MKC Corporate & Business Advisory Sdn Bhd v Cubic Electronics Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-1383–11 OF 2012
HADHARIAH SYED ISMAIL J
10 JUNE 2015

Civil Procedure — Documents — Without prejudice — Exceptions — When justice of the case requires it — Whether without prejudice letters admissible to prove deceitful act

Civil Procedure — Res judicata — Issue estoppel — Application to strike out action dismissed — Whether defendant can during trial raise again issue of res judicata which was raised during striking out application — Whether ruling in striking out action finally determined rights and liabilities of parties — Whether res judicata arose

Civil Procedure — Striking out — Application to strike out action — Res judicata — Application to strike out action dismissed — Whether defendant can during trial raise again issue of res judicata which was raised during striking out application — Whether ruling in striking out action finally determined rights and liabilities of parties — Whether res judicata arose

Contract — Breach — Termination — Innocent party's choice whether to accept repudiation or treat contract as still subsisting — Innocent party not accepting repudiation by suing for specific performance — Contracts Act 1950 s 40

Contract — Tenancy agreement — Breach — Whether payment of rental conditional upon delivery of vacant possession — Whether vacant possession a condition for performance of contract — Whether landlord in breach of tenancy agreement by refusing to hand over vacant possession — Letting out demised property to third party when earlier tenancy still subsisting — Whether purported termination by landlord wrongful — Whether landlord liable to pay damages — Assessment of damages payable

Evidence — Without prejudice communications — Admissibility — Exceptions — When justice of the case requires it — Whether without prejudice letters admissible to prove deceitful act

Landlord and tenant — Tenancy — Agreement — Breach — Whether payment of rental conditional upon delivery of vacant possession — Whether vacant possession a condition for performance of contract — Whether landlord in breach of tenancy agreement by refusing to hand over vacant possession — Letting out demised property to third party when earlier tenancy still subsisting — Whether purported termination by landlord wrongful — Whether landlord liable to pay damages

Tort — Fraud — Conspiracy — Whether deceit proven — Conspiracy to deprive plaintiff of benefits of agreement and to cause losses to plaintiff — Assessment of damages payable

The dispute between the plaintiff and the defendants arose from a tenancy agreement dated 12 August 2009 ('the agreement') entered into between the plaintiff and the first defendant. The agreement was for three years expiring on 11 August 2012. Under the agreement, the first defendant let out its property to the plaintiff at a monthly rental of RM250,000. The plaintiff was entitled to sublet the property to a third party and collect the rental proceeds. The second defendant was a director in the first defendant's company. The alleged breach related to delivery of vacant possession and payment of rental. The plaintiff claimed that the first defendant failed to give vacant possession for the entire property. The first defendant on the other hand claimed that the plaintiff failed to pay rental and refused to take vacant possession. The first defendant thus terminated the agreement. The plaintiff contended that the termination was invalid and sued the first defendant for breach of contract. Unknown to the plaintiff, whilst the agreement was still subsisting, the first defendant had entered into a tenancy agreement dated 14 January 2011 with the third defendant over the same subject property with monthly rental of RM116,099.25. Prior to that, the third defendant had entered into a subtenancy agreement dated 3 January 2011 with the fourth defendant with monthly rental agreed at RM1,486,070.40. The plaintiff alleged that the first and second defendants together with the third and fourth defendants had conspired to deprive the plaintiff of its rights under the agreement. As against all the defendants, the plaintiff alleged fraud, deceit and conspiracy to injure the plaintiff. The plaintiff sought to enforce its rights under the agreement and be put to its original position as if the agreement was performed. The first defendant submitted the issues of fraud and conspiracy had been raised in earlier striking out proceedings which had been dismissed. As such, it was argued that the plaintiff was estopped from relitigating or reasserting the same issues on the grounds of res judicata. The admissibility of certain without prejudice correspondence was also objected to.

Held, allowing the plaintiff's claim and dismissing the defendants' counterclaim with costs of RM2,000:

(1) Under the agreement, the first defendant had contracted to let the entire property to the plaintiff. Clause 5 of the First Schedule stated that vacant possession for the entire property shall be given to the plaintiff within six months from the date of the agreement ie on or before 12 February 2010. Only upon delivery of vacant possession of the entire property, the plaintiff was obligated to pay the rental. This was stated in cl 6(ii) of the First Schedule. Hence, vacant possession was a term and condition for the performance of the contract (see para 21).

(2) By failing to give full vacant possession, the first defendant had breached cl 5 of the first schedule of the agreement. Hence, the first defendant's contention that the plaintiff refused to take vacant possession was a lie. To the contrary, the truth was the first defendant had no intention to give vacant possession to the plaintiff. This was proved when the first defendant kept on giving empty promises to give vacant possession and at the same time entered into various agreements with the third defendant. With no vacant possession given, there was no duty on the plaintiff to pay the rental sum of RM250,000. The first defendant's contention that the plaintiff had failed to pay the rental was also a lie. The first defendant was the party who had breached the agreement. The first defendant was therefore liable to pay damages to the plaintiff (see para 28).

(3) In its termination letter dated 31 March 2011, the first defendant alleged they terminated the agreement because there was undue influence and/or undue pressure by the plaintiff. The burden was on the first defendant to prove either one or both of what it said. No evidence of such allegation was led by the first defendant's witnesses. They failed to discharge the burden. Coupled with the fact that the first defendant had breached the agreement, the first defendant had no valid grounds to terminate the agreement. The termination notice was not valid. The termination was wrongful (see para 29).

(4) Section 40 of the Contracts Act 1950 applied to the plaintiff. Under s 40, the plaintiff had the option of whether to accept the repudiation or treat the contract as still subsisting. In this case, the plaintiff chose the latter. The plaintiff did not accept the termination. This was confirmed when the plaintiff sued the first defendant for specific performance. Hence, the agreement was valid and effective until 11 August 2012 (see para 32).

(5) When the first defendant had let out the entire property to the plaintiff and the tenancy was still subsisting, the first defendant could not let out the same subject property, either in its entirety or a portion of it to any third party. The fourth defendant was estopped from arguing on the plaintiff's tenancy (see para 32).

(6) The fourth defendant's agreement dated 3 January 2011 was not valid because the third defendant was not the master tenant on 3 January

2011. How could the third defendant sublet to the fourth defendant on 3 January 2011 or earlier than that when the third defendant's tenancy agreement was entered on 14 January 2011. Also, how could the third defendant be a master tenant when the plaintiff's agreement is valid. Further, the third defendant had become the master tenant by unlawful means. DW3 ignored the plaintiff even though he knew about the plaintiff's tenancy. Hence, the agreement dated 3 January 2011 between the third defendant and fourth defendant was not valid. Similarly, the agreement dated 14 January 2011 between the first and third defendants was not valid (see para 32).

(7) Realising the amount of monies about to be made if the plaintiff signed an agreement with the fourth defendant, the first to third defendants decided to grab the monies for themselves. The deceit by the first, second and third defendants was proven (see para 33).

(8) The courts have recognised certain exceptions to the privilege when the justice of the case requires it. The without prejudice letters written by the first defendant showed that the first defendant had deceived the plaintiff. The first defendant could not use the without prejudice label to hide what they wrote when they had deceived the plaintiff. Hence, the without prejudice letters were relevant and admissible to prove the deceitful act of the first defendant (see paras 35 & 37).

(9) The sequence of events conclusively proved the defendants had conspired to deprive the plaintiff the benefits of the agreement and to cause losses to the plaintiff. This was proven beyond reasonable doubt. The defendants, were therefore liable to pay damages to the plaintiff (see para 38).

(10) There was nothing in law to stop the first defendant from raising res judicata at the trial even though it was raised before during the hearing of striking out application. When the originating summons was dismissed, it only meant the plaintiff's claim which rested on fraud and conspiracy to injure was not suitable to be decided by way of affidavit evidence. The judge had not made any ruling which finally determined the rights and liabilities of the parties. Therefore, res judicata did not arise (see para 52).

(11) The plaintiff's basis to claim for damages arose from both breach of contract and conspiracy to injure. The plaintiff was entitled to claim for RM1,236,070.40 a month, being rental received by the third defendant from the fourth defendant for the period from 1 January 2011 to 7 March 2012 because the rental proceeds rightly belonged to the plaintiff had the agreement been performed. The plaintiff was also entitled to claim for the same amount from the fourth defendant for the period from 8 March 2012 to 11 August 2012 because the agreement was valid until 11 August 2012 (see para 62).

(12) The plaintiff had proven its case of breach of contract against the first defendant and tort of conspiracy to injure against all the defendants. The defendants as the guilty parties were not entitled to gain any benefit from their own wrong (see para 68).

[Bahasa Malaysia summary

Pertikaian antara plaintif dan defendan-defendan berbangkit daripada perjanjian penyewaan bertarikh 12 Ogos 2009 ('perjanjian') yang dimasuki oleh plaintif dan defendan pertama. Perjanjian tersebut adalah bagi tempoh tiga tahun dan tamat pada 11 Ogos 2012. Di bawah perjanjian, defendan pertama menyewakan hartanahnya kepada plaintif dengan sewa bulanan RM250,000. Plaintif berhak untuk sewa semula hartanah tersebut kepada pihak ketiga dan mengutip hasil sewaan. Defendan kedua adalah pengarah syarikat defendan pertama. Pelanggaran yang didakwa berkenaan dengan penyerahan milikan kosong dan bayaran sewa. Plaintif mendakwa bahawa defendan pertama gagal untuk memberi milikan kosong bagi keseluruhan hartanah. Defendan pertama, sebaliknya, mendakwa bahawa plaintif gagal membayar sewa dan enggan mengambil milikan kosong. Dengan itu, defendan pertama menamatkan perjanjian tersebut. Plaintif menghujahkan bahawa penamatan tersebut tidak sah dan meyaman defendan pertama bagi pelanggaran kontrak. Tanpa pengetahuan plaintif, sementara perjanjian masih wujud, defendan pertama memasuki perjanjian sewa bertarikh 14 Januari 2011 dengan defendan ketiga ke atas hartanah yang sama dengan sewa bulanan sebanyak RM116,099.25. Sebelum itu, defendan ketiga telah memasuki perjanjian penyewaan semula bertarikh 3 Januari 2011 dengan defendan keempat dengan sewa bulanan yang dipersetujui sebanyak RM1,486,070.40. Plaintif menghujahkan bahawa defendan pertama dan kedua bersama-sama dengan defendan ketiga dan keempat telah berkonspirasi untuk menafikan plaintif akan haknya di bawah perjanjian tersebut. Terhadap semua defendan, plaintif mendakwa penipuan dan konspirasi untuk mencederakan plaintif. Plaintif memohon untuk menguatkuasakan haknya di bawah perjanjian dan dikembalikan kepada kedudukan asal seolah-olah perjanjian dilaksanakan. Defendan pertama menghujahkan bahawa isu penipuan dan konspirasi telah dibangkitkan dalam prosiding pembatalan terdahulu telah ditolak. Dengan itu, dihujahkan bahawa plaintif diestop daripada melitigasikan atau menegaskan isu yang sama atas dasar res judicata. Kebolehterimaan surat-menyurat tanpa prejudis juga dibantah.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan-defendan dengan kos sebanyak RM2,000:

(1) Di bawah perjanjian tersebut, defendan pertama telah berkontrak untuk menyewakan keseluruhan hartanah kepada plaintif. Klausa 5 Jadual Pertama menyatakan bahawa milikan kosong bagi keseluruhan hartanah hendaklah diberikan kepada plaintif dalam tempoh enam bulan dari

tarikh perjanjian iaitu pada atau sebelum 12 Februari 2010. Hanya apabila milikan kosong keseluruhan hartanah diserahkan sahaja barulah plaintif berkewajipan untuk membayar sewa. Ini dinyatakan dalam klausa 6(ii) Jadual Pertama. Oeh itu, milikan kosong adalah terma dan syarat bagi pelaksanaan kontrak (lihat perenggan 21).

(2) Dengan kegagalan untuk memberi milikan kosong, defendan pertama telah melanggar klausa 5 Jadual Pertama perjanjian. Oleh itu, hujahan defendan pertama bahawa plaintif enggan mengambil milikan kosong merupakan satu penipuan. Sebaliknya, defendan pertama sebenarnya tidak mempunyai niat untuk memberi milikan kosong kepada plaintif. Ini dibuktikan apabila defendan pertama sering memberikan janji kosong untuk menyerahkan milikan kosong dan pada masa yang sama, memasuki pelbagai perjanjian dengan defendan ketiga. Tanpa penyerahan milikan kosong, tiada kewajipan ke atas plaintif untuk membayar jumlah sewa sebanyak RM250,000. Hujahan defendan pertama bahawa plaintif gagal membayar sewa juga satu penipuan. Defendan pertama adalah pihak yang melanggar perjanjian. Oleh itu, defendan pertama bertanggungan untuk membayar ganti rugi kepada plaintif (lihat perenggan 28).

(3) Dalam surat penamatan bertarikh 31 Mac 2011, defendan pertama mendakwa bahawa mereka menamatkan perjanjian kerana terdapat pengaruh tidak wajar dan/atau tekanan tidak wajar oleh plaintif. Beban terletak pada defendan pertama untuk membuktikan salah satu atau kedua-dua yang dinyatakan. Tiada keterangan mengenai dakwaan sedemikian dikemukakan oleh saksi-saksi defendan pertama. Mereka gagal melepaskan beban tersebut. Ditambah dengan fakta bahawa defendan pertama telah melanggar perjanjian tersebut, defendan pertama tidak mempunyai alasan kukuh untuk menamatkan perjanjian tersebut. Notis penamatan adalah tidak sah (lihat perenggan 29).

(4) Seksyen 40 Akta Kontrak 1950 terpakai kepada plaintif. Di bawah s 40, plaintif mempunyai pilihan untuk sama ada memberikan repudiasi atau menganggap kontrak tersebut sebagai masih wujud. Dalam situasi ini, plaintif memilih pilihan kedua. Plaintif tidak memilih untuk menamatkannya. Ini disahkan apabila plaintif menyaman defendan pertama bagi pelaksanaan spesifik. Oleh itu, perjanjian masih sah dan berkuat kuasa hingga 11 Ogos 2012 (lihat perenggan 32).

(5) Apabila defendan pertama menyewakan keseluruhan hartanah kepada plaintif dan sewaan masih wujud, defendan pertama tidak boleh menyewakan hartanah yang sama, sama ada secara keseluruhannya atau sebahagian daripada kepada mana-mana pihak ketiga. Defendan keempat diestop daripada menghujahkan mempertikaikan sewaan plaintif (lihat perenggan 32).

(6) Perjanjian defendan keempat bertarikh 3 Januari 2011 tidak sah kerana defendan ketiga bukan tuan punya sewa pada 3 Januari 2011. Bagaimana mungkin defendan ketiga sewa semula kepada defendan 3 Januari 2011 atau lebih awal dari itu sedangkan perjanjian penyewaan defendan ketiga dimasuki pada 14 Januari 2011. Tambahan lagi, bagaimana mungkin defendan ketiga menjadi seorang tuan punya sewa sedangkan perjanjian plaintif adalah sah. Selanjutnya, defendan ketiga menjadi tuan punya sewa melalui cara yang tidak sah. DW3 mengabaikan plaintif walaupun dia tahu mengenai sewaan plaintif. Oleh itu, perjanjian bertarikh 3 Januari 2011 antara defendan ketiga dan keempat tidak sah. Perjanjian bertarikh 14 Januari 2011 antara defendan ketiga dan keempat juga tidak sah (lihat perenggan 32).

(7) Menyedari bahawa jumlah wang akan diperolehi sekiranya plaintif menandantangani satu perjanjian dengan defendan keempat, defendan pertama dan ketiga berkeputusan untuk mengaut wang tersebut untuk diri mereka sendiri. Penipuan oleh defendan pertama, kedua dan ketiga berjaya dibuktikan (lihat perenggan 33).

(8) Mahkamah memperakui beberapa pengeculian kepada keistimewaan ini apabila keadilan kes mengkehendaki sedemikian. Surat-menyurat tanpa prejudis yang ditulis oleh defendan pertama menunjukkan bahawa defendan pertama telah menipu plaintif. Defendan pertama tidak boleh menggunakan label tanpa prejudis untuk menyembunyikan apa yang mereka tulis semasa mereka menipu plaintif. Oleh itu, surat-surat tanpa prejudis adalah relevan dan boleh diterima untuk membuktikan tindakan penipuan oleh defendan pertama (lihat perenggan 35 & 37).

(9) Urutan peristiwa secara kesimpulannya membuktikan bahawa defendan-defendan telah berkonspirasi untuk menafikan plaintif akan faedah-faedah perjanjian dan menyebabkan kerugian kepada plaintif. Ini dibuktikan melampaui keraguan munasabah. Defendan-defendan dengan itu bertanggungan untuk membayar ganti rugi kepada plaintif (lihat perenggan 38).

(10) Tiada apa-apa di bawah undang-undang untuk menghalang defendan pertama daripada membangkitkan res judicata semasa perbicaraan walaupun ia dibangkitkan semasa perbicaraan permohonan pembatalan. Apabila saman pemula ditolak, ia hanya bermaksud bahawa tuntutan plaintif yang bersandarkan penipuan dan konspirasi untuk mencederakan tidak sesuai untuk diputuskan melalui keterangan afidavit. Hakim tidak membuat apa-apa penghakiman yang akhirnya memutuskan hak dan liabiliti pihak-pihak. Oleh itu, res judicata tidak berbangkit (lihat perenggan 52).

(11) Asas plaintif-plaintif untuk menuntut ganti rugi berbangkit daripada kedua-dua pemecahan kontrak dan konspirasi untuk mencederakan.

Plaintif berhak untuk menuntut RM1,236,070.40 sebulan, iaitu sewa yang diterima oleh defendan ketiga daripada defendan keempat bagi tempoh 1 Januari 2011 hingga 7 Mac 2012 kerana hasil sewaan sebenarnya milik plaintif sekiranya perjanjian tersebut dilaksanakan. Plaintif juga berhak untuk menuntut jumlah yang sama daripada defendan keempat bagi tempoh 8 Mac 2012 hingga 11 Ogos 2012 kerana perjanjian sah hingga 11 Ogos 2012 (lihat perenggan 62).

(12) Plaintif telah membuktikan kes pelanggaran kontrak terhadap defendan pertama dan tort konspirasi untuk mencederakan terhadap semua defendan-defendan. Defendan-defendan sebagai pihak yang bersalah tidak berhak untuk memperolehi manfaat daripada kesalahan mereka sendiri (lihat perenggan 68).]

Notes

For cases on admissibility, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 3274–3289.

For cases on agreement, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1271–1273.

For cases on application to strike out action, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8809–8847.

For cases on breach, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7025–7030.

For cases on conspiracy, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 957–957.

For cases on issue estoppel, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7931–7957.

For cases on termination, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3804–3826.

For cases on without prejudice, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3330–3331.

Cases referred to

Arab Malaysian Finance Bhd v Kah Motor Co Sdn Bhd [2010] 5 MLJ 10, CA (refd)

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697; [2007] 6 CLJ 93, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (refd)

Dato Mohamad Salim Fateh bin Fateh Din v Nadeswaran a/l Rajah (No 1) [2012] 10 MLJ 203, HC (folld)

Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors [1998] 3 MLJ 422, HC (refd)

Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors [1979] 2 MLJ 224, FC (refd)

Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610; [2010] 1 AMR 285, CA (refd)
Len Min Kong v United Malayan Banking Corp Bhd and another appeal [1998] 2 MLJ 478; [1998] 2 CLJ 879, CA (refd)
MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals [1995] 2 MLJ 493, CA (refd)
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17, FC (refd)
Rush & Tompkins Ltd v Greater London Council and another [1989] AC 1280; [1988] 3 All ER 737, HL (refd)
Subramaniam a/l Paramasivam & Ors v Malaysian Airline System Bhd [2002] 1 MLJ 45; [2002] 1 CLJ 230, HC (refd)
Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors [1995] 1 MLJ 39, HC (folld)
Tanalachimy a/p Thoraisamy & Ors v Jayapalasingam a/l Kandiah & Ors (sued as liquidators of the Great Alonioners Trading Corp Bhd) and another appeal [2014] 4 MLJ 85, CA (refd)
Thuan Lor Holdings Sdn Bhd lwn Khairoon Bee bt Abdul Karim [1995] MLJU 472, HC (folld)
Unilever plc v The Procter & Gamble Co [2001] 1 All ER 783, CA (refd)

Legislation referred to

Contracts Act 1950 ss 74, 40
Companies Act 1965
Rules of Court 2012 O 18 r 19(1)

Justin Voon (CT Lee with him) (Justin Voon Chooi & Wing) for the plaintiff.
Kevin Prakash (Mohanadas Partnership) for the first defendant.
Ganesh (Loges with him) (Hakem Arabi & Assoc) for the third defendant.
Mohamad Farid (Hamidi & Farid) for the fourth defendant.

Hadhariah Syed Ismail J:

INTRODUCTION

[1] The dispute between the plaintiff and the defendants arises from a tenancy agreement dated 12 August 2009 entered into between the plaintiff and the first defendant. The agreement is for three years expiring on 11 August 2012. Under the agreement, the first defendant let out its property measuring 1,234,197 sqft to the plaintiff at a monthly rental of RM250,000. It is the term of the agreement that the plaintiff is entitled to sublet the property to a third party and collect the rental proceeds. The existence of the agreement were made known by the first and second defendant to the third and fourth defendant. The second defendant is the director in the first defendant's company. It was alleged that the plaintiff had failed to pay the rental and refused to take vacant possession. By its solicitors letter dated 31 March 2012, the first defendant

terminated the agreement. The plaintiff contends it was the first defendant who had breached the agreement by failing to give vacant possession. The plaintiff plead the termination is invalid and sued the first defendant for breach of contract. Unknown to the plaintiff, whilst the agreement is still subsisting, the first defendant had entered into a tenancy agreement dated 14 January 2011 with the third defendant over the same subject property with monthly rental of RM116,099.25. Prior to that, the third defendant had entered into a subtenancy agreement dated 3 January 2011 with the fourth defendant with monthly rental agreed at RM 1,486,070.40. The plaintiff alleged that the first and second defendants together with the third and fourth defendants had conspired to deprive the plaintiff of its rights under the tenancy agreement dated 12 August 2009. As a result of the defendants' unlawful act, the plaintiff has suffered losses. As against all the defendants, the plaintiff alleged fraud, deceit and conspiracy to injure the plaintiff. Vide this action, the plaintiff sought to enforce its rights under the agreement and be put to its original position as if the contract is performed. The issues before the court are: (i) whether the first defendant had breached the tenancy agreement dated 12 August 2009; (ii) whether the tenancy agreement is effective until 11 August 2011; (iii) whether the defendants had conspired to injure the plaintiff and (iv) whether the plaintiff is entitled to the reliefs claimed herein.

THE PARTIES

[2] The plaintiff is a private limited company incorporated under the Companies Act 1965 with a registered address at 49-B, Jalan Melaka Raya 8, Taman Melaka Raya, 75000 Melaka. The first defendant is a private limited company incorporated under the Companies Act 1965 and has a registered address at Level 8, Symphony House, Blok D13 Pusat Dagangan Dana 1, Jalan PJU 1A/46, 47301 Petaling Jaya, Selangor. The first defendant was wound up by the Shah Alam High Court Order dated 25 July 2011 under Shah Alam High Court Companies Winding Up No MT(FLJC)-28–457 of 2010. Pursuant to the said winding up order, Mr Mok Chew Yin and Mr Gan Ah Tee of Messrs BDO Consulting Sdn Bhd were appointed as joint liquidators of the first defendant. The plaintiff had obtained leave of the court to file this action against the first defendant. The second defendant is one of the directors of the first defendant. The second defendant is also the principal officer of the first defendant before the first defendant was wound up. The second defendant is a bankrupt. The third defendant is a private limited company incorporated under the Companies Act 1965 with its registered address at 37–1, Tingkat 1, Jalan Kemasik Senawang 7, Jalan Taman Komersial Senawang, Seremban, Negeri Sembilan. The fourth defendant is incorporated under the Universities and University Colleges Act 1971, with an address at Hang Tuah Jaya, Durian Tunggal, Melaka.

A BACKGROUND FACTS

[3] The first defendant is the registered owner of the entire land held under PM 2895 Lot 16658 Mukim Bukit Katil, Daerah Melaka Tengah, Melaka,previously held under HS(M) 725, PT No 6960, Mukim Bukit Katil, Melaka ('the said property') until the said property was sold to the fourth defendant's subsidiary company, Neraca Niaga Sdn Bhd on 23 January 2013. The said property was charged to OCBC Bank (M) Bhd vide Presentation No 7688/2007. At all material times, the first defendant is represented by the second defendant as the party having the largest interest in the first defendant where the second defendant is the majority shareholder. During the discussion and negotiation between the plaintiff and the first defendant, the first defendant represented to the plaintiff the followings:

(a) the first defendant needs funds to settle its debts to OCBC Bank (M) Bhd (OCBC) and Malaysia Debt Ventures Bhd (MDV);

(b) the first and the second defendant requires help from the plaintiff to generate income for the first defendant;

(c) the second is the personal guarantor for most of the first defendant's debt and therefore he requires assistance from the plaintiff to either purchase the said property and/or to rent the said property and even if the said property could not be sold (because it requires consent from MDV and/or consent from the court), the first defendant requires the said property to be rented and needs rental proceeds of at least RM250,000 to pay towards the account of OCBC;

(d) the first and the second defendant also informed the plaintiff that should the plaintiff agree to help the first defendant, the first defendant will enter into a tenancy agreement with the plaintiff first and then a sale and purchase agreement for the said property, wherein if the sale and purchase of the said property could not materialise, the said tenancy agreement is still effective;

(e) the first and the second defendant also represented to the plaintiff that the plaintiff will be given a tenancy with options in the long term with the first defendant wherein the said tenancy is subject to a further tenancy for four further terms of which each term is for a period of three years; and

(f) the first and the second defendant also agreed that six months will be specified in the tenancy agreement for vacant possession to be given which will be extended if necessary. They also informed and gave assurance to the plaintiff that the said tenancy agreement cannot be terminated and will follow the agreed terms.

[4] Believing the representations stated in paras (a)-(f) above were true, the plaintiff entered into a tenancy agreement dated 12 August 2009 with the first defendant. The salient terms of the agreement are:

(a) the tenancy is for three years commencing from 12 August 2009–11 August 2012;

(b) agreed monthly rental payable by the plaintiff is RM250,000;

(c) vacant possession is to be delivered to the plaintiff not later than six months from the date of the agreement ie on or before 11 February 2010;

(d) the plaintiff could sublet the said property or any part thereof to a third party without notice to the first defendant during the tenure of the said tenancy for the purpose of commercial development, education, industrial or related use thereof deem fit by the plaintiff; and

(e) the buildings built on the said property rented to the plaintiff consist of ten buildings as follows:

(i) Manufacturing Admin 1;

(ii) Admin 1, Admin 2 and Admin 3;

(iii) Logistic 1 & Logistic 2; and

(iv) Factory 1, Factory 2, Factory 3 and Factory 4.

(f) the area rented by the plaintiff is 1,234,197 sqft.

(g) the first defendant agreed to inform all existing tenant at the time ie IAC Manufacturing (M) Sdn Bhd ('IAC') and Mitsui-Suko Sdn Bhd ('Mitsui') regarding the said tenancy and agreed to obtain written confirmation from IAC and Mitsui that they will pay the rental to the plaintiff as if the plaintiff is the party replacing the first defendant in the tenancy agreement between the first defendant and IAC dated 6 February 2009 and between the first defendant and Mitsui dated 15 December 2006; and

(h) the first defendant cannot terminate the tenancy agreement during the tenure of the said tenancy except if the plaintiff had breached any of the terms of the said agreement.

[5] Pursuant to the agreement the plaintiff paid a security deposit of RM500,000 and utility deposit of RM50,000 to the first defendant.

THE PLAINTIFF'S CASE

[6] Three witnesses testified for the plaintiff. The main witness is Mr Chee Ho Chun ('PW1'), one of the directors in the plaintiff's company. He narrated

the events that transpired between the parties as follows. The first defendant failed to give vacant possession by 11 February 2010. The parties then mutually agreed to an extension of six months until 11 August 2010 for vacant possession to be delivered to the plaintiff. At the material time, the said property were sublet by the first defendant to some tenants. The list of tenants and the amount of rental collected from each subtenant is shown in the table below.

Premise	Area (ft2)	Tenant	Monthly Rental (RM)	Service Charge (RM)	Tenancy Period	Nature of Business
Logistic - 2	11,000	Mitsui Soko	10,920	550	Apr10-Sep10	3-PL, storage
Factory 3, Zone -1	10,400	Hampshire	11,600	6,760	Mar10-Aug10	Aero parts mfg
Factory 3, Zone -2	4,800	CLF	6,240	0	Sep08-Aug10	Training services
Factory 4, Zone - 10	3,500	CMO-Azotech	2,800	0	Mar09-Aug10	LCD TV parts storage
Logistic-2 store	9,600	UTeM	9,600	0	Sep09-Aug10	Storage
Logistic-1 store	100,000	IAC	80,000	0	Till completion Of S& P	Aero parts mfg
Factory 4 & Mfg Adm Factory 4 Warehouse Manufacturing Adm 1	 33,000 20,000 9,820 62,820	 Cubic Elec/CMO	 39,600 18,000 11,784 69,384	0	Apr-Sept 10	Production & Office
		Total	190,544.00	7,310.00		

[7] The table show the total monthly rental collected by the first defendant from its subtenants is RM190,544. Around the end of March 2010, the first and second defendant told the plaintiff that vacant possession of the entire property will be given to them in April 2010. However, since the first defendant had yet to arrange for all rentals from its subtenants in the said property to be assigned to the plaintiff, the first and second defendants agreed that the monthly rental payable by the plaintiff to the first defendant while waiting for the assignment of the subtenants to the plaintiff is RM250,000 – RM190,544 = RM59,456. Believing it would get vacant possession in April, the plaintiff, through its solicitor's letter dated 24 March 2010 issued a MBB Cheque No 603988 for the sum of RM59,456 to the first defendant's solicitors and was duly acknowledged receipt by the first defendant. In April, situation remain the same. No full vacant possession was given, instead, the first defendant gave only the keys to the main gate (Post 1) and lobby office (Admin 3) to the plaintiff on 9 April 2010. Whilst waiting for the assignment, the plaintiff continue paying RM59,456 rental to the first defendant in September

2010 because the first defendant had represented that vacant possession will be given in September. This payment also was duly acknowledged receipt by the first defendant. In September 2010 again, vacant possession for the entire property was not given to the plaintiff. Nevertheless, the first and second defendant requested the plaintiff to pay RM59,456 for the month of October 2010 which the plaintiff did. On 23 June 2010, receiver and manager was appointed for the first defendant. But the plaintiff knew about it only on 8 October 2010 when they received a letter dated 21 September 2010 from the receiver and manager. In the said letter of 21 September 2010, the first defendant had stated that the tenancy agreement is still subsisting, except that the rental should be made payable to the receiver and manager as agent of the first defendant and the cheques should be made payable to 'Cubic Electronics Sdn Bhd — In Receivership'. After that, the plaintiff received the first defendant's receiver and manager's letter dated 12 October 2010 which alleged that since June 2010, the second defendant had no authority to negotiate with the plaintiff and that the first defendant will inform the plaintiff when wilt the tenancy be 'recommenced'. On receipt of the 12 October 2010 letter, immediately, PW1 wrote to the first defendant's receiver and manager to state that the correct position is the tenancy is still subsisting and it is only payment of rental that has been withheld pending delivery of vacant possession. On 28 October 2010 at about 10.30am, PW1 together with the plaintiff's business associate and joint venture partner went to the said property. He was stopped from entering the said property by the security guard. Apparently, the guard was instructed by the first defendant not to allow any representative from the plaintiff to enter the said property. With the assistance of the second defendant, PW1 gain entry to the said property. Vide a letter dated 2 November 2010, the first defendant via its receiver and manager informed the plaintiff that the first defendant will use the two months' rental of RM118,912 (RM59,456 x 2) paid by the plaintiff for the months of September and October 2010 as part of monthly rental for November 2010 and in respect of the balance monthly rental for the month of November 2010, the first defendant will discuss with the plaintiff since some of its tenancy with the subtenants had expired. Once he gain entry into the said property, PW1 did the followings:

(a) installed the plaintiff's signboards at the said property;

(b) notified the existing tenants of the said property that the plaintiff is the master tenant of the property. One of the subtenant is the third defendant who rented a portion of the property measuring 3500 sqft; and

(c) the plaintiff enters into a subtenancy agreements as follows:

(i) agreement dated 15 December 2010 with PPC Marine System Sdn Bhd, subletting certain part of Factory 4 at the monthly rental of RM52,800. This subtenancy was acknowledged by the first defendant. The tenancy of PPC Marine System Sdn Bhd had

A expired in the end of July 2011 but the rental proceeds for June 2011 and July 2011 were taken by the first defendant. This fact is admitted by the first defendant's witness, DW1; and

(ii) agreement dated 1 April 2011 with Protection Technologies (M) Sdn Bhd, subletting certain part of Factory 3 at a monthly rental of RM19,104 and RM3,840 for a period of two years expiring on 31 March 2013. Rental was subsequently seized by the first defendant.

[8] From 9 November–18 December 2010, there were exchanged of letters between the plaintiff and the first defendant (via its receiver and manager) which record the numerous issues pertaining to the hand over of vacant possession to the plaintiff. With no sign of vacant possession of the entire property will be delivered, the plaintiff did not pay further rental to the first defendant. Thereafter, the plaintiff came to know that the receiver and manager of the first defendant was discharged on 24 December 2010. Following the discharge of the receiver and manager, the plaintiff dealt with the first and second defendants and reminded them that the tenancy agreement is still in force. Vide a letter dated 3 January 2011, the plaintiff notified the first defendant of its intention to take full possession of the property in January 2011. The plaintiff also sent a letter dated 6 January 2011 to the third defendant to remind them that the plaintiff is the master tenant and that the third defendant need to sign a fresh subtenancy agreement with the plaintiff. Then, on 1 February 2011, PW1 received a without prejudice email from the second defendant informing the plaintiff about the first defendant's intention to replace the said agreement with a fresh tenancy agreement, allegedly on the basis that the third defendant had intimated to the first defendant of its intention to be the 'White Knight' of the first defendant. In the said email, the first defendant proposed to let out only Logistic 2, Factory 3 and Factory 4 with a total area of 379,200 sqft at RM0.25 per sqft to the plaintiff. The plaintiff disagree with the first defendant's proposal. Similar request was repeated via the first defendant's solicitors Messrs Chee Siah Le Kee & Partners without prejudice letter dated 16 February 2011. Thereafter, the first defendant, through its solicitors Messrs Chee Siah Le Kee & Partners again wrote to the plaintiff's solicitors, Messrs Moi, NK Koh & Chee a without prejudice letter dated 18 March 2011, making a proposal to the plaintiff to exclude certain portions of the said property, namely Admin 1, 2 and 3, Factory 1, Factory 2, Logistic 1 and Manufacturing Admin 1 from the tenancy agreement. This proposal also was rejected by the plaintiff. Two months after sending its letter of 3 January 2011, the plaintiff received the letter dated 31 March 2011 from the first defendant's solicitors, terminating the tenancy agreement citing undue influence, the plaintiff's refusal to take possession and the plaintiff's failure to pay rental as the reasons for the termination. Subsequent to this, the plaintiff found out that:

(a) the first defendant had entered into a MARS Main Agreement dated 14 January 2011 with the third defendant to let out Admin 1, 2 & 3 and Factory 2 of the said property to the third defendant at monthly rental of RM116,099.25; and

(b) the third defendant had entered into a subtenancy agreement dated 3 January 2011 with the fourth defendant ('LITEM subtenancy agreement') wherein the third defendant sublet Admin 1, 2 & 3 and Factory 2 measuring 464,397 sqft to the fourth defendant with a monthly rental of RM1,486,070.40.

[9] The plaintiff had no knowledge at all about the tenancy agreements dated 3 January 2011 and 14 January 2011 until they filed Originating Summons No 24–161 of 2011 at the Malacca High Court against the first and fourth defendants, seeking, inter alia, for specific performance of the tenancy agreement dated 12 August 2009. The plaintiff's claim was dismissed by the learned trial judge on the ground the plaintiff had used the wrong mode. In November 2012, the plaintiff filed this writ action against all the defendants.

[10] Relief sought by the plaintiff:

(i) declaration that the alleged termination letter dated 31 March 2011 by the first defendant's solicitor is invalid;

(ii) declaration that the MARS main agreement dated 14 January 2011 between the first defendant and the third defendant is invalid;

(iii) declaration that the UTEM subtenancy agreement dated 3 January 2011 between the third defendant and the fourth defendant is invalid;

(iv) declaration that the said master tenancy agreement dated 12 August 2009 between the plaintiff and the first defendant was effective until 11 August 2012;

(v) in addition and/or in the alternative, a declaration that all rental proceeds of the said property received by the first defendant and/or second defendant and/or third defendant are held on trust by the first defendant and/or the second defendant and/or the third defendant respectively as constructive trustees for the plaintiff and the said rental proceeds is a judgment sum to be paid by the first defendant and/or the second defendant and/or the third defendant respectively to the plaintiff;

(vi) against the third defendant, the sum of RM21,151,735.36 or any other sum received by the third defendant from the fourth defendant (or such other sum deems fit and proper by this court) for the said premises from 1 January 2011–7 March 2012 and/or such other period deems fit and proper by this court with interest at the rate of 5%pa on the said sum from date of this writ until full payment;

(vii) against the fourth defendant, the sum of RM7,628,494.72 (or other sum deems fit and proper by this court) or a sum to be taxed by the registrar of the court for use and/or trespass of the said property from period of 8 March –11 August 2012 and/or for other period deems fit and proper by this court with interest at the rate of 5%pa on the said sum from the date of this writ until full settlement;

(viii) against the first defendant, the sum of RM105,600 which is the rental from PPC fon the months of June and July 2011 with interest at the rate of 5%pa on RM105,600 from 1 August 2011 until date of full settlement together with all rental proceeds in respect, of any part of the said property after deducting the monthly rental of RM250,000 a month;

(ix) against the defendants, account of all rental proceeds or other income received and/or paid in respect of the entire said property or any part of the same from 1 January 2011–11 August 2012 to be given by the defendants to the plaintiff within 14 days from the date of judgment;

(x) general damages to be taxed by the registrar of the court against all defendants to be paid to the plaintiff;

(xi) interest at 5%pa on the general damages taxed from the date of the writ until full settlement;

(xii) exemplary damages against the second defendant to be taxed by the registrar of the court and paid to the plaintiff;

(xiii) interest at 5%pa on para (xii) above from the date of the writ until full settlement to be paid by the second defendant to the plaintiff;

(xiv) costs of this action to be taxed and paid by the defendants to the plaintiff;

(xv) the plaintiff claims against the first defendant for the return of the deposit in the sum of RM550,000 and interest at the rate of 5%pa on RM550,000 from the date of the writ until full settlement; and

(xvi) any other or such other relief deems fit and proper by this court.

THE FIRST DEFENDANT'S CASE

[11] Two witnesses were called. Mr Mok Chew Yin ('DW1') is one of the two liquidators of the first defendant appointed by the court on 25 July 2011. He admits he had no personal knowledge of this case. His testimony is based purely on documents which he had access to. His evidence can be summarised as follows. The first defendant did not breach the tenancy agreement. The plaintiff cannot relitigated this case when its Originating Summons No 24–161 of 2011 has been dismissed by the court. Res judicata applies to the

plaintiff. Vacant possession was given on 6 April 2010 and was acknowledged by the plaintiff vide its letter dated 9 November 2010. The plaintiff did not pay RM250,000 rental. Plaintiff acted unilaterally in paying RM59,456 rental, less than the agreed rent. This sum is not accepted by the defendant. By way of a letter dated 12 October 2010, the receiver and manager have informed the plaintiff that the second defendant had no authority to negotiate for and on behalf of the first defendant. When cross-examined by the plaintiff's counsel, DW1 admits he dealt with the second defendant. For this case, he says it is not necessary for him to call the second defendant. He denied seeing the three without prejudice letters dated 1 February 2011, 16 February 2011 and 18 March 2011 respectively. He agrees that the reason he raised res judicata is to avoid disclosing the nitty gritty of the case. He also agrees that the first defendant's application to strike out the plaintiff's suit was dismissed by the High Court and Court of Appeal. His answers as to whether the first defendant had performed its obligations under the tenancy agreement is pertinent to note. In particular he agrees that the first defendant had breached the tenancy agreement. The acts of breach are:

(a) did not deliver vacant possession to the plaintiff;

(b) collect rental from the subtenants;

(c) did not write letters to the subtenants;

(d) terminate the agreement after the plaintiff disagree with the first defendant's request;

(e) did not give the right of first refusal to purchase to the plaintiff; and

(f) enters into tenancy agreement dated 3 January 2011 with the third defendant when the master tenancy agreement is still subsisting.

[12] He also agrees to the following facts:

(a) until vacant possession is given, the plaintiff is not obliged to pay a single cent rental;

(b) as at 18 March 2011, the first defendant acknowledged that the tenancy agreement is still exist and in force.

[13] The second witness is Mr Lok Peng Chuan ('DW2'). He is the Executive Director in KPMG Transaction & Restructuring Sdn Bhd, the company from which the receivers and managers of the first defendant were appointed. The receivers and managers appointed were Mr Ong Hock An and Mr Ooi Woon Chee. DW2 agrees the best person to testify is Mr Ooi Woon Chee because he is the person who has signed most of the letters. He said he is not aware of the agreement dated 12 August 2009. Apart from saying payment of rental is not due until vacant possession is given, DW2's testimony did not

add anything of particular importance than what was already said by DW1. Nevertheless, contending the tenancy agreement is no longer valid due to the plaintiff's breach, the first defendant counterclaimed for the followings:

(a) a declaration that the tenancy agreement dated 12 August 2009 between the first defendant and the plaintiff is deemed terminated and unenforceable as at 6 April 2010 due to the plaintiff's material breach and/or repudiation of the tenancy agreement by refusing to accept vacant possession of the property;

(b) alternatively, a declaration that the tenancy agreement dated 12 August 2009 between the first defendant and the plaintiff is deemed terminated and unenforceable due to the plaintiff's failure and/or refusal to pay the reserved rent;

(c) alternatively, a declaration that the tenancy agreement dated 12 August 2009 between the first defendant and the plaintiff is deemed terminated and is unenforceable due to the plaintiff's material breach and/or repudiation of the tenancy agreement as at November 2010 due to the plaintiff's refusal to adhere to condition imposed by the then R&M to recommence the tenancy agreement;

(d) a declaration that the plaintiff and the first defendant is no longer bound by the terms of the tenancy agreement due to the plaintiff's material breach and/or repudiation of the tenancy agreement and that either party has no existing right to assert over the tenancy agreement;

(e) a declaration that the tenancy agreement dated 14 January 2011 between the first defendant and the third defendant is valid;

(f) damages to be assessed;

(g) costs; and

(h) any other relief that this honourable court deems just and fit to grant.

THE SECOND DEFENDANT'S CASE

[14] The second defendant did not file his defence to the plaintiff's claim. He did not give evidence in the trial. Under the law, the second defendant is deemed to have admitted to the plaintiff's allegations and claims. To support that proposition, I refer to two cases. In *Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors* [1995] 1 MLJ 39, at p 49, the court held:

> The first to sixth defendants did not file their defence though the writ and statement of claim were served on them ... Since no defence had been filed, the defendants are deemed to admit the averments pleaded by the plaintiff.

[15] In *Thuan Lor Holdings Sdn Bhd lwn Khairoon Bee bt Abdul*

Karim [1995] MLJU 472, the court held a failure to serve a defence amounts to an admission by the defendant of everything in the statement of claim. These two cases were referred to and applied in the case of *Dato Mohamad Salim Fateh bin Fateh Din v Nadeswaran a/l Rajah (No 1)* [2012] 10 MLJ 203. Applying the principles in the aforesaid cases to the facts of this case, I hold the second defendant's failure to file a defence is akin to an admission of all statements made by the plaintiff in the statement of claim.

THE THIRD DEFENDANT'S CASE

[16] The third defendant called only one witness, En Kamaruddin bin Mohamad Musa ('DW3'). He is the managing director in the third defendant's company. It is his testimony that he deals with the second defendant. He also testify that from 2009–2011, the third defendant has entered into various agreements with the first defendant. The parties who signed the agreements are him and the second defendant. The agreements are:

(a) tenancy agreement dated 25 February 2009;

(b) tenancy agreement dated 23 December 2009;

(c) sale and purchase agreement dated 19 August 2010;

(d) tenancy agreement dated 25 December 2010;

(e) sale and purchase agreement dated 3 January 2011;

(f) tenancy agreement dated 3 January 2011; and

(g) tenancy agreement dated 14 January 2011.

[17] When asked to give reasons as to how and why so many agreements were entered, DW3 said the second defendant was in dire need of money to avoid from being made a bankrupt. He was then asked by the second defendant to find a buyer who is interested to purchase the first defendant's property. This happen sometimes in June 2010. He then suggested to the second defendant that the third defendant to be the purchaser. The third defendant agreed to purchase at the price of RM72,730,000. The third defendant did not appoint a lawyer for this huge deal. Then, the sale and purchase agreement dated 19 August 2010 was signed ('19 August 2010 SPA'). The 19 August 2010 SPA contained cl 19.1 which states the sale is subject to the plaintiff's tenancy agreement. He admitted he knew about cl 19.1 and its restriction. But, he was told by the second defendant that the plaintiff had failed to pay the rental and the tenancy agreement had been terminated. He did not verify the truthfulness or otherwise of the second defendant's statement with the plaintiff. At the material time, the third defendant was one of the subtenant under its tenancy agreement dated 23 December 2009 with the first defendant. On the basis the plaintiff did not ask for rental from the third defendant, he accepted the second

defendant's explanation and the matter stops there. The 19 August 2010 SPA is not fruitful because the third defendant could not get a bank loan. He then suggested to the second defendant to allow the third defendant to get tenant using the 19 August 2010 SPA. This arrangement was readily agreed by the second defendant. Prior to October 2010, he has given a copy of the 19 August 2010 SPA to DW4, a representative from the fourth defendant. The fourth defendant was in urgent need of a premises to place its new intake of 2000 students. The fourth defendant then sent a letter dated 3 December 2010 to the third defendant informing its interest to rent a portion of the property. Whilst this negotiation was going on, the receiver and manager was appointed for the first defendant on 23 June 2010. This was viewed as an obstacle to close the deal between third and fourth defendant. The second defendant managed to remove the receiver and manager on 24 December 2010. On the Christmas day, the third and the first defendant signed a tenancy agreement dated 25 December 2010. Under this agreement, the third defendant become the master tenant of the entire property. Then, the third defendant signed a tenancy agreement dated 3 January 2011 with the fourth defendant. During cross-examination, DW3 was proven to be not truthful when he said the rental payable by the third defendant to the first defendant under the tenancy agreement dated 25 December 2010 is RM310,799.25 when in his answers to question 85 and 86 in his' witness statement, he states the rental is RM250,000. He also disagrees that the rental payable by the third defendant to the first defendant under the agreement dated 14 January 2011 is RM116,099.25. He also denied the third defendant had conspired with first, second and fourth defendant to deprive the plaintiff from the rental proceeds. In fact he said the third defendant was cheated by the second defendant.

THE FOURTH DEFENDANT'S CASE

[18] Azhar bin Mohamad ('DW4') is the sole witness for the fourth defendant. He is the legal adviser to the fourth defendant. He admitted he was given a copy each of the agreement entered into between the first and third defendants vis a vis the SPA dated 19 August 2010 and the tenancy agreement dated 25 December 2010. Based on these two agreements, he was satisfied that the third defendant is the master tenant who can sublet the property. He does not know the rental rate payable by the third defendant to the first defendant because it has been obliterated. At the material time rental is not an issue to the fourth defendant because it requires the premises urgently to place its new intake of 2,000 students. The fourth defendant then proceeded to enter into a subtenancy agreement dated 3 January 2011 with the third defendant with monthly rental fixed at RM1,44486,070.40. According to DW4, prior to this, in its tenancy agreement dated 18 July 2005 and 22 February 2006 with the first defendant, the fourth defendant had been paying rental of RM1,234,087.35. For tenancy agreement dated 10 September 2007, the rental paid is RM1,435,291. Therefore, paying RM1,486,070.40 rental to the

third defendant is not extraordinary. DW4 denied he had any knowledge about the plaintiff's tenancy. He also denied the fourth defendant had committed an act of trespass to the property or had conspired with the first, second and third defendants to deceit the plaintiff. He also denied that the plaintiff is entitled to claim RM7,628,494.72 from the fourth defendant for occupying the property from 8 March–11 August 2012.

[19] When cross-examined by the plaintiff's counsel, he agrees that the sale and purchase agreement between the first and third defendant dated 19 August 2010 and the tenancy agreement dated 25 December 2010 between the first and third defendant were given to him prior to the fourth defendant entering into a tenancy agreement dated 3 January 2011 with the third defendant. From the 19 August 2010 agreement, he agreed that he knew the plaintiff is the master tenant. It is his evidence that the fourth defendant do not want to know about the plaintiff's tenancy agreement. He agrees that the fourth defendant can deal directly with the first defendant. Despite cl 1 of the tenancy agreement dated 14 January 2011 between first and third defendant states the third defendant's tenancy is subjected to the plaintiff's tenancy agreement, DW4 said the fourth defendant do not wish to know.

DISPUTE BETWEEN THE THIRD AND FOURTH DEFENDANTS

[20] In an unrelated event, the fourth defendant refused to pay rental for February 2012 to the third defendant purportedly because the third defendant had misrepresented to the fourth defendant that they are the registered owner of the property when it is not. This resulted in the third defendant failed to pay its rental to the first defendant. The first defendant then terminated its tenancy agreement dated 14 January 2011 with the third defendant in March 2012. Consequently, the third and fourth defendant sued each other. Two suits were filed with the High Court of Malacca. In Suit No 22NCVC-33–03 of 2012, the defendant sought for a declaration that its tenancy agreement dated 3 January 2011 with the third defendant is invalid and it is not obligated to pay rental. In Suit No 22NCVC-34–03 of 2012, the third defendant sought for payment of rental for the period expiring on 7 March 2012. The court held the tenancy agreement dated 3 January 2011 is valid. The learned trial judge dismissed the fourth defendant's claim in Suit No 22NCVC-33–03 of 2012 and allowed the third defendant's claim in Suit No 22 NCVC-34–03 of 2012. The fourth defendant was ordered to pay to the third defendant rental for February 2012. It is not disputed that tenancy agreement between the third and the fourth defendant was terminated on 7 March 2012.

BREACH

[21] The breach is related to delivery of vacant possession and payment of rental. The first defendant says the plaintiff failed to pay rental and refused to

take vacant possession. The plaintiff says the first defendant failed to give vacant possession for the entire property. It is not in dispute that under the agreement, the first defendant had contracted to let 1,234,197 sqft (the entire property) to the plaintiff. Clause 5 of the First Schedule states that vacant possession for the entire property shall be given to the plaintiff within six months from the date of the tenancy agreement ie on or before 12 February 2010. Only upon delivery of vacant possession of the entire property, the plaintiff is obligated to pay the rental. This is stated in cl 6(ii) of the First Schedule which reads as follows:

6.(a) Reserved Rental:

(i) RM250,000.00 only per month for an existing area of 1,234,197 sqtt

(ii) The first of the Reserved Rental shall be made within fourteen (14) days from the delivery of vacant possession of the premises to the tenant and subsequent such monthly payment shall be payable in advance within the first fourteen (14) days of each and every succeeding month.

[22] The question is was vacant possession of 1,234,197 sqft given to the plaintiff. The first defendant alleged vacant possession was given to the plaintiff on 6 April 2010. In submitting vacant possession had been delivered, counsel for the first defendant relied on the following facts:

(a) the plaintiff admitted they have received vacant possession via their two letters, both dated 9 November 2010:

In the said letters, the plaintiff had stated:

(i) vacant possession of the factory had already been given to them by Cubic's letter dated 6 April 2010;

(ii) they have entered the factory and thanking the first defendant for acknowledging their right of possession over the factory as per the tenancy agreement; and

(iii) that, since vacant possession was delivered, the total rental payable shall be pro-rated accordingly.

It was submitted that in both the letters, the plaintiff does not draw a distinction between having received a portion of or the entire property. However, the plaintiff's witness, PW1 had given oral testimony that vacant possession for 1,234,197 sqft was not delivered. Based on the admission letters, counsel submits the plaintiff cannot now adduced oral evidence to contradict those letters. He also submits that PW1's testimony must be tested against the whole of other evidence and circumstances of the case. He, then cited *Len Min Kong v United Malayan Banking Corp Bhd and another appeal* [1998] 2 MLJ 478; [1998] 2 CLJ 879 wherein it was held that in order to find out whether a witness is telling the truth or not, the overall circumstances must be looked at;

(b) negotiations with the receiver and manager and the recommencement of the tenancy:

Immediately after taking over possession of the property, the plaintiff and the receiver and manager began discussions on various issues,, including discussions on the other tenants at the property, the tenancies which had lapsed but which have continued on a monthly basis as well as the tenancies which were still subsisting. The receiver and manager had proposed that the existing tenants would pay their rents directly to the plaintiff based on the terms of their respective tenancies and that the plaintiff would have to pay the pro rated rent from 9 November 2010. On its part, the plaintiff had raised several complaint:

(i) tiles on the second floor of an admin block was in bad shape and needed to be replaced;

(ii) the service of security guards and other service providers must be terminated; and

(iii) deduction of rental payable by the plaintiff in respect of an area known as Factory 1 occupied by the first defendant measuring 124,800 sqft

It is submitted for the first defendant that the fact that the plaintiff immediately began negotiating the rent to be paid by the first defendant over the space which it occupies signifies that the plaintiff had indeed taken over vacant possession of the property;

(c) no refunds sought:

Counsel submits, even if it is true that vacant possession was not delivered, the plaintiff had not asked the first defendant to refund the sum of RM59,456 purportedly paid towards rental for the months of September and October 2010 when the receiver and manager were discharged. The first defendant did not accept these payments as payments of rental. This fact demonstrates that the plaintiff accept that vacant possession was indeed delivered and the said monies would be utilised as part payment of November rental;

(d) keys to the property were delivered to the plaintiff:

The first defendant reiterated that they had handed the keys to the main gate (Post 1) and the lobby office at Admin 3 to the plaintiff on 6 April 2010. This again demonstrates delivery of vacant possession;

(e) the plaintiff had set up its own office on the property:

During cross-examination of the plaintiff's first witness, PW1, it appears that the plaintiff had established an office within the premise and could access the entire property without any restriction. The question and answer relevant to this issue is:

Q: But before that you were always allowed to walk in and walk out of the factory, correct?

A: No, When after the 6th April, I was going in and out throughout the front gate ok, where the key was given to me. There were four gates in the factory and I was given one gate. The key to one gate for me to enter where I can have access straight to my office. That's all.

It is submitted for the first defendant that the plaintiff could not have been able to set up its own office on the property without vacant possession and control over the property;

(f) condition precedent:

The first defendant took the position that delivery of vacant possession is a condition precedent before payment of rental is made. With partial payment of rental being made by the plaintiff, it was argued that, it must mean vacant possession has been delivered. To support that argument, *Arab Malaysian Finance Bhd v Kah Motor Co Sdn Bhd* [2010] 5 MLJ 10 was cited. At p 15 of the said case, the Court of Appeal explains condition precedent as 'unless a particular event occurs, either no contract arises (a condition precedent to the contract as a whole) or, although a contract may have arisen, its performance, in whole or in part, cannot be enforced (a condition precedent to performance)'. Based on the principles expounded by the Court of Appeal, the first defendant submits that payment of RM59,456 signifies that vacant possession of the property had indeed been delivered by the first defendant;

(g) the plaintiff had installed signboards:

It is not disputed that the plaintiff had put up two signboards at the property sometimes.around November 2010 while the receiver and manager were not discharged yet to signify its presence. The first defendant submits, the plaintiff would not have spent on the signboards had it not received vacant possession; and

(h) plaintiff entered into subtenancies to let out the property:

the first defendant submits, the most telling evidence that the plaintiff did in fact receive vacant possession was that it had entered into a subtenancy agreement with one PPC Marine System Sdn Bhd on 15 December 2010 and Protection Technologies (M) Sdn Bhd on 1 April

2011. The plaintiff, through its witness, PW1 admitted that for both the subtenancies, the plaintiff had possession of part of the property and had collected rental for the same.

[23] In reply, counsel for the plaintiff submits:

(a) the letter dated 6 April 2010 only confirms that keys to a very small portion of the property was given to the plaintiff. This is certainly not full vacant possession as the area rented is 1.2m sqft in order for any rentals to be paid. The clearest evidence would be the first defendant never gave full physical vacant possession to the plaintiff. They could not do so because they are still occupying 124,800 sqft. This fact is admitted by the first defendant's witness, DW2;

(b) the plaintiff took partial possession of a small portion of the property on 6 April 2010. The plaintiff's letter dated 9 November 2010 reference to 'vacant possession' must be read in its full context. It means right to possession but not actual physical full vacant possession. The plaintiff in its letter dated 21 November 2010 has explained that possession referred to meant legal rather than physical possession. If the plaintiff already had full vacant possession, how could the fourth defendant so easily walk in and take over vacant possession of the property on or about early January 2011. The first defendant also controlled the service providers, especially the guards. In fact, the first defendant issued a letter dated 14 October 2010 to the security guards (Pentagon Protection) not to allow the plaintiff to enter the property. By doing this, effectively, the plaintiff's vacant possession to even a small part of the property was taken away;

(c) the first defendant's allegation that 'no refunds' were sought by the plaintiff defies logic when to do so can be construed wrongly as giving up its rights to the property. The payment of RM59,456 was made because the first defendant had promised so many times that full vacant possession will be given;

(d) the ordering and putting up of signboards by the plaintiff was because the first defendant had promised full vacant possession. Neither did the first defendant stop the plaintiff from doing so, save to dismantle the same because the fourth defendant was moving in;

(e) the rental of RM250,000 was not due from the start because full vacant possession was never given. The delivery of vacant possession is a contractual obligation by the first defendant and not a condition precedent. The tenancy agreement did not stipulate that it is a purported condition precedent;

(f) the two subtenancies with PPC Marine and Protection Technologies entered by the plaintiff, in the end was taken over by the first defendant; and

(g) none of the subtenants like Mitsui, IAC, Hampshire, Mars, Cubic Learning Factory Sdn Bhd, Cubic Integrated Management Sdn Bhd or others recognised the plaintiff as the master tenant. They had contracted directly with the first defendant who controlled the same, received rental and never actually relinquished the same to the plaintiff.

[24] After hearing the evidence and reading the submissions of the parties, I find the first defendant's submission is grossly misleading. The agreement is just an ordinary standard tenancy agreement. The word 'delivery of vacant possession' is a condition precedent for payment of rental was not mentioned in the agreement. What the agreement says is vacant possession is a term and condition for the performance of the contract. The first defendant knew it has to give vacant possession of 1,234,197 sqft before it can collect rental from the plaintiff. This fact is admitted by both the first defendant's witness, DW1 and DW2.

[25] In *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors* [1979] 2 MLJ 224, cl 5 of the agreement provides that 'the purchaser agrees and undertakes to ensure that by or before the completion of the purchase of the said shares, the vendors are released as guarantors for the company under the guarantee ...'. The Federal Court upheld the trial judge's finding that such a term is not a condition precedent to the contract but merely a term of the contract.

[26] At p 229, the Federal Court states:

> In the present case any talk about conditions precedent or conditional contract is misleading. It is irrelevant and tends to cause confusion. The question whether the contract is conditional or not depends entirely on the interpretation of the sale agreement. The 'conditions' agreed by the parties were nothing more than the terms of the contract. The fact that a 'condition' is a term of a contract does not make it a conditional contract.

[27] Coming back to this case. It is the term of the agreement that the first defendant had contracted to deliver vacant possession of 1,234,197 sqft before the plaintiff is bound to pay RM250,000 rental. If the first defendant did not deliver vacant possession of 1,234,197 sqft, it is not entitled to collect payment of RM250,000 rental. Full vacant possession as understood by PW1 and DW2 is actual physical possession of 1,234,197 sqft. Anything less than 1,234,197 sqft is not full vacant possession. It was never the intention of the parties that payment of RM59,456 signifies full physical vacant possession has been given. The payment of RM59,456 is a set off from RM250,000 and was made to the

first defendant because the plaintiff was led to believe that full vacant possession will be given. There was no confusion by the parties that this payment was made pending assignment of the subtenants tenancy to the plaintiff. Therefore, the first defendant argument that payment of RM59,456 meant full vacant possession has been given is not true, illogical and misleading. Having said that, I found full physical possession of 1,234,197 sqft was not delivered to the plaintiff. The following facts were established at the trial:

(a) on 6 April 2010, only a small portion of the property was given to the plaintiff. This also was subsequently taken away by the first defendant;

(b) the first defendant are occupying 124,800 sqft of space in Factory 1;

(c) on 14 October 2010, the first defendant, through its receiver and manager forbid the plaintiff from entering the said property;

(d) throughout November and December 2010, the following issues between the first defendant and the plaintiff were not resolved:

(i) deductions of rentals collected by the first defendant through its receiver and manager from the rental rate payable by the plaintiff;

(ii) legal termination of some existing tenants;

(iii) the rental rate, maintenance charges and utility charges of Factory 1 which was occupied by the first defendant;

(iv) restoration and repairs of the floor tiles of Admin Block 1; and

(v) termination of the first defendant's service providers;

(e) The fourth defendant take over vacant possession of a portion of the property sometimes in early January 2011.

[28] The above facts conclusively prove that full physical vacant possession of the entire property was not given to the plaintiff. By failing to give full vacant possession, the first defendant had breached cl 5 of the first schedule of the master tenancy agreement. Based on the facts, the first defendant's contention that the plaintiff refused to take vacant possession is a lie. To the contrary, the truth is the first defendant had no intention to give vacant possession to the plaintiff. This is proved when the first defendant keeps on giving empty promises to give vacant possession and at the same time entered into various agreements with the third defendant. With no vacant possession given, there is no duty on the plaintiff to pay the rental sum of RM250,000. The first defendant's contention that the plaintiff had failed to pay the rental is also a lie. To conclude, I hold the first defendant is the party who had breached the tenancy agreement. The first defendant is therefore liable to pay damages to the plaintiff.

TERMINATION

[29] In its termination letter dated 31 March 2011, the first defendant alleged they terminated the agreement because there was undue influence and/or undue pressure by the plaintiff. The burden is on the first defendant to prove either one or both of what it says. No evidence of such allegation was led by the first defendant's witnesses. They failed to discharge the burden. I find this as strange. If the first defendant honestly believe it was a case of undue pressure or undue influence, why the first defendant chose to abandon this defence. The only conclusion to be drawn by such course of conduct is simple. The allegations made by the first defendant is just another lie. How could there be undue pressure or undue influence when the rental payable by the third defendant to the first defendant is only RM250,000 and subsequently reduced to RM116,099.25 respectively under agreements dated 3 January 2011 and 14 January 2011. Coupled with the fact that the first defendant had breached the agreement, the first defendant had no valid grounds to terminate the agreement. The termination notice is not valid. The termination is wrongful.

VALIDITY OF AGREEMENTS

[30] The plaintiff's case is its tenancy agreement dated 12 August 2009 with the first defendant is still valid and effective until 11 August 2012. The first defendant took the position that the agreement has been terminated. Due to my earlier finding, the first defendant's contention must fail. In my view, s 40 of the Contracts Act 1950 applies to the plaintiff.

[31] Section 40 provides:

> 40 When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[32] Under s 40, the plaintiff has the option of whether to accept the repudiation or treat the contract as still subsisting. In this case, the plaintiff choose the latter. The plaintiff did not accept the termination. This is confirm when the plaintiff sued the first defendant for specific performance. As can be seen later, the first defendant acknowledged the agreement still exist and valid as late as 18 March 2011. Under the circumstances, I hold the agreement dated 12 August 2009 is valid and effective until 11 August 2012. The next question for me to ask is this: If the agreement of 12 August 2009 is still valid, what is its effect on the agreements entered into between the first defendant and the third defendant and between the third defendant and the fourth defendant. I had no opportunity to consider the third defendant's submission on this point because their written submission was filed very late and was rejected by this court. Counsel for the fourth defendant argued the issue is academic because the

tenancy agreement dated 3 January 2011 was declared valid by the Malacca High Court and has since expired. That argument is not accurate. The plaintiff is not a party in the suit at Malacca High Court. The issues arose in that suit is different from the present suit. In that suit, the tenancy agreement dated 3 January 2011 between the third and fourth defendant is held valid purely on the ground the fourth defendant had failed to prove the third defendant had misrepresented itself as the landowner of the property and that the fourth defendant knew all along the third defendant is only a landlord or master tenant. Whereas, in the present suit, the fourth defendant, through DW4 admitted he knew about the plaintiff's tenancy agreement but chose not to know about it. The same position is taken by DW3. DW4 is a legal adviser. He knew the law. What neither DW3 and DW4 nor their counsels can deny is when the first defendant had let out the entire property to the plaintiff and the tenancy is still subsisting, the first defendant cannot let out the same subject property, either in its entirety or a portion of it to any third party. That is a basic common sense. Otherwise, there is no purpose for parties to enter into an agreement if the next day someone else took away what was contracted for. The fourth defendant is estopped from arguing on the plaintiff's tenancy because once DW4 elects not to know, he cannot turn around and say something else. For the case against the fourth defendant, legally speaking, the agreement dated 3 January 2011 is not valid because the third defendant is not the master tenant on 3 January 2011. This is supported by the fact that the sale and purchase agreement dated 19 August 2010 and the tenancy agreement dated 25 December 2010 relied upon by DW4 were cancelled. Further support is the tenancy agreement dated 3 January 2011 between the first and third defendant has been substituted with an agreement dated 14 January 2011. How can the third defendant sublet to the fourth defendant on 3 January 2011 or earlier than that when the tenancy agreement is entered on 14 January 2011. Also, how can the third defendant be a master tenant when the plaintiff's agreement is valid. There cannot be two master tenants. Most importantly, the third defendant became the master tenant by unlawful means. DW3 ignore the plaintiff even though he knew about the plaintiff's tenancy. This is a clear case of the third defendant purposely and intentionally deprive the plaintiff from being the master tenant. Under those circumstances, I hold the agreement dated 3 January 2011 between the third defendant and fourth defendant is not valid. Similarly, I hold the agreement dated 14 January 2011 between the first and third defendant is not valid.

A B C D E F G H

CONSPIRACY

[33] Conspiracy to injure has been defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means for the purpose of injuring another whereby the said act results in damage to the other; see *Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors* [1998] 3 MLJ 422. Conspiracy can be proved by direct or circumstantial evidence; see

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MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals [1995] 2 MLJ 493. In the instant case, the plaintiff sought to prove that the defendants had conspired to cause losses to the plaintiff by unlawfully entering into various agreements when they knew the plaintiff's tenancy is still on foot. Since deceit and fraud was alleged, the burden of prove is beyond reasonable doubt. The evidential proof is circumstantial in nature. The best way to start is by stating the defendants are not stranger to each other. The first, second and third defendants had one common interest, namely to make money because they are not financially stable. The fourth defendant had the money and was badly in need for premises to house its students. The fourth defendant agreed to pay rental of RM1,486,070.40 for 464,397 sqft and wanted a tenancy for three years. Compared to the RM250,000 rental payable by the plaintiff for the entire property, the first to third defendants saw the opportunity of making monies. There is a rental proceeds of RM1,236,070.40 (RM1,486,070.40–RM250,000). This is a huge sum. For 36 months, the rental is RM44,498,534.40. Realising the amount of monies about to be made if the plaintiff sign an agreement with the fourth defendant, they decided to grab the monies to themselves. Therefore, despite the fact DVV3 knew about the plaintiff's tenancy, he purposely chose to ignore the plaintiff. Cleverly, they decided the best way to go about doing thing is to enter into a tri-partied agreements. In this way, the rental proceeds will go to the third defendant and not the first defendant. All the agreements were done secretly, behind the plaintiff's back, without the plaintiff's knowledge and hurriedly. This act itself shows deceit by the first, second and third defendants. To further prove deceit, the plaintiff has adduced evidence that the first defendant has been making empty promises to give vacant possession when actually the first defendant has negotiated and entered into various agreements with the third defendant. The strongest evidence of deceit can be gleaned from the without prejudice letters. This refers to the email dated 1 February 2011 and letters dated 16 February 2011 and 18 March 2011 respectively. It is not in dispute that in all three letters, the first defendant proposed to the plaintiff to replace the tenancy agreement with a fresh agreement with the buildings to be tenanted to the plaintiff is limited to Logistic 2, Factory 3 and Factory 4 measuring 379,200 sqft. The plaintiff submits these letters are admissible in evidence to prove fraud and deceit by the first defendant. This is objected by counsel for the first defendant who submits they are not admissible under without prejudice rule. He cited *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17. At p 18, the Federal Court states:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

[34] Since admissibility is in issue, the question is what is without prejudice rule? In *Rush & Tompkins Ltd v Greater London Council and another* [1988] 3 All ER 737 at pp 739–740, [1989] AC 1280 at p 1299, Lord Griffiths said:

> The 'without prejudice' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cuts v Head* ([1984] 1 All ER 597 at pp 605–606, [1984] Ch 290 at p 306); 'That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at p 156, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admission on the question of liability'. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.

At p 1300, he went on to say:

> That the rule is not absolute, and that there are exceptions when the justice of the case requires it.

[35] Over the years, the courts have recognised certain exceptions to the privilege when the justice of the case requires it. In *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783, at p 783 Robert Walker LJ said:

> Although the protection of admission was the most important practical effect of the without prejudice rule — a rule founded partly in public policy and partly in the agreement of the parties — it would create huge practical difficulties to dissect out identifiable admission and withhold protection from the rest of without prejudice communications. It would also be contrary to the underlying objective of giving protection to the parties to speak freely about all issues in the litigations, both factual and legal, when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. However, even in situations to which the without prejudice rule undoubtedlyapplied, the veil imposed by public policy might have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule had been unequivocally abused.

At p 791, he continues to say:

> Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote.

At p 795, he further says:

A without prejudice is not a label which can be used indiscriminately so as to immunise an act from its normal legal consequences, where there is no genuine dispute or negotiation.

B **[36]** In *Unilever*'s case the instances given where without prejudice letters were admitted in evidence are:

(a) letters containing a threat is admissible to prove that a threat was made;

(b) a without prejudice letter containing a statement which amounted to an act of bankruptcy is admissible to prove that the statement was made;

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(c) evidence of the negotiations is also admissible to show that an agreement concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence; and

D (d) one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety.

E **[37]** Applying the law to the facts of this case. The three without prejudice letters wrote by the first defendant is a proposal by them to the plaintiff to replace the tenancy agreement with a new agreement with less area tenanted to the plaintiff. Similar proposal was repeated thrice and was rejected by the plaintiff. There was no negotiation to replace the agreement, to begin with. The

F negotiations is only on the issue of when full vacant possession can be delivered. These letters show the first defendant had deceit the plaintiff into believing that the tenancy agreement is still exist and valid as late as 18 March 2011. Otherwise, the first defendant could not have asked for replacement. The fact that the first defendant had entered into a sale and purchase agreement dated

G 3 January 2011 and a tenancy agreement dated 3 January 2011, both with the third defendant and the first defendant also knew that the third defendant had entered into a tenancy agreement dated 3 January 2011 with the fourth defendant clearly show there could not be any negotiation to replace the tenancy agreement. The first defendant's proposal is a sham. How could there

H be negotiations when the plaintiff did not even know its rights has been taken away. The first defendant has misrepresented to the plaintiff that 1,234,197 sqft is intact when it is not. It is clear to me that the first defendant cannot use the without prejudice label to hide what they wrote when they have deceit the

I plaintiff. In the circumstances, I hold the three without prejudice letters dated 1 February 2011; 16 February 2011 and 18 March 2011 are relevant and admissible to prove the deceitful act of the first defendant. I admit these letters as evidence.

[38] So far the evidence touch on the manner the agreements were entered into. I now move to the timing the agreements were entered. The tenancy agreement dated 25 December 2010 was signed one day after the receiver and manager was removed. Less than ten days later, two tenancy agreements, both dated 3 January 2011 were entered between first, third and fourth defendants. The date 3 January 2011 is the date the plaintiff sent a reminder letter to the first defendant demanding vacant possession. Everything was done in a hurry. The most illogical aspect of the whole arrangement is being the owner of the property, the firstdefendant can deal directly with the fourth defendant and collect RM1,236,070.40. But, here, the first defendant allowed the three defendant to collect a profit of RM1,236,070.40 whereas the first defendant only collected a meagre sum of RM116,099.25. No right thinking businessman would do what the first defendant did. The other illogical aspect is the first and third defendant cancelled the tenancy agreement dated 3 January 2011 and replace it with tenancy agreement dated 14 January 2011 to validate the tenancy between the third and fourth defendant. Because of all these ridiculous arrangements, the only conclusion to be drawn is the first, second and third defendants must have a share in the profits. Neither DW1, DW2 nor DW3 could tell the court what happens to the rental collected by the third defendant from the fourth defendant. Turning to the fourth defendant. In its defence, the fourth defendant alleged it has no knowledge of the plaintiff's tenancy. This has been proven to be wrong because DW4 admitted he knew about it. The burning question is why didn't he verify with the plaintiff whether the agreement is still valid or not. There is no evidence that if the agreement is valid, the plaintiff would not sublet the property to the fourth defendant. Especially when the rental offered by the fourth defendant is more than one million. It is more disturbing as to why DW4 who knew that there are two parties who claimed to be the master tenant, preferred the third defendant than the plaintiff. The reason is because the fourth defendant had wanted to purchase the property. DW4 knew cl 6 in the plaintiff's tenancy agreement gives the plaintiff the right of first refusal to purchase the property. By ignoring the plaintiff, the fourth defendant can deal directly with the first defendant to finally purchase the property. This is supported by the subsequent event where the fourth defendant purportedly disputed the third defendant's position as the landlord. It is strange why the fourth defendant suddenly takes a 360 degree turn, on a flimsy ground which was found to be a lie. The truth is DW4 knew the third defendant is the landlord, not the owner of the property. When the fourth defendant terminated its agreement with the three defendant, the first defendant also terminated its agreement with the third defendant. Then, the fourth defendant purportedly paid a rental of RM655,000 to the first defendant until they purchased the property on 23 January 2013. The sequence of events conclusively proved the first, second, third and fourth defendants had conspired to deprive the plaintiff the benefits of the tenancy

agreement dated 12 August 2009 and to cause losses to the plaintiff. I find this has been proven beyond reasonable doubt. The defendants, are therefore liable to pay damages to the plaintiff.

TAMPERED DOCUMENTS

[39] In defending the plaintiff's claims, the defendants had resorted to tampering with numerous documents. They are listed below:

(a) sale and purchase agreement dated 19 August 2010 between the first defendant and the third defendant (SPA).

The complete SPA had pp 10 and 13 and was exhibited by the fourth defendant in its striking out application. The same complete SPA was produced by the plaintiff for the purpose of this trial at pp 394–413 of Bundle D. Page 10 of the SPA specified that the SPA is subject to all existing tenancy agreements and p 13 of the SPA specifically referred to the plaintiff's tenancy agreement and the plaintiff's name. However, the SPA dated 19 August 2010 produced by the fourth defendant at pp 1–14 of Bundle K did not include pp 10 and 13 of the SPA. DW4's explanation is it is a clerical error. No credible explanation was given by DW4 or his counsel as to how they can omit pp 10 and 13 of the SPA for the trial. In the absence of any credible explanation, I hold DW4 had intentionally take out pp 10 and 13 to mislead this court. This irresistible conclusion is supported by the following facts:

(i) the original SPA 19 August 2010 was not produced in court at the beginning of the trial by any of the defendants. It was only produced after a stern warning by the court;

(ii) it is unbelievable that solicitor for the fourth defendant did not check Bundle K before filing. Bundle K contained 48 pages only;

(iii) most importantly, why these two crucial pages containing critical terms relating to the rights of the plaintiff are missing. This cannot be a mere coincidence nor accident; and

(iv) any explanation by the defendants that they are not trying to hide as the correct pages were produced before cannot be accepted by this court because their disclosure now is for the trial. As an officer of the court, solicitor for the fourth defendant is duty bound to give full and frank disclosure of all documents. If not for the plaintiff's counsel vigilance, this issue will not be uncovered.

(b) tenancy agreement dated 25 December 2010 between the first defendant and third defendant:

This tenancy agreement was exhibited by the third defendant at pp 50–60 of Bundle I. The plaintiff's complaint is the agreement is not

complete because cl 6 which states the rental payable by the third defendant to the first defendant has been obliterated. Similarly, the four defendant also exhibited the same agreement at pp 15–20 of Bundle K with the same obliteration. When questioned by the court as to why incomplete document was produced, counsel for the third defendant merely say 'this is what my client give to me'. After the issue of obliteration was raised by the plaintiff during the trial, the third defendant's solicitor produced in court on 19 September 2014, a photocopy of the tenancy agreement dated 25 December 2010, marked as IDD4. It is observed that the rental stated in IDD4 is allegedly RM310,799.25 per month. The original copy of the tenancy agreement was not produced in court to prove the actual rental and the authenticity of the document. It is unbelievable that solicitors for the third and fourth defendants allow incomplete document to be produced unless they wish to hide something;

(c) sale and purchase agreement dated 3 January 2011 between the first defendant and third defendant:

The third defendant alleged that the SPA dated 19 August 2010 was mutually aborted by both the first and third defendant. Subsequently, the first and third defendant entered into the sale and purchase agreement dated 3 January 2011. The SPA 3 January 2011 was first exhibited by the third defendant in another suit on 6 March 2012 and produced by the plaintiff at pp 51–68 of Bundle D. At the top right corner of the SPA at pp 52–67 of Bundle D, it is marked with the word 'SPA-L & B (Cubic)' in all pages. The SPA at pp 51–68 appears to be a complete document.

[40] At the bottom of p 3 of the SPA which can be found at p 54 of Bundle D had the following caption:

3. The said land is subject to the following express conditions and restriction in interest :-

SYARAT-SYARAT NYATA

'Untuk kegunaan kilang sahaja'.

SEKATAN-SEKATAN KEPENTINGAN

[41] At the top of p 4 of the SPA which can be found at p 55 of Bundle D had the following caption:

Tanah ini tidak boleh dipindahmilik atau dipajak kecuali dengan kebenaran Pihak Berkuasa Negeri. Sekatan kepentingan ini dikecualikan kepada Pembeili pertama.

[42] However, the same SPA dated 3 January 2011 produced by the third defendant at pp 83–98 of Bundle I had deliberately swapped pages. On the top

right corner of pp 84 and 98 is marked the word 'SPA-L & B (Cubic)' but on the top right corner of the in between pp 85–97 are marked 'SPA — All Assets (Cubic)' which proved that these pages had been swapped by the third defendant. These are similar document and yet had different marking. In addition to that, the terms stated in pp 3–4 of the SPA at pp 84–85 of Bundle I does not flow.

[43] At the bottom of p 3 of the SPA which appears at p 84 of Bundle I had this caption:

> 3. The said Land is subject to the following express conditions and restriction in interest:-
>
> SYARAT-SYARAT NYATA
>
> 'Untuk kegunaan kilang sahaja'.
>
> SEKATAN-SEKATAN KEPENTINGAN

[44] At the top of p 4 of the SPA appearing at p 85 of Bundle I had this caption:

> 4. The said Land is subject to the fottowing express conditions and restriction in interest—
>
> SYARAT-SYARAT NYATA
>
> 'Untuk kegunaan kilang sahaja'.
>
> SEKATAN-SEKATAN KEPENTINGAN
>
> 'Tanah ini tidak boleh dipindahrnilik atau dipajak kecuali dengan kebenaran Pihak Berkuasa Negeri. Sekatan kepentingan ini dikecualikan kepada Pembeli pertama'.

[45] The same SPA exhibited by the fourth defendant at pp 21–35 of Bundle K contains the same swapped pages just like the third defendant's bundle of documents and the terms stated in pp 3–4 of the SPA also does not flow.

[46] More importantly, at p 12 of the SPA dated 3 January 2011 produced by the plaintiff at p 63 of Bundle D contained cl 19.1(a), (b), (c) and (d) which provides as follows:

> 19.1. The Vendor is selling the said Land and the Purchaser is purchasing the said Land without vacant possession and subject to the following agreements entered between The Vendor and the following parties:
>
> (a) tenancy agreement dated 6 February 2009 entered between the Landlord and IAC MANUFACTURING (MALAYSIA) SDN BHD, a company incorporated in Malaysia with a registered office at No. B-5-7 (Suite 1), 5th Floor, Megan Avenue 1,189, Jalan Tun Razak, 50400 Kuala Lumpur (?C);

(b) tenancy agreement dated 12 August 2009 with MKC Corporation Sdn Bhd for the Said Land and buildings erected thereon; and

(c) a conditional sale and purchase agreement dated 6 February 2009 entered between The Vendor and IAC as the purchaser of all that portion of the said Land at the Purchase consideration and upon the terms and conditions set out therein ('the IAC SPA '). The Purchaser further agree to acquire the said Land subject to the terms of the IAC SPA.

(d) other tenancies between the Vendor and Mitsui Soko Sdn Bhd, Cubic Learning Factory Sdn Bhd and Hampshire Aerospace Sdn Bhd.

[47] But the same SPA dated 3 January 2011 produced by the third and fourth defendant only had cl 19.1(a) and (b) which reads as follows:

(a) tenancy agreement dated 6 February 2009 entered between the Vendor and IAC MANUFACTURING (MALAYSIA) SDN BHD, a company incorporated in Malaysia with a registered office at No B-5-7 (Suite 1), 5th Floor, Megan Avenue 1, 189, Jalan Tun Razak, 50400 Kuala Lumpur;

(b) tenancy agreement dated 5 December 2006 with Mitsui-Suko Sdn Bhd, a company incorporated in Malaysia with a registered office at Lot 4, Lebuh 2, Kawasan 21, Perusahaan Selat Kelang Utara, Bandar Sultan Sulaiman, 42000 Port Klang, Selangor ('Mitsui').

[48] It is clear to me that the SPA produced by the third and fourth defendant did not make any reference to the plaintiff's tenancy agreement. The omission is purposely done, to hide the truth from the court. The facts they want to hide is the plaintiff is the rightful master tenant; the plaintiff has the right of first refusal to purchase and the rental paid by the third defendant to the first defendant is RM250,000. I find it extremely hard to believe that counsels for the third and fourth defendants did not notice the incomplete documents until it was brought up by counsel for the plaintiff. In the absence of credible explanation, DW3, DW4 and their respective counsels' conduct constitute a gross interference with the administration of justice. Until the end of the trial on 20 January 2015, the original SPA dated 3 January 2011 was never produced by any of the defendants in court, although notice to produce were served on the third and fourth defendants before trial, direction was given by the court to all defendants in the midst of the trial and the first and third defendants are parties to the said SPA dated 3 January 2011. I take strong objection to the conduct of DW3 and DW4 and their respective counsels in attempting to hide true facts from the court. For this, I urge the plaintiff to take contempt proceedings against the parties.

A RES JUDICATA

[49] Counsel for the first defendant submits there is nothing new to the allegation of fraud and conspiracy to injure as it was raised in the earlier suit. It is therefore submitted that the plaintiff is estopped to relitigate or reassert the same cause of action which had been determined by the court. The first defendant relied solely on the decision of the Melaka High Court in the Originating Summons No 24–161 of 2011 which held:

> Memandangkan terdapatnya isu-isu yang memerlukan keterangan lisan dari saksi-saksi, dan plaintif telah gagal membuktikan kesnya melalui pernyataan di dalam affidavit, saya menolak Saman Pemula ini dengan kos.

[50] Simply because the originating summons was dismissed, counsel for the first defendant submit res judicata principles as expounded in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 applied.

[51] In response, counsel for the plaintiff submits that there is no res judicata for the following reasons:

(a) the originating summons was dismissed on the ground that the plaintiff had used the wrong mode. Merits of the plaintiff's claim was not heard; and

(b) the first defendant had applied to strike out the plaintiff's current suit on the ground of res judicata and the application was dismissed by the High Court and affirmed by the Court of Appeal.

[52] Against this background, counsel for the first defendant refers me to the case of *Tanalachimy a/p Thoraisamy & Ors v Jayapalasingam a/l Kandiah & Ors (sued as liquidators of the Great Alonioners Trading Corp Bhd) and another appeal* [2014] 4 MLJ 85. In that case, the defendants/respondents had successfully strike out the plaintiff's/appellant's claim on the ground of res judicata. On appeal, the Court of Appeal held the appellants' claim is not obviously unsustainable to be struck out under O 18 r 19(1). Nevertheless, the Court of Appeal also held that the defendants/respondents can still introduce evidence and submit on the issues of res judicata during the trial. Based on Court of Appeal's decision in *Tanalachimy*'s case, counsel for the first defendant submits the first defendant can still raise and argued on res judicata. My reply is this. There is nothing in iaw to stop the first defendant from raising res judicata at the trial even though it was raised before during the hearing of striking out application. What matters to the court is whether there is merit in the submission of res judicata, I find counsel for the first defendant had misunderstood the principles of res judicata. When the originating summons was dismissed, it only means the plaintiff's claim which rest on fraud and conspiracy to injure is not suitable to be decided by way of affidavit evidence.

This is the finding made by the trial judge in the originating summons. The trial judge who hear the originating summons had not made any ruling which finally determine the rights and liabilities of the parties. The issues of whether the termination of the tenancy agreement dated 12 August 2009 is lawful or not; whether there is conspiracy to injure or not are live issues before this court. These issues were ventilated for the first time in this court. Therefore, it is misleading for the first defendant to say res judicata applies here. On the background facts, res judicata does not even arise. This issue is a non starter.

DAMAGES

[53] The plaintiff's first witness, PW1 has testified that the losses suffered by the plaintiff is RM1,236,070.40 a month being rental proceeds for the period from 1 January 2011 until 11 August 2012. This figure is derived by deducting the monthly rental of RM250,000 payable by the plaintiff to the first defendant from the rental income of RM1,486,070.40 paid by the fourth defendant.

[54] In resisting the damages claimed by the plaintiff, counsel for the first defendant argued:

(a) no evidence was led that the plaintiff could have procured similar rental to the rental paid by the third and fourth defendants or received by the first defendant;

(b) the plaintiff did not actually work to earn the rental proceeds; and

(c) the third and fourth defendants are not privy to the master tenancy agreement between the plaintiff and the first defendant.

[55] In reply, counsel for the plaintiff submits the argument put forth by the first defendant is mischievous. The plaintiff could not earn the rental proceeds because the first defendant had breached the tenancy agreement. I agree with the plaintiff. If not because of the first defendant's breach and deceit, the plaintiff would have received the rental proceeds.

[56] The relevant provision of the law governing damages is contained in s 74 of the Contracts Act 1950.

Section 74 provides:

> 74 (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[57] In assessing damages, it is generally accepted that the court must abide by the principle of fairness. To this end, certain principles have emerged in the case laws. I shall refer to some of these cases as they serve a very useful guidance.

[58] In *Subramaniam a/l Paramasivam & Ors v Malaysian Airline System Bhd* [2002] 1 MLJ 45; [2002] 1 CLJ 230, the court held:

> In attempting to measure the damages that may be awarded to the plaintiffs, two basic principles of assessment must first be understood. The first is with respect to its function. As Lord Blackburn said in *Livingstone v Rawyard Coal Co* [1880] App Cas 25 at p 39, damages is: that the sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. The second is a corollary of the first—that in awarding damages, the plaintiff should not be allowed to profit by it

[59] In *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697; [2007] 6 CLJ 93, the court held:

> The general principle for assessment of damages is compensatory, ie the innocent party is to be placed, so far as money can do, in the same position as if the contract had been performed.

[60] In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352, Edgar Joseph Jr SCJ held:

> When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong and also that the damages are not too remote to be recoverable. Where precise evidence is obtainable, the court naturally expects to have it, where it is not, the court must do the best it can.

[61] The Court of Appeal in *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610; [2010] 1 AMR 285 provided a guide on how damages are to be assessed for cases not involving breach of contract:

> It is our view that for a claim based on fraud and conspiracy to defraud, the plaintiffs should be entitled to the loss suffered as the result of the deprivation of their income or profit caused by the wrong committed by the defendants after taking into account the foreseeability factor — see para 1138 *Halsbury's Laws of England* (4th Ed), Vol 12. Here the plaintiff's third witness has given creditable and uncontradicted evidence on how the amount of losses was arrived at and this has been accepted by the High Court. Though each plaintiff was not calfed to testify on their respective loss, we see no reason for this requirement since in this FELDA scheme all the plaintiffs have agreed to sell their crops to the third defendant and the profits derived therefrom shared collectively by them with the first defendant.

[62] Applying the law to the facts of this case, in the instant case, the plaintiff's basis to claim for damages arises from both breach of contract and conspiracy to injure. It is my view that the plaintiff is entitled to claim for RM1,236,070.40 a month, being rental received by the third defendant from the fourth defendant for the period from 1 January 2011–7 March 2012 because the rental proceeds rightly belongs to the plaintiff had the tenancy agreement been performed. It is also my view that the plaintiff is entitled to claim for the same amount from the fourth defendant for the period from 8 March 2012 to 11 August 2012 because the tenancy agreement is valid until 11 August 2012.

AGAINST THE FIRST DEFENDANT

[63] The plaintiff's claim includes rental due to the plaintiff from other subtenant, apart from the fourth defendant. Considering the fact that any monies due to the plaintiff is to be deducted against the RM250,000 rental and other expenses, the parties agreed to go for assessment of damages before the senior assistant registrar of the High Court, both for breach of contract and tort of conspiracy to injure.

AGAINST THE THIRD DEFENDANT

[64] At RM1,236,070.40 per month for the period from 1 January 2011–7 March 2012, the computation is as follows:

(a) 1 January 2011–31 December 2011	=	12 months
RM1,236,070.40 x 12 months	=	RM14,832,844.80
(b) 1 January 2012–28 February 2012	=	two months
RM1,236,070.40 x 2 months	=	RM2,472,140.80
(?) 1 March 2012–7 March 2012	=	seven days
RM1,236,070.40 x 7 days	=	RM279,112.67

31

Total = RM14,832,844.80 + RM2,472,140.80 + RM279,112.67 = RM17,584,098.27

[65] I allowed the plaintiff's claim for the sum of RM17,584,098.27 against the third defendant. This judgment sum carries with it 5% interest pa from the date of the writ to the date of satisfaction.

AGAINST THE FOURTH DEFENDANT

[66] At RM1,236,070.40 per month for the period from 8 March 2012 to 11 August 2012, the computation is as follows:

(d) 8 March 2012–31 March 2012	=	24 days
RM1,236,070.40 x 24 days	=	RM956,957.73
31		
(e) 1 April 2012–31 July 2012	=	four months
RM1,236,070.40 x 4 months	=	RM4,944,281.60
(f) 1 August 2012–11 August 2012	=	11 days
RM1,236,070.40 x 11 days	=	RM438.605.62
31		

Total = RM956,957.73 + RM4,944,281.60 + RM438,605.62 = RM6,339,844.95

[67] I allowed the plaintiff's claim for the sum of RM6,299,971.72 against the fourth defendant. This judgment sum carries with it 5%pa interest from the date of the writ to the date of satisfaction.

CONCLUSION

[68] Based on the evidence adduced before the court, the plaintiff has proven its case of breach of contract against the first defendant and tort of conspiracy to injure against all the defendants. The defendants as the guilty parties are not entitled to gain any benefit from their own wrong. On those grounds, I allowed the plaintiff's claims in prayer (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (x), (xi), (xiv) and (xv) of the statement of claim with cost of RM175,000. The cost ordered against the defendants are: RM100,000 against the first defendant; RM35,000 each against the third and fourth defendant respectively and RM5,000 against the second defendant. On the same ground, I dismiss the first defendant's counterclaim with RM2,000 cost.

Plaintiff's claim allowed and defendants' counterclaim dismissed with costs of RM2,000.

Reported by Kanesh Sundrum