to pay the instalment because of the existence of the collateral agreement. This could only lead to the conclusion that the defences put forth by the defendants were merely afterthought defences to be disregarded by this court. Therefore, the court is of the view that issue 2 should be answered in affirmative.

**[61]** Further, in *Lim Chong Watt v Wawasan Sinmaland Properties Sdn Bhd & 2 Ors* [2003] AMEJ 0103; [2003] MLJU 198 (at pp 21-23) Low Hop Bing J (as he then was) said:

> *The first defendant had from the execution of the JVA on June 26, 1998 to the filing of the affidavit in reply in encl (10) never raised the issue of the alleged oral misrepresentation*. The JVA was prepared by the first defendant's own solicitors who must have given proper legal advice that the use of the said land was agriculture and that it was essential to apply for subdivisional approvals. That must have been the reason why JVA has clearly defined "subdivisional approvals" to include, inter alia, a conversion of the use of the said land from agriculture to building.
>
> Further, the solicitor preparing the JVA has not affirmed an affidavit averring the existence of such alleged oral misrepresentation. Even at the time of the agreed six-month extension given by the plaintiff to whom the first defendant had paid a sum of RM15,000.00 by way of consideration the alleged oral misrepresentation had never been raised. *If the alleged oral misrepresentation had in fact been a true state of affairs, this allegation would have been raised at the first opportunity, but that was not to be the case here. The only irresistible inference that I can draw and which I hereby do is that this allegation is a red herring or an afterthought to prevent the plaintiff from obtaining summary judgment.*
>
> (Emphasis added.)

**[62]** Coming back to the facts of the present case and based on the authorities cited above, it is clearly shown that the issue of short notice is an afterthought as the defendants have failed to raise the issue at the earliest opportunity and waited for about three and a half years to raise this issue in their pleadings.

**[63]** Further, I find that based on the conduct of the plaintiff, the plaintiff has shown its intention to continue with the renewal of the said second lease agreement for 30 years. This can be seen from the early notice given by the plaintiff's then solicitors dated January 6, 2009 conveying its intention for the renewal of the said first lease agreement [see pp 226-227 COBD Vol 1) which states as follows:

> ... Our clients notify that the Lease is due to expire on 21st May 2009, and our clients would like to renew the Lease. As such we are instructed to hereby give your clients notice that our clients intend to renew the Lease upon its expiry on 21st May 2009 for another five (5) years pursuant to Clause 4.1 (m)(i) of the Lease agreement of 13th February 2003, and *thereafter for each renewal due*.
>
> (Emphasis added.)

**[64]** The words "thereafter for each renewal date" in the said letter dated January 6, 2009 clearly show that the plaintiff intended to renew the lease not only for the period of the next five years from May 21, 2009 to May 20, 2014 (i.e. five-year period for the said second lease agreement), but also thereafter for each of the following four renewable terms, i.e. third term from May 21, 2014 to May 20, 2019, fourth term from May 21, 2019 to May 20, 2024, fifth term from May 21, 2024 to May 20, 2029 and sixth term from May 21, 2029 to May 20, 2034.

**[65]** I find the plaintiff had conveyed to the defendants, the plaintiff's intention to renew the lease for the entire 30 years and I see no reason why the defendants still allege that they do not have any notice of the plaintiff's intention to renew the said second lease agreement.

**[66]** Further, I find that the plaintiff has also made a request to renew the said lease for the remaining years through the plaintiff's then solicitors' letter dated March 10, 2014.

> See pp 262-263 COBD Vol 1 which clearly stated as follows:
>
> > Our clients notify that they would like to renew the Lease upon its expiry. As such we are instructed to hereby give your clients notice that *our clients intend to renew the Lease upon its expiry on 21st May 2014 for another five (5) years pursuant to Clause 4.1(m)(i) of the Lease Agreement of 9th June 2010 and thereafter for each renewal due*.
> >
> > (Emphasis added.)

**[67]** Vernon Ong JC (now FCJ) in *United Overseas Bank (Malaysia) Bhd v Ocean Avenue Sdn Bhd* [2009] 2 AMR 625; [2008] 5 MLJ 500 had stated:

> [46] Learned counsel for the defendant also submitted that by a letter dated November 23, 2005 the plaintiff's solicitors purported to exercise the option on the plaintiff's behalf. *He argued that purported exercise was an exercise in futility as the plaintiff cannot be allowed to exercise the option twice*. Further learned counsel for the

defendant argued that the option does not allow any agent of the plaintiff to exercise the option on their behalf. *For the reasons adverted to earlier, the defendant's contention is misconceived. The plaintiff has already validly exercised the option vide their letter dated December 7, 2004. The subsequent letters of the plaintiff's solicitors merely reiterated the plaintiff's position.*

*Accordingly, as the option had already been exercised by the plaintiff, the defendant's contention is immaterial and devoid of merit*.

(Emphasis added.)

**[68]** Based on the above authority and the said letter dated March 10, 2014, it clearly shows the plaintiff's intention in the said letter dated January 6, 2019 to renew the said second lease agreement for the remaining years.

**[69]** Further, I find the defendants' conduct in not making any issues regarding the purported short notice given by the plaintiff shows that the defendants had waived the plaintiff's purported breach of clause 4(m)(i) of the second lease agreement for giving short notice to the first defendant.

**[70]** I find support in the case of *Magespare @ Mageswary a/p Muthukrishnan v YB Dato' Anpalagan a/l Ramiah & Anor (Moses @ Moses Pillai a/l R Susayan & Anor – Interveners)* [2009] 1 MLJ 403, at 432 where James Foong J (as he then was) has stated:

[95] In conclusion with regard to this issue, I find as a fact that the first defendant had not breached any of the terms in the partnership agreement. Thus, termination of this partnership under clause 24 of the partnership agreement cannot be sustained. However, as the plaintiff has given notice of termination, a right she possessed under clause 23, I rule that the partnership is terminated under this provision. *As I have said, there was short notice given to the first defendant for termination under this clause but since the first defendant did not take issue on this, I considered it waived and ceased to be an issue*.

(Emphasis added.)

**[71]** Further, I find there is no letter by the defendants which has specifically rejected the notice of renewal dated March 10, 2014.

**[72]** The Court of Appeal in *David Wong Hon Leong David v Noorazman bin Adnan* [1996] 1 AMR 7 at 13; [1995] 3 MLJ 283 at 289 held that:

In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 at 487:

"In *Wiedemann v Walpole (Motion for Judgment)* [1891] 2 QB 534 at 537, an action for breach of promise of marriage, it was held, *that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that*

*he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise*.

Lord Esher MR, in his judgment, remarked, 'Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise'. (Emphasis supplied.) Earlier, in his judgment, he said, '*Now there are cases of business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree*'."

(Emphasis added.)

**[73]** Therefore, I am of the view that the plaintiff has validly exercised its option to renew the said lease in accordance with clause 4.1(m)(i) of the said second lease agreement by way of the first renewal notice on January 6, 2009, which is already a notice given "not less than three months before the expiration of the term hereby created" under clause 4.1(m)(i) of the said second lease agreement.

**[74]** As a result, I find that the defendants have breached clause 4.1(m) of the said second lease agreement for their failure to renew the said lease for at least an extended term of five years from May 21, 2014 until May 20, 2019 upon the material time when the plaintiff has validly exercised its option to renew the said lease for the remaining years.

**[75]** Further, I find that DW1 in his testimony in court has confirmed that they have continued to receive gross revenue sharing and monthly rental from September 1, 2014 onwards until the trial date.

(See p 119 notes of evidence dated May 28, 2018)

JTV Alright. And, in fact you have continued to receive gross revenue sharing and monthly rental all the way from September 1, 2014 onwards until today. Right?

OH Yes.

**[76]** The evidence of DW1 clearly shows that the first defendant after five months and at a late stage went against his own conduct by alleging the "non-renewal" of the said lease via the first defendant's letter dated September 1, 2014.

**[77]** Thus, it is trite law that any action done by the lessor in accepting rent or doing of any act to show an intention to treat the lease as subsisting, it shall constitute a waiver of the right to forfeit the lease and/or waiver of breach of the covenant of the lease.

**[78]** I find support in this context, in the case of *Lim Lay Sooi & Anor v Merah Rubber Estates* (1931) Ltd [1951] 1 MLJ 246 at 248 where the Court of Appeal held that:

> *There can be no question in this case that at the times when these two sums of $450 were accepted by the respondents, in May and June, 1950, they were aware of the grounds of forfeiture*. The only question is whether they in fact accepted this money as rent or otherwise or whether they can be heard to say that they accepted it otherwise than as rent.
>
> *The appellants contended that the acceptance of this money was in law a waiver of the grounds of forfeiture*, notwithstanding that the receipt was accompanied by a protest that the money was not accepted as rent. They relied upon the decision in *Croft v Luniley*, *Davenport v The Queen*, *Mathews v Smalwood*, *Hartell v Blackler and Fuller's Theatre* and *Vaudeville Co v Rofe*.
>
> In *Matthews v Smallwood*, Parker J in discussing the question of waiver says:
>
> > *"It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve'. That is a position which he is not entitled to take up. If, knowing of the breach he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything*."
>
> (Emphasis added.)

**[79]** The above case law clearly shows that the Court of Appeal held that the appellants had accepted rent with knowledge of the cause of forfeiture and had thereby waived the forfeiture.

**[80]** Coming back to the facts of the present case, I find that the doctrine of estoppel operates against the defendants as once the defendants have accepted payment for monthly rental and gross revenue sharing as if the said lease has been renewed for at least another five years, the defendants are estopped from alleging that the said lease has not been extended or renewed for at least a further term of five years from May 21, 2014 until May 20, 2019.

**[81]** In *Global Indian Education Sdn Bhd v Neeta's Herbal International Sdn Bhd* [2016] 4 AMR 843 at 856; [2016] 6 MLJ 109 at 127, the Court of Appeal held as follows:

> [53] In view of that we concur with the plaintiff's submission that *having agreed to and having paid the said 15% increase in rental the defendant is now estopped from challenging the validity of the plaintiff's solicitors' notice dated May 10, 2012 and/or contending that the tenancy is valid up to January 19, 2015 or January 17, 2018* (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 AMR 2871; [1995] 3 MLJ 331; [1995] 4 CLJ 283).
>
> (Emphasis added.)

**[82]** From the evidence tendered in court, I find that the said payment for monthly rental and gross revenue sharing was made on the basis that the said lease is renewed and not on monthly basis as alleged by the defendants.

**[83]** Contemporaneous documents i.e. letters dated March 31, 2015, December 29, 2015, January 5, 2017 and April 5, 2017 (see pp 296, 312, 332-334 and 335-336 COBD Vol 1) to the first defendant clearly show that the payments made by the plaintiff to the first defendant were payments for monthly rental inclusive of gross revenue sharing and I noticed that there were no letters in reply from the first defendant to deny the same.

**[84]** Further, I find the plaintiff has specifically referred to the lease arrangement in the said four letters and two other letters dated January 20, 2013 and October 8, 2014 (see pp 284 and 286-287 COBD Vol 1) which clearly refer to the extension of lease and calculation of gross revenue sharing under the lease arrangement.

**[85]** It is also to be noted that the defendants never disputed or issued any reply to any of the letters above to refute the plaintiff's position that all the payments were made on the basis of monthly rental plus gross revenue sharing. This is confirmed by DW1 during trial (see pp 120-121 notes of evidence dated May 28, 2018).

**[86]** Therefore, I am of the view that the defendants are estopped from taking a contrary position or blowing hot and cold and alleged that the said payments were made on the basis of an oral agreement for monthly tenancy [see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 AMR 601; [2015] 2 MLJ 441].

**[87]** Further, I find that the payment for "gross revenue sharing" only exists through the said agreement, the said first lease agreement and/or the said second lease agreement and not through any purported unilateral "monthly rental" as alleged by the defendants. This is clear when such payments are

also in accordance with clause 1.1 of the said second lease agreement (see p 230 COBD Vol 1) (which provides that the monthly rental shall be RM3,500 per month) and also clause 5 of the said second lease agreement (see pp 240-241 COBD Vol 1), i.e. provisions relating to "gross revenue sharing".

**[88]** Case laws seem to suggest that the veracity of oral evidence must be tested by reference to the contemporaneous documentary evidence.

**[89]** Therefore, from the evidence presented before this court, it is clear that the said payments for monthly rental and gross revenue sharing were made on the basis that the said lease is still on foot and in effect.

**[90]** In *Dream Property* (supra) at p 621-622 (AMR); p 465 (MLJ), the Federal Court had stated:

> In relying, among others, on this letter to conclude that vacant possession was delivered on November 21, 2005, *the High Court and the majority of the Court of Appeal had applied the correct approach in testing the veracity of oral evidence by reference to the contemporary documentary evidence*. In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, Chang Min Tat FJ explained the importance for trial judge to have regard to the contemporary documents:
>
> > "Nevertheless, the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witness and their evidence. *He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statement in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.*"
>
> (Emphasis added.)

**[91]** Therefore, based on the above, I am of the opinion that having no answer from the first defendant for five months does not mean the renewal is not agreed upon. On the contrary, it is an acquiescence to the said renewal. It is also trite law that failure to reply letters is an admission of its contents as mentioned above.

**[92]** Having waived the purported breach by the plaintiff and further accepting the monthly rental and gross revenue sharing from the plaintiff with no issue at all, I am of the considered view that the defendants have treated the said second lease agreement as if it is still on foot and/or that the said lease has been renewed at least for the extended terms from May 21, 2014

until May 20, 2019 pursuant to clause 4.1(m)(i) of the said second lease agreement and are now bound by estoppel relying on such grounds to justify the non-renewal of the lease by the defendants.

**[93]** The defendants also justified their decision not to renew the said lease on the ground that the plaintiff was in breach of clause 3.1(f) when it failed to pay during the currency of the said second lease agreement its property assessment rate payable from 2008 to 2013.

**[94]** However, I find during the trial, DW1 has admitted that the issue of non-payment of property assessment rate is not a reason leading to the non-renewal of the said lease. To me such a change of position is a departure from the defendants' own pleadings in paragraph 9 of amended defence.

(See pp 57-58 notes of evidence dated May 28, 2018)

OH Your Honour, Your Lord, my reason, this is I think, in particularly referring to the property tax, property assessment part of it. What I'm saying that there is nothing to talk about renewal is because the lease already expired, because the plaintiff failed to serve the notice as they should when the lease expired. So I think this is basically go on the basis that if we were to go on the property tax assessment clause alone, I also have the right, if Your Lord say so, but my answer to the question and all my letter has stated very clearly to the plaintiff is, is a granting of a brand new lease. The lease already expired. *The property tax assessment it's only a breach; it got nothing to do with the renewal of the lease*.

JTV *Sorry, your last paragraph, "The property tax assessment is only a breach. It's got nothing to do with the renewal of the lease," you maintain that*?

OH And if ...

JTV *No, do you maintain that statement you just made – "the property tax assessment is just a breach it has got nothing to do with the renewal of the lease" – do you maintain what you just said*?

OH I'm just saying ...

JTV No, do you maintain what you just said?

OH I'm saying ...

JTV Do you maintain what you just said?

OH There is a breach of the agreement, yes.

JTV *And it's got nothing to do with the renewal of the lease. That's what you just said*.

OH *Yes*.

JTV Ok, you agree, fine. You maintain, yes. Alright, stop there. *I go back to my question but before that, just want to make it very clear, you just said that the property assessment is just a breach and it has nothing to do with the renewal of the lease. I asked you many times and you said you have maintained it. Ok, agree? Yes*?

OH *Yes.*

(Emphasis added.)

**[95]** From the above testimony of DW1, it clearly shows that there is no contractual basis for the defendants to not renew the lease by reason of this alleged non-payment of property assessment.

**[96]** This is because clause 4.1(m)(i) of the said second lease agreement does not provide that the purported non-payment of the assessment will prohibit renewal of the lease.

**[97]** Further, I find that any issue of non-payment is governed by clause 8.1 of the said second lease agreement where the lease can be determined only if there is non-payment of rental or gross revenue sharing and any non-performance or non-observance of covenants therein, where the first defendant can purportedly re-enter the said lease land.

**[98]** Further, I find that it is illogical to allege non-payment of assessment of five years from 2008 until 2013 when this encompasses even the period before the said second lease agreement, i.e. during the first lease agreement. I am of the view that if indeed the non-payment of the property assessment fees is the real reason for non-renewal of the said lease, the said first lease agreement ought not to be renewed as well.

**[99]** On top of that, I find that there is further no prior notice by the first defendant given to the plaintiff on the intention not to renew lease if property assessment is allegedly not paid.

**[100]** Based on the above, it is clear that the defendants have now conceded that the issue of non-payment of the property assessment fee has got nothing to do with non-renewal of the said lease and this left the defendants with no basis at all to justify the non-renewal of the said lease.

**[101]** Further I find that the plaintiff only received all the proper and relevant documentation for the property assessment fees on October 3, 2014 through the first defendant's letter dated October 1, 2014. Therefore, it is my view that there can be no breach on the plaintiff's part in not paying the property assessment fees prior to October 3, 2014, particularly when the first

defendant has failed to provide the documents from the authorities for payment of assessment to the plaintiff.

**[102]** The first defendant's allegation that the plaintiff has received the proper and relevant documentations in February 2014 by the first defendant's letter dated February 14, 2014, to me is baseless and not proven at all as throughout the whole trial, I find that the first defendant has failed to produce any evidence to prove the purported fact that the plaintiff has received the said letter dated February 14, 2014 as early as February 2014.

**[103]** Pursuant to s 103 of the Evidence Act 1950, the first defendant has the burden of proving the fact that the plaintiff has received the said letter dated February 14, 2014 as early as February 2014 if he wishes the court to believe in its existence.

**[104]** I am of the considered view that since the first defendant has failed to discharge the said burden, the first defendant's allegation that the plaintiff has received the proper and relevant documentations as early as February 2014 cannot be accepted by this court.

**[105]** Therefore, based on the above, I find that the defendants' allegation that the plaintiff has breached clause 3.1(f) of the said second lease agreement is devoid of merit.

**[106]** The next issue, I find that the defendants have raised two new allegations in its letter dated October 1, 2014 and November 10, 2014 (see pp 272 and 288 COBD Vol 1) prior to granting of a new lease to the plaintiff:

(i) That the lease period for 30 years' lease should begin on April 1, 2000 (date of purported payment first rental) and ought to purportedly end on March 31, 2030; and

(ii) The first defendant requires settlement of RM300,679.55 i.e. the purported loan and "any other sum" owing to them.

**[107]** In relation to the commencement date of the said lease, it is to be noted that:

(a) Form 15A dated February 13, 2003 entered into between the second defendant and the plaintiff showed that the said first lease agreement commenced from May 21, 2004 and expired on May 21, 2009 (see pp 220-223 COBD Vol 1).

(b) Form 15A dated June 9, 2010 entered between the plaintiff and the second defendant showed that the said second lease agreement began from May 21, 2009 until May 20, 2014 (see pp 248-251 COBD Vol 1).

(c) By virtue of s 206(1)(b) of the NLC the said first lease agreement only takes effect from the date of registration i.e. from May 21, 2004.

(d) Further, if there is indeed any dispute on the commencement date of the said lease, the defendants ought not to agree to and execute the relevant Form 15A of the NLC and to record that the said first lease agreement begins from May 21, 2004 and the said second lease agreement begins from May 21, 2009.

(e) The first defendant only raised such issue on the commencement date of the said lease by its letter dated October 1, 2014 after the parties have registered the said first lease agreement and the said second lease agreement with the Land Office in 2003 and 2010 respectively.

**[108]** Based on the above, I find that such an allegation is merely an afterthought by the defendants to justify their decision not to renew the said lease.

**[109]** This court is of the view that it is untenable for the defendants to rely on anything else apart from the said first lease agreement and/or the said second lease agreement to allege that the said lease commenced on April 1, 2000.

**[110]** In relation to the second new issue raised by the first defendant in the said letter dated October 1, 2014 (see p 272 COBD Vol 1) it is to be noted that:

(a) It was not provided in the said second lease agreement that it is a condition for the plaintiff to settle the said loan prior to renewing the said lease and therefore, it is wrongful for the first defendant to unilaterally impose such a condition in breach of the said second lease agreement;

(b) In any event, the said loan was purportedly advanced by the first defendant to the plaintiff vide the first defendant's letter dated December 29, 2000 (see p 173 COBD Vol 1) on the basis that it is an unsecured, interest-free loan with no fixed repayment terms; and

(c) The loan issue is a separate issue and should not be mixed up with the said lease issue at the material times.

**[111]** DW1 in his evidence in court relied on the title "grant of new lease" stated in the letters dated September 1, 2014, October 1, 2014 and November 10, 2014 (see pp 268, 272 and 288 COBD Vol 1) to allege that the first defendant is in effect "granting a new lease" to the plaintiff i.e. negotiating fresh terms of

tenancy with the plaintiff instead of talking about the renewal of the said lease pursuant to the said second lease agreement.

**[112]** However, upon perusal of the defendants' pleadings and contemporaneous documents in court, I find that such an allegation is merely an afterthought by the defendants for the following reasons:

(i) In paragraph 9 of the amended defence and counterclaim, the defendants referred to paragraphs 19, 27 and 44 of the statement of claim and pleaded that "the 1st Defendant's decision not to renew the lease for a further 5 year period, or alternatively to terminate the said second lease agreement, and to treat the lease as a monthly tenancy was legally justified";

(ii) The above paragraph clearly shows that the first defendant is in effect talking about the renewal of the said lease under the said second lease agreement (and not renegotiating fresh terms of new lease with the plaintiff) in the said letter dated September 1, 2014 (see p 268 COBD Vol. 1);

(iii) Paragraph 1 of the first defendant letter dated September 1, 2014 referred to the plaintiff's said letter dated March 10, 2014 as a reply and did not even refer to any allegation of "grant of new lease" and therefore, the said September 1, 2014 is in effect talking about renewal of the said lease pursuant to the said second lease agreement despite the title of the said letter is "Grant of new lease".

(iv) Besides, in paragraph 3 of the first defendant's letter dated October 1, 2014, the first defendant stated that:

> "*We note your request to enter into a new lease for a further term of 5 years*. However, we need to resolve the following outstanding issues with you first and *due to your breach of the Lease Agreement, the granting of a new* lease to you is subject to the approval of our Board of Directors."
>
> (Emphasis added.)

**[113]** In view of the aforesaid, I am of the considered view the contents of the said letters dated October 1, 2014 and November 10, 2014 clearly show that the first defendant is talking about the renewal of the said lease pursuant to inter-alia the said second lease agreement.

**[114]** Therefore, the defendants' decision whether to "grant a new lease" i.e. renewal of the said term ought to be based on inter-alia the said agreement, the said first lease agreement and/or the said second lease agreement and it

is my opinion that the defendants are not entitled to simply impose any new conditions or terms on the plaintiff which is beyond or outside the scope of the agreement between the plaintiff and the defendants.

*Whether there is oral agreement of monthly tenancy*

**[115]** The first defendant alleged in its letter dated September 1, 2014 (see p 268 COBD Vol 1) that in view that the lease has expired on May 21, 2014, the plaintiff is henceforth purportedly deemed as a "monthly tenant" with a monthly rental of "RM25,000.00".

**[116]** After perusing the evidence presented before this court, I find that there was no such agreement reached between the plaintiff and the defendants that the plaintiff agreed to pay a monthly rental of RM25,000 to the first defendant on the basis of a monthly tenancy.

**[117]** In fact, I find that DW1 has admitted during the trial that such purported arrangement was merely an attempt by the defendants to unilaterally impose such a term.

(See p 122 notes of evidence dated May 28, 2018.)

JTV *This is unilateral, isn't it? Because there was never an agreement to pay RM25,000. Agree*?

OH *Yes*.

(Emphasis added.)

**[118]** After conceding that there was never an agreement to pay RM25,000, DW1 further alleged that such oral terms of "monthly tenancy" was purportedly agreed between Janet Yeo (also known as "Lee Yoke Ching") (i.e. another shareholder of the plaintiff).

(See pp 123-124 notes of evidence dated May 28, 2018.)

JTV Mr Oh, I'm not going to argue with you. I'm going to proceed to the next question. Since you say there is now, these monthly oral terms is between who and who?

OH Between the other shareholder Janet Yoke and myself.

JTV I see. I notice that in this addendum, for the first time you mentioned this. 2018, today, 28th May, at Question and Answer No. 2. Who represented the parties? Lee Yoke Ching for plaintiff and I was defendant, sometime after September 1, 2014. You never mentioned this before. You agree with me that it was Lee Yoke Ching involved? Have you mentioned Lee Yoke Ching's nickname before in any other documents?

OH No.

JTV Not even in your main witness statement, isn't it?

OH Yes.

**[119]** I find that the name of Janet Yeo/Lee Yoke Ching was never mentioned anywhere in any other documents and/or in DW1's witness statement.

**[120]** From the above testimony of DW1, it is patently clear that the defendants had not only failed to prove through oral evidence but also through contemporaneous documents the alleged oral agreement. Thus, it is my finding that there was no oral agreement for purported monthly tenancy that had been agreed upon between the parties. The defendants have failed to discharged its burden of proof under s 103 of the Evidence Act 1950.

**[121]** For this very reason, an adverse inference under s 114(g) of the Evidence Act 1950 is invoked against the defendants for not bringing Janet Yeo/Lee Yoke Ching to court to prove there is an oral agreement for purported monthly tenancy that had been agreed upon between the parties.

**[122]** The Court of Appeal in *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 AMR 2984 at 2993; [1996] 3 MLJ 627 at 635 held:

> *He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, had denied even making one*. For this very reason, the adverse inference under s 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. *There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant*.
>
> (Emphasis added.)

**[123]** Based on the facts presented before this court, I am of the considered opinion that the first defendant had accepted monthly rental plus gross revenue sharing paid by the plaintiff to the first defendant until to date and the defendants' allegation that there is a monthly tenancy agreement is untenable.

**[124]** Based on the totality of the evidence presented before this court, it is my finding that the doctrine of equitable estoppels applies in the present case

to prevent the defendants from non-renewal of the said lease and/or alleging the plaintiff is a "monthly tenant" on the following grounds:

(i) The plaintiff has expended huge sum of monies and time in constructing and operating a Horse Ranch Resort, i.e. Riders Lodge since year 1999;

(ii) The defendants through DW1 clearly knew from the very beginning that the plaintiff intends to construct and operate a Horse Ranch Resort on the said land and huge sum will be expended onto the said lands;

(iii) In fact, Sennett (PW 1) has set out an estimated financial projection of "Riders Lodge" amounting to the investment sum of about RM3.2 million plus operating cost for initial months by way of a fax dated 18.11.1998 to DW1 (see page 123-127 COBD Vol 1). DW1 has also confirmed during the trial that he is aware of the said financial projections stated in the fax (see: DW1's testimony at p 23 notes of evidence dated May 28, 2018);

(iv) I find it irrational and if not, totally unbelievable that the plaintiff would have agreed to construct the said Horse Ranch Resort ("Riders Lodge") on the said lease land if there is no such representations and/or assurances that the defendants are to grant a long term lease to the plaintiff prior to the construction of the said Horse Ranch Resort;

(v) The defendants knew that the plaintiff intended to expend huge sum to construct and operate "Riders Lodge" on the said lease land and subsequently led the plaintiff to believe that the plaintiff will be given a long term lease on the said lease land prior to the construction and operation of "Riders Lodge"; and

(vi) Further, the plaintiff also continued to expend monies and effort to operate the Horse Ranch Resort under a lease arrangement after May 21, 2014 and relied on the remaining tenure of the 30 years lease promised from the outset.

**[125]** Therefore, I am of the considered view that the plaintiff is entitled to rely on the doctrine of "equitable estoppel" to prevent the non-renewal of the said lease by the defendants and at the very least, prevent the defendants from alleging that the plaintiff is merely a "monthly tenant".

**[126]** Based on the aforesaid, I am of the view that the plaintiff's right to remain on the said lease land for 30 years is protected by equity and the defendants have acted wrongfully in refusing the renewal of the said lease.

**[127]** It is not disputed that based on the above facts, I am of the opinion that the plaintiff is entitled to an order of specific performance against the defendants to renew the said lease for a further period of five years from May 21, 2014 until May 20, 2019 and thereafter until 2034.

**[128]** The relief of specific performance is based on ss 11 and 21(3) of the Specific Relief Act 1950 and I am satisfied that the plaintiff has fulfilled the criteria as envisaged in both sections above.

**[129]** I also find that there is a breach of the said agreement and the lease agreements by the defendants and also an attempt to disrupt the plaintiff's operations by causing uncertainties on the lease which the plaintiff depends upon for its livelihood.

**[130]** The first defendant as a shareholder has inexplicably acted against the interest of the plaintiff causing unnecessary issues and problems to the plaintiff. Such a behaviour is unreasonable and/or for the ulterior motive including conduct to prejudice the plaintiff's interest on the said lease land which is calculated to destroy the Horse Ranch business which depends entirely on the lease of the lease land where the said resort is built.

**[131]** Sennett (PW1) has given evidence of the fact of damage caused to the plaintiff in question and answer 50 of the plaintiff's witness statement (PWS1) as follows:

> Amongst others, the non-renewal of the said lease has affected the plaintiff as *without a registered lease, the plaintiff is not allowed to hire foreign workers*.
>
> The non-renewal of the said lease has *cost the plaintiff hundreds of thousands of Ringgit in hours of work and harassment to the plaintiff*, and this has all contributed to effecting the overall income of the Horse Ranch Resort.
>
> The non-renewal of the said lease also places the plaintiff in *great insecurity and stress*.
>
> The *legal fees* incurred is also unnecessary and further drained the company's working capital for business and expansion.
>
> (Emphasis added.)

**[132]** Based on the above, I am of the view that the plaintiff is entitled to an order for damages to be assessed by the court payable by the defendants to the plaintiff.

***The loan issue***

**[133]** Another subject matter of the suit herein is the loan sum of RM300,679.75, which was initially part of the debt due by the plaintiff to the Legends in respect of the works done by Legends for the plaintiff on the said lease land and subsequently assigned by the Legends to the first defendant vide a letter dated December 29, 2000 ("the said loan").

**[134]** The plaintiff seeks for a declaration under paragraph 51(iii) of the said amended statement of claim (SOC) that "*currently there is no sum due by the plaintiff to the first defendant*", whereas the defendants counterclaimed for the said sum of RM300,679.75 to be paid by the plaintiff to the first defendant.

**[135]** Based on the contemporaneous documents tendered in court, I am of the considered opinion, that the said loan was a long term loan given on the basis that it is unsecured loan with interest free and no fixed repayment terms.

**[136]** I find support in the letter issued by the first defendant to the plaintiff dated December 29, 2000 (see p 173 COBD Vol 1) which clearly stated that the first defendant hereby approve the advancement of the total amount of RM300,169.75 to the company (plaintiff) subject to the following terms:

(a) the loan will be given to the company as interest free;

(b) there will be no term of repayment; and

(c) it will be unsecured loan.

**[137]** It is also clearly stated in paragraph 3 of the plaintiff's members resolution dated December 30, 2000 (see p 175 COBD Vol 1) that "The balance of RM300,679.75 will be advanced to the company (i.e. plaintiff) as an interest free unsecured loan with no fixed term of repayment".

**[138]** DW1 also has testified during the trial that the term set out in the first defendant's letter dated December 29, 2000 was what was promised to the plaintiff at the very outset.

(See p 32 notes of evidence dated May 28, 2018.)

JTV Then as for the balance, "We hereby approve the advancement of total of RM300,679.75 to the company subject to the following terms. *The loan will be given to the company as interest free. There will be no terms of repayment and it will be unsecured loan". You agree with this, right, that this was what was promised at the very outset*?

OH *Yes*.

(Emphasis added.)

**[139]** DW1 also further testified that the terms set out in the plaintiff's resolution dated December 30, 2000 are indeed the contractual terms in respect of the said loan purportedly advanced by the first defendant to the plaintiff.

(See page 33 notes of evidence dated May 28, 2018.)

JTV It is binding on the material time, right, and by Riders Lodge giving you the 50,993 shares and by Riders Lodge's acceptance of the assignment at p 175, if you look at the p 175 of the same bundle, there is a resolution. *This is the contract for this loan, agree? These are the contractual terms i.e. the three items: loan will be given interest free, no terms of repayment, unsecured loan*?

OH *Yes*.

JTV And it's very clear because at p 175 there is a "Whereas", there on top, "the creditor Legends has written the company as informing exercise to holding company RM351,000. Then paragraph 2 " that which respect of work done, "paragraph 3, *Tropik has written to the company to inform it has accepted the assignment as further consent to accept amount of RM50,000 to be deemed paid, balance will be advanced as an interest free, unsecured loan, with no fixed rate terms of repayment". That's very clear, am I right*?

OH *Yes*.

(Emphasis added.)

**[140]** Even though there were inconsistencies in the plaintiff's financial reports, but DW1 agreed during the trial that the explanation note stated in the plaintiff's financial report for year 2006 is consistent with the contractual terms entered between the first defendant and the plaintiff (see p 1065 COBD Vol 4) (see DW1's evidence at pp 66-67 notes of evidence dated May 28, 2018).

JTV Ok, but before year 2007, the 2006 one which is at p 1065, at paragraph 12 says amount due to directors are unsecured, interest free with no fixed repayment terms included in other creditors and accruals amount to 382,000 due to shareholders of company. These amounts are interest free with no fixed repayment terms. So that's why you say it's inconsistent right?

OH Yes.

JTV *Yes, but this one is consistent with your contractual term. Am I right*?

OH *Yes*.

(Emphasis added.)

**[141]** Based on the above, I am of the view that the said loan was purportedly advanced by the first defendant to the plaintiff as an unsecured, interest free loan with no fixed repayment terms.

**[142]** The next question to be determined is whether the said loan is currently due and payable by the plaintiff to the first defendant (immediately repayable) in view that the said loan is unsecured interest free with no fixed repayment terms.

**[143]** Case laws seem to suggest that when a loan is unsecured, non-interest and has no fixed repayment terms, the said loan is repayable within a reasonable time of a request for repayment depending on the circumstances of the case and it is not repayable immediately.

**[144]** In *Kathryn Ma Wai Fong (f) v WTK Realty Sdn Bhd* [2015] MLJU 361, Lee Heng Cheong J (now JCA) held that:

> [28] Guidance is found in the case of *Wee Kah Lee v Silverdale Investment Pte Ltd* [2000] 4 SLR 428 which was relied upon by the plaintiff. This court finds that the facts of *Wee Kah Lee*'s case supra are relevant as there are some similarities to the present case. In *Wee Kah Lee*'s case supra, the plaintiff was one of the eight shareholders of the defendant who was the developer of a residential property. The plaintiff had given various loans to the defendant for a project as investment to enable the defendant to finance the purchase and development of the property. *The loans were interest-free, unsecured and there was no fixed term of repayment*. The plaintiff contended that the said loans were repayable on demand although there was no agreement on when they ought to be repaid. The defendant on the other hand contended that the loans advanced by the shareholders would be used to finance the purchase and development of the property and disagreed that the loans advanced would be repayable on demand. *Both the plaintiff and defendant stated there was no mention about the terms governing the loans other than that the said loans were interest-free, unsecured and having no fixed period repayment*.
>
> [29] As stated earlier, that there was no formal agreement as to when the various loans will be repaid to the shareholders of the defendant in the present case. In *Wee Kah Lee*'s case supra, *even though there were two repayments of loans by the defendant, the Singapore High Court still held that the advances to the defendant were not repayable* whereas in the present case, the plaintiff has failed to adduce any evidence of any repayment made to the deceased and the plaintiff, the plaintiff has no personal

knowledge of the agreement amongst the three brothers, and at all material times, was not a director nor shareholder.

[30] It is noted that the plaintiff had written two letters dated July 31, 2013 and August 12, 2013 respectively to the defendant, the defendant had promptly responded to the plaintiff's aforesaid letters vide the defendant's letters of August 6, 2013 and August 19, 2013 respectively. *This court agrees with the defendant's contention that the fact that a demand had been made does not mean that it is repayable immediately or repayable on demand. Guidance can be found in Wee Kah Lee's case supra where the court there held that, "a debtor could hardly be expected to pull out the requisite amount of cash from his wallet or to write a cash cheque instantaneously upon a demand or request for repayment". The court went further to hold that what would be reasonable depends on all the circumstances surrounding the loan, including the relationship between the parties, the purpose and the size of the loan.*

[31] *The Singapore High Court in Wee Kah Lee's case supra also held that in the absence of any term governing the time of repayment a loan would be repayable on demand or at least within a reasonable time of a request for repayment. The Singapore High Court was of the opinion that the two alternatives, i.e. repayment on demand or repayment within a reasonable time, in this context would mean the same thing, as a debtor could hardly be expected to pay instantaneously upon a demand or request for repayment. What would be construed as a "reasonable time" would depend on all the circumstances surrounding the loan, including the relationship between the parties, the purpose and the size of the loan.*

(Emphasis added.)

**[145]** Applying the principles of the aforesaid case to the present case herein, I find that it is similarly untenable for the first defendant to demand for the repayment of the said loan all at once from the plaintiff because the said loan was unsecured, interest free with no fixed repayment terms and the plaintiff cannot be expected to pay the whole sum all at once.

**[146]** I also find that it is unreasonable for the first defendant to demand for the immediate repayment of the said loan all at once after having regard to the circumstances of the present case as follows:

(a) The said loan of RM300,679.75 is part of the debt of RM352,672.75 (which was initially due from the plaintiff to the Legends and subsequently assigned by the Legends to the first defendant), to which a sum of RM50,993 is deemed paid by the issuance and allotment of 50,993 ordinary shares of RM1.00 each in the plaintiff to the first defendant. This is in fact an early repayment of part of the debt of RM351,672.75 and therefore, I am of the view that is untrue for the first defendant to paint the picture that the plaintiff has never ever made any payment to the first defendant for the debt due and owing by the plaintiff to the first defendant.

(b) Further, the plaintiff is generally making losses overall and especially in recent years and a demand for an immediate repayment of the said loan sum in very damaging and harmful to the plaintiff's business, operation and finances. The details of the plaintiff's profit/losses after taxation according to the plaintiff's audited account can be seen at pp 894, 908, 928, 947, 971, 1000 COBD Vol 3 and pp 1025, 1053, 1083, 1109, 1135, 1167, 1204 COBD Vol 4.

(c) DW1 also agreed during cross-examination that the company report shows that the plaintiff preponderantly has losses more than gains generally.

(See p 50 notes of evidence dated May 28, 2018.)

JTV And 1204, loss of RM204,000, correct? 1204, RM204,000. So the company report preponderantly has losses more than gains, you agree/Generally.

OH Yes.

**[147]** In *Tan Boo Seng v Ria Realiti Sdn Bhd* [2011] AMEJ 0330; [2011] 1 LNS 1405, Lee Heng Cheong J (now JCA) said that:

> [2] The said advances made by the shareholders, including the petitioner who was a shareholder and director of the respondent company at all material times, and not "outsiders". *All of the shareholders including the petitioner knew about the financial situation of the respondent company and that any untimely demand for the repayment of the said advances will worsen the financial situation and adversely affected the smooth operation of the respondent company. It will only make financial and commercial sense that the said advances are repayable as and when there are surplus funds in the respondent company. I find that all the shareholders including the petitioner knew or ought to know that the respondent companies requires the said advances as working capital for the development and operation of the respondent company's oil palm estates*.
>
> [3] *All shareholders/directors know very well and ought to know that plantation investment is capital intensive and the said advances is for the medium to long term period and that the various advances made by the shareholders/directors to the respondent company are for working capital and only repayable as and when there are surplus funds in the respondent company*.
>
> (Emphasis added.)

(See also *Lee Kok Heng & Anor v De Garden Development Sdn Bhd* [2014] AMEJ 0991; [2014] 1 LNS 898.)

**[148]** The above cases have held that capital advancements made by the shareholders of the company which are interest-free with no fixed

repayment terms are not repayable on demand, especially when the shareholders knew about the financial situation of the company and that any untimely demand for the repayment of the said advances will worsen the financial situation and adversely affect the smooth operation of the company.

**[149]** Eventhough, I noticed the said loan in the present case is not capital advancement but a loan made by the first defendant to the plaintiff, but I am of the view that the principles above should similarly apply to the first defendant who is a shareholder of the plaintiff and also, when the said loan was intended to be a long-term investment by the first defendant as confirmed by DW1 during the trial.

(See p 27 notes of evidence dated May 28, 2018.)

JTV Oh I see, ok. So because it is an investment and paid out in shares, where you actually invest in the company, I say to you that *this is actually a long term investment, agree*?

OH *Yes.*

(Emphasis added.)

**[150]** Furthermore, I find that the plaintiff is bound by clause 11.2 of the joint venture agreement dated March 31, 1999 ("the said JVA") (see p 714 COBD Vol 1) to repay the working capital advanced by the parties to the said JVA (i.e. Sennett, Lee Yoke Ching and her husband Yee Chee Yan – who are also the current shareholders of the plaintiff) to the plaintiff "as quickly as possible out of the initial operating revenue and on a proportionate basis".

**[151]** Sennett (PW1) has explained the term "as quickly as possible" stated in clause 11.2 of the said JVA during the trial as follows:

(See p 80 notes of evidence dated May 15, 2018.)

JTV Can you explain the last part? What it means "as quickly as posibble"? "Repaid as quickly as possible".

SENNETT "As quickly as possible". I think "quickly as possible" means *as timely and whenever there are any extra funds to repay that working capital loan*.

(Emphasis added.)

**[152]** Therefore, in view that the plaintiff has yet to make full repayment to the parties to the said JVA (which ought to be paid "as quickly as possible"

based on the surplus funds of the plaintiff), I am of the view that it is unreasonable for the first defendant to insist on immediate repayment of the said loan which was purportedly advanced by the first defendant on the basis that it is unsecured, interest-free with no fixed repayment terms only.

**[153]** As for the first defendant's allegation that there should not be a difference between the working capital advanced by the parties to the said JVA and the said loan as alleged by DW1 during trial (see p 37 notes of evidence dated May 28, 2018), I am of the view that such allegations are unsubstantiated and inconsistent with the clear terms of contemporaneous evidence set out in inter alia the said JVA, the said first defendant's letter dated December 29, 2000 (see p 173 COBD Vol 1) and the plaintiff's members' resolution dated December 30, 2000 (see p 175 COBD Vol 1).

**[154]** Based on the aforesaid reason, I am of the considered opinion that the defendants' counterclaim for the whole outstanding loan sum under paragraph 27(a) of the amended defence and counterclaim is untenable and must be dismissed.

**[155]** In paragraphs 27(a) and (f) of the amended defence and counterclaim, the defendants also counterclaimed for the caveat lodged by the plaintiff on the said lease land be removed and further counterclaimed for the compensation or damages for wrongfully or without reasonable cause entering or securing the entry of the said caveat from the plaintiff.

**[156]** Based on the factual matrix of this present case, I find that the plaintiff's caveat ought to remain on the said lease land as the plaintiff has satisfied the three requirements as enunciated by the Court of Appeal in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 AMR 969; [1995] 3 CLJ 520 as follows:

(a) The caveator has a caveatable interest in the land;

(b) There is a serious question to be tried; and

(c) On the balance of convenience the caveat should be extended until the disposal of the present suit herein.

**[157]** In the circumstances, I am of the view that the plaintiff has a true concern that the defendants may sell the said lease land (which is subdivided from the said land) to any other third party and/or deal with the said lease land in whatsoever manner which would gravely affect and/or seriously prejudice the plaintiff's legal interest in the said land, particularly when the plaintiff's sole business is opening the Horse Ranch business which depends entirely on the lease of the said lease land where the said resort is built.

**[158]** Hence, I am of the considered opinion that the caveat was correctly lodged in order to preserve the status quo and the plaintiff's caveatable interest towards the lease and the right to purchase the said lease land on a first right of refusal basis in the lease agreement.

**[159]** Further, the balance of convenience is in favour of the plaintiff because if the caveat is removed, the defendants are at liberty to deal with the said land and the relief for specific performance sought by the plaintiff in the present case may be rendered redundant in the event that plaintiff's claim is allowed by the court.

**Conclusion**

**[160]** Based on the aforesaid, I am of the considered opinion that the defendants have wrongfully refused to renew the said lease for at least another five years from May 21, 2014 until May 20, 2019 and thereafter until 2034 and hence, the plaintiff is entitled to an order of specific performance and also entitled to lodge a private caveat on the said lease land to protect the plaintiff's interests. Besides that, the first defendant has also wrongfully demanded for the settlement of the said loan all at once from the plaintiff.

**[161]** On the grounds above stated, I hereby allow the plaintiff's claim as set out in paragraph 51 of amended statement of claim and dismiss the defendants' counterclaim with costs of RM50,000.00 subject to payment of the allocatur fees.