



**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[CIVIL SUIT NO. WA-24NCC-417-10/2016]**

BETWEEN

- 1. KLASARI SDN BHD
(Company No: 398763-M)**
- 2. EASTERN GLOBAL LINK SDN BHD
(Company No: 512498-P)**
- 3. INSTANT RELIANCE SDN BHD
(Company No: 519896-U)**
- 4. NG HENG HOOI
(NRIC No: 730721-04-5001)**
- 5. OMAR BIN OSMAN
(NRIC No: 370319-11-5247)**
- 6. WONG CHEN PEI FANG
(NRIC No: 551204-71-5026)**
- 7. WONG SING @ WONG MUN SEONG
(NRIC No: 410920-06-5117)**

... PLAINTIFFS

AND

**CHAN KWONG CHEE
(Passport No: 503355887)**

... DEFENDANT

BEFORE

Y.A. KHADIJAH BINTI IDRIS

JUDICIAL COMMISSIONER

GROUND OF JUDGMENT

Introduction

[1] In this Originating Summons (OS) the Plaintiffs sought, among others, for the Consent Order dated 5 December 2011 (Consent Order) entered between the Plaintiffs and the Defendant in Kuala Lumpur High Court Civil Suit No. 22NCC-761-2011 (Suit 761) to be annulled and dissolved.

[2] The Plaintiffs subsequently filed an application under Order 14A rule 1 of the Rules of Court 2012 (RoC 2012). The Order 14A application was dismissed. Thus this appeal by the Plaintiffs.

The OS

[3] In the OS the parties are as follows –

- a) Klasari Sdn Bhd (Klasari SB), the 1st Plaintiff;
- b) Eastern Global Link Sdn Bhd (Eastern Global SB), the 2nd Plaintiff;
- c) Instant Reliance Sdn Bhd (Instant Reliance SB), the 3rd Defendant;
- d) Ng Heng Hooi, the 4th Plaintiff;
- e) Omar bin Osman, the 5th Plaintiff;

- f) Wong Chen Pei Fang, the 6th Plaintiff
- g) Wong Sing@Wong Mun Seong, the 7th Plaintiff

[4] The 1st to the 7th Plaintiffs sought for an order that the Consent Order recorded in Suit 761 be annulled and dissolved on the ground that Chan Kwong Chee, the Defendant here and the plaintiff in Suit 761 has no *locus standi* and/or interests in the said Suit. According to the Plaintiffs, in Suit 761 the Defendant Chan Kwong Chee falsely represented himself to be an attorney under a power of attorney given by the shareholders of the 1st to the 3rd Plaintiffs authorising the Defendant to institute Suit 761, on behalf of the shareholders of the 1st to the 3rd Plaintiffs, against the Plaintiffs. Relying on the said representation the Plaintiffs agreed to carry out negotiations with the Defendant which led to the Consent Order.

[5] Two months prior to the filing of the OS, the Plaintiffs discovered the Power of Attorney (Impugned Power of Attorney) which the Plaintiffs produced as Exhibit WIW-3 to Enclosure 2 was never deposited and registered in the High Court of Malaya. As such the Power of Attorney is not valid and cannot be enforced. Therefore Suit 761 was wrongfully filed by the Defendant as the Defendant has no valid authority to do the same on behalf of the shareholders. It follows the Consent Order entered between the Plaintiffs and the Defendant is invalid and ought to be set aside and annulled by the court.

Background of Suit 761

[6] Suit 761 was an action by the Defendant, a British citizen, against all the Plaintiffs. The facts which can be gathered from the Statement of Claim dated 5 May 2011 (Statement of Claim) in Suit 761 are as follows –

- (a) the Defendant and the 7th Plaintiff, Wong Sing @ Wong Mun Seong are business partners since 1990s and both has jointly formed several companies in Malaysia where shares of the companies are equally divided between them. This means each of them holds 50% of the shares in each of the company they incorporated.
- (b) as a result of the said joint collaboration, the 1st, 2nd and 3rd Plaintiffs were set up. It was the parties' mutual intention and agreement that both of them shall each holds 50% of the shares in each of the 1st, 2nd and 3rd Plaintiffs' companies.
- (c) The 7th Plaintiff informed the Defendant that since the Defendant is a foreigner, he cannot hold more than 50% shares in the 1st, 2nd and 3rd Plaintiffs' companies. To overcome this, the 7th Plaintiff introduced the 5th Plaintiff to the Defendant for purpose of holding the Defendant's shares in the three companies as the Defendant's nominee and/or in trust for the Defendant. Thus the Defendant's 50% shares in the 1st to the 3rd Plaintiffs was held in the following manner –
 - i) out of the Defendant's 50% shares in the 1st Plaintiff, the 5th Plaintiff holds 75,000 units and Gary Chan Ka Wai (Gary Chan), who is the Defendant's son, holds 50,000 units of shares in the 1st Plaintiff. Both the 5th Plaintiff and Gary Chan hold the shares as the Defendant's nominee and in trust for the Defendant.
 - ii) out of the Defendant's 50% shares in the 2nd Plaintiff, the 5th Plaintiff and Gary Chan hold 75,000 and 12,500 units of shares respectively as the Defendant's nominee and in trust for the Defendant.



While the balance 37,500 units was held by the Defendant.

- iii) out of the Defendant's 50% shares in the 3rd Plaintiff, the 5th Plaintiff and Chu Kam Sau Carrie (Defendant's wife) hold 75,000 and 50,000 units of shares respectively as the Defendant's nominee and in trust for the Defendant.

[7] The Defendant and the 7th Plaintiff bought a few pieces of land which were registered in the name of the 1st, 2nd and 3rd Plaintiffs' companies. It is the Defendant's position that the lands were registered as such because the Defendant is a foreigner. The Defendant has lodged caveat over those pieces of lands.

[8] The Defendant pleaded that the 1st, 3rd and 7th Plaintiffs owed him monies which is due and payable to him.

[9] The Defendant discovered on 16 February 2011 the 5th Plaintiff, without the Defendant's knowledge and consent, wrongfully transferred 74,999 units out of the 75,000 shares held by the 5th Plaintiff in the 1st Plaintiff to the 7th Plaintiff. It was also discovered on even date that the 5th Plaintiff also, without the Defendant's knowledge and consent, wrongfully transferred 74,999 units out of the 75,000 shares held by the 5th Plaintiff in the 3rd Plaintiff to the 4th Plaintiff.

[10] The Defendant had demanded, via various letters issued by his solicitor to the 1st, 2nd, 3rd, 5th and 7th Plaintiffs, that the said Plaintiffs transfer to him the shares held by the 5th Plaintiff in the 1st to the 3rd Plaintiffs as his nominee and in trust for him. However the said Plaintiffs failed to do so. The Defendant filed a civil action against the said Plaintiffs via Kuala Lumpur High Court D3-2-1529-2007 which was subsequently withdrawn with liberty to file afresh.

[11] The Defendant therefore claimed in Suit 761 for, among others, the following orders:

- a) that the 75,000 units shares that the 5th Plaintiff holds in each of the 1st to the 3rd Plaintiffs was held by the 5th Plaintiff as the Defendant's nominee and in trust for the Defendant;
- b) that the transfer of the 74,499 units shares in the 1st Plaintiff by the 5th Plaintiff to the 7th Plaintiff is null and void *ab initio*;
- c) that the transfer of the 74,499 units shares in the 3rd Plaintiff by the 5th Plaintiff to the 4th Plaintiff is null and void *ab initio*;
- d) that the 1st to the 3rd Plaintiffs to execute the transfer of the half share of the Defendant in the lands bought in the name of the 1st to the 3rd Plaintiffs, namely, the 1st Plaintiff's Land, the 2nd Plaintiff's Land and the 3rd Plaintiff's Land free from encumbrances. In the event the 1st Plaintiff had transferred or sold the 1st Plaintiff's Land to third parties then the 1st Plaintiff to pay to the Defendant half of the proceeds of sales in respect of the land sold;
- e) the 1st and 7th Plaintiffs to pay the Defendant RM265,231.50 being the sum due and payable as at 10 October 2006 and the 3rd and 7th Plaintiffs to pay the Defendant RM268,627.99 being the sum due and payable as at 31 July 2007; and
- f) exemplary and aggravated damages.

[12] Suit 761 was resolved by way of the Consent Order entered by the parties. The Consent Order provided, among others, as follows:

- a) the lands purchased under the name of the 1st to the 3rd Plaintiffs are to be sold, either through auction or private sales, at a minimum price of RM3.5 million.
- b) the land under the ownership of Ultra Benchmark Sdn Bhd to be sold, either through auction or private sales, at a minimum price of RM900,000.
- c) all caveats lodged by the Defendant on the lands registered in the name of the 1st to the 3rd Plaintiffs are to be removed.
- d) the balance of the proceeds from the sales above, after deducting the costs and fees, is to be distributed to the Defendant and the 7th Plaintiff in the ratio of 40%:60%.

Order 14A application

[13] Via Enclosure 9, the Plaintiffs filed an application pursuant to Order 14A rule 1 RoC 2012 for the OS to be disposed of by determining the following question of law –

- (a) whether the Defendant has the *locus standi* to file Suit 761 and to record the Consent Order; and
- (b) if the answer to the question in (a) is in the negative, whether the Consent Order can be maintained and enforced.

Plaintiffs' contentions

[14] Based on the OS and the affidavit in support thereto, the reasons why the Plaintiffs claim the Defendant has no *locus* to initiate Suit 761 and enter into the Consent Order may be summarized as follows –

- (a) Defendant has no *locus standi* to initiate suit 761 as the Defendant was neither director nor registered shareholder of the 1st, 2nd and 3rd Plaintiffs. Defendant has no interest in the said companies and failed to show the nexus between the Defendant and the said companies.
- (b) the Defendant had falsely misrepresented himself as an attorney under a Power of Attorney executed by the shareholders of the 1st, 2nd and 3rd Plaintiffs' companies for purpose of filing Suit 761 against the Plaintiffs on behalf of the said shareholders. The Power of Attorney was never deposited and registered in the High Court of Malaya. A copy of the Power of Attorney is attached as Exhibit WIW-3 to Enclosure 2.
- (c) the Trust Deed dated 22 May 2001 relied by the Defendant does not give any right to the Defendant to file Suit 761 as the shares were held in trust by the 5th Plaintiff on behalf of Selina Chan Ka Yan (Selina Chan) and not on behalf of the Defendant.
- (d) The Defendant is not entitled to the proceeds of sale of lands held under the proprietary of the 1st and 3rd Plaintiffs and Ultra Benchmark Sdn Bhd because Defendant is not a director nor a shareholder in that said companies.
- (e) the Defendant has no legal capacity to represent Gary Chan. This is because the Power Attorney dated 21 July

2015 created by Gary Chan in his capacity as shareholder of Ultra Benchmark Sdn Bhd in favour of the Defendant was never deposited and registered in the High Court of Malaya.

Defendant's contentions

[15] The Defendant's reply to the Plaintiffs' claim are as follows –

- (a) Suit 761 was filed by the Defendant in his own capacity and for his own interest. The Defendant has never pleaded in the Writ and the Statement of Claim in Suit 761 that he was granted a power of attorney by the shareholders of the 1st to the 3rd Plaintiffs.
- (b) The Defendant was given an authorization letter by each of the 1st, 2nd, 3rd and the 6th Plaintiffs to represent the said Plaintiffs in Suit 761 and for the purpose of recording the Consent Order dated 5 December 2011. Copies of the respective authorization letters all dated 29 November 2011 are collectively marked as Exhibit CKC-A to the Defendant's affidavit Enclosure 5.
- (c) In Suit 761, the Defendant pleaded he is a shareholder of the 2nd Plaintiff. The Defendant also pleaded that he is the beneficiary to 50% of the shares in the 1st to the 3rd Plaintiffs. Pursuant to a Trust Deed dated 22 May 2001 the 5th Plaintiff holds 30,000 units of shares in the 2nd Plaintiff in trust for the Defendant. The 5th Plaintiff had also executed a Power of Attorney on even date to the Defendant (Exhibit CKC-1 to Enclosure 17). Via another Trust Deed of even date executed between the 5th Plaintiff and Selina Chan who is the Defendant's daughter, the 5th



Plaintiff holds 75,000 units of shares in the 1st Plaintiff in trust for Selina Chan who is the Defendant's nominee (Exhibit CKC-2 to Enclosure 17).

- (d) Defendant also pleaded that he is entitled to 50% of the lands held by the 1st to the 3rd Plaintiffs. On the aforesaid basis he has the *locus standi* to initiate Suit 761.
- (e) In suit 761 the Defendant did not at any time represent himself as an attorney under a power of attorney granted by the shareholders of the 1st to the 3rd Plaintiffs. The Statement of Claim that he filed in Suit 761 did not at any time pleaded that he was an attorney of the said shareholders.
- (f) In respect of the Impugned Power of Attorney referred to by the Plaintiffs in the OS and the affidavit in support thereto, the Defendant stated at the time the Consent Order was executed on 5 December 2011 the said Power of Attorney which was dated 21 July 2015 does not exist. The Defendant admitted to the extent that there is a Power of Attorney executed by his son as the donor on 21 July 2015 to him as the donee. However the Defendant emphasized the Impugned Power of Attorney has nothing to do with the Consent Order entered into between the Plaintiffs and the Defendant on 5 December 2011. As such the Plaintiffs cannot say they are influenced by the Impugned Power of Attorney dated 21 July 2015 to enter into a negotiation with the Defendant which led to the execution of the Consent Order dated 5 December 2011.

[16] The Defendant argues the Plaintiffs' point of law (*locus standi*) is inapplicable because Defendant's cause of action against Plaintiffs lies with law of trust. Defendant commenced action as true and



beneficial owner for the shares in the Defendant. Therefore, the issue of *locus standi* and no interest could not be sustained.

[17] Defendant submits that the Plaintiffs' grounds are untrue and misleading based on the following reasons:

- a) In Suit 761 the Defendant never claimed that he is a registered shareholder or registered owner of the lands. Defendant stated that he is the beneficial owner for 50% of shares and for his contribution in purchase of the properties.
- b) When the Consent Order was entered in Suit 761 the Power of Attorney did not exist. The said Power of Attorney was never mentioned in Suit 761. Therefore, it has no relevance to the Consent Order.
- c) Plaintiffs are aware and have knowledge of Defendant's claim and have every opportunity to legal advice or representation prior recording the Consent Judgment.

[18] Learned counsel for the Defendant submits that the OS ought not to be disposed of by determining the question of law posed by the Plaintiffs as material facts in regards to the allegation of misrepresentation is disputed.

The law

[19] Order 14A rule 1 RoC 2012 provides as follows:

1. *Determination of questions of law or construction (O. 14A r. 1)*

(1) *The Court may upon the application of a party or of its own motion determine any question of law or*

construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19, or any other provision of these rules.

2. *Manner in which applications under rule 1 may be made (O. 14A r. 2)*

An application under rule 1 may be made by a notice of application or, notwithstanding Order 32, rule 1, may be made orally in the course of any interlocutory application to the Court.

[20] In *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062 the Court of Appeal laid down the requirements

for the exercise of the discretionary power of the court under the said Order 14A –

[10] It is obvious that the power of the court under this order is discretionary, as clearly evident by the use of the word ‘may’ therein. The power, in our opinion, is only exercisable where the determination of any such question of law or construction of any document, as the case may be, appears to the court to be suitable without the full trial of the action and will finally determine the entire cause or matter or any claim or issue in such action. This is a required prior condition or a prerequisite which must be fulfilled before this order can be invoked. The court should not, as a matter of course, proceed to determine any such question without first considering the legal prerequisite in this order. In a nutshell, the conditions prescribed in r. 1 are not that can be conveniently avoided or sidestepped.

...

[12] The Malaysia High Court Practice, High Court, MLJ [2004] at para. 14A.1.3 clearly states that the test of whether the question of law or construction is ‘suitable’ to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action (see also BP Malaysia Sdn Bhd v. Zabedah Mohamed & Ors [2007] 8 CLJ 245).

[21] I have scrutinised the facts in the OS as presented by both the Plaintiffs and Defendant in their affidavits and the relevant documents which are attached as exhibits to the affidavits and I am of the view that the material facts are not in dispute and as such the question of law posed by the Plaintiff is suitable for determination under Order 14A without a full trial. As will be shown below, the material facts for purpose of determining the question of law is not in dispute despite the Plaintiffs' desperate attempt raising issues on the facts and the Defendant's contentions that material facts is disputed. It is also my considered opinion that the said question of law determines the entire cause of the OS.

Findings of the court

[22] To my mind, the crux of the Plaintiffs' complaint for wanting to set aside the Consent Order in Suit 761 is this –

- (a) the Defendant is not a shareholder of the 1st, 2nd and 3rd Plaintiffs and he has no interest whatsoever in the said Plaintiffs.
- (b) the Defendant has no *locus standi* to file Suit 761 on behalf of the 1st, 2nd and 3rd Plaintiffs because there was no power of attorney granted by the said Plaintiffs to the Defendant to file the said Suit.
- (c) the impugned Power of Attorney executed by the Defendant's son is null and void. A copy of the impugned Power of Attorney is marked as Exhibit WIW-3 to Enclosure 10 (also marked as Exhibit WIW-3 to Enclosure 2 albeit incomplete as page 1 is missing).

[23] It is the Plaintiffs' position that the Defendant misled the court in that the Defendant had stated that he was granted with a power of



attorney from the shareholders of the 1st, 2nd and 3rd Plaintiffs to initiate legal proceedings on behalf of them against the Plaintiffs. To support this position of theirs, the Plaintiffs exhibited a copy of the Defendant's Statement of Claim marked Exhibit WIW-2 to their affidavit Enclosure 2. The Plaintiffs said because of this false representation by the Defendant the Plaintiffs agreed to carry out negotiations with the Defendant in relation to Suit 761. Eventually the negotiations led to the Plaintiffs and the Defendant in Suit 761 executing the Consent Order on 5 December 2011.

[24] The Plaintiffs also claim the Power of Attorney (Impugned Power of Attorney) which the Plaintiffs alleged form the basis upon which the Defendant filed Suit 761 was invalid and void as it was not registered at the High Court of Malaya. Therefore the Defendant has no *locus* standi to initiate Suit 761 and it follows the Consent Order is void. The Plaintiffs now claim had they known the Defendant has no *locus* standi they would not have carry out negotiations with the Defendant. A copy of the Impugned Power of Attorney which the Plaintiffs claim to be invalid and void is marked as Exhibit WIW-3 to Enclosure 10 (also marked as Exhibit WIW-3 to Enclosure 2 albeit with missing page 1).

[25] Thus the Plaintiffs claim the Defendant has no *locus* standi to institute the OS as he is not a shareholder of the 1st, 2nd and 3rd Plaintiffs and he has no interests in the said companies.

[26] On the other side the Defendant submits, in Suit 761 he never claimed that he is a registered shareholder or registered owner of the lands. His claim in Suit 761 was made on the basis that he is the beneficial owner of the 50% of shares in the 1st to the 3rd Plaintiffs and based on his contribution in the purchase of the lands.

[27] The Defendant further submits he did not mentioned the Impugned Power of Attorney in Suit 761. The Impugned Power of



Attorney did not exist when the Consent Order was executed. Therefore, it has no relevance to the Consent Order. The Defendant stated he relied on the Trust Deed dated 22 May 2001 in Suit 761.

The Plaintiffs' affidavits

[28] Before I proceed to consider the question of law, it is pertinent to point out crucial issues in respect of the admissibility of the affidavits affirmed and filed on behalf of all the Plaintiffs in the OS. The Plaintiffs' affidavits are Enclosures 2, 7, 8, 10 and 18. The issues are discussed below –

- (a) The Plaintiffs' deponent
 - (i) The Plaintiffs' affidavits in the OS are all affirmed by one Wong I Wei who is not a party to the OS and neither is she a party in Suit 761. The deponent Wong I Wei deposed that she is given the authority by the Plaintiffs to depose the affidavits on behalf of the Plaintiffs. The deponent Wong I Wei averred that the facts deposed in the affidavits are within her personal knowledge and/or from the records to which she has access.
 - (ii) However the deponent did not, in any one of the affidavits filed in the OS state in what capacity she deposed the affidavits on behalf of the Plaintiffs. There were no description of her occupation or the description of her employment with the Plaintiffs as required under Order 41 rule 1(4) RoC 2012.
 - (iii) I have perused the information (the corporate, share capital, directors/officers, shareholders/members, company charges and financial information) obtained

by the Plaintiffs from the Companies Commission of Malaysia (CCM) on 22 November 2016 in respect of the 1st, 2nd and 3rd Plaintiffs which are marked as Exhibit WIW-1 to Enclosure 8. It is noted that the name 'Wong I Wei' does not appear anywhere in the various documents in the said Exhibit WIW-1.

- (iv) Order 41 rule 5(1) of the RoC 2012 provides that an affidavit may contain only such facts as the deponent of the affidavit is able of her own knowledge to prove. This requirement is obviously intended to exclude hearsay evidence and therefore the deponent must be in a position which enables her to personally swear to the facts which transpired amongst all the Plaintiffs. In view of the deponent Wong I Wei's status in relation to all the Plaintiffs is unknown, the said deponent's standing to affirm facts which relate to the subject matter of the OS is highly questionable. Although Order 41 rule 5(2) of the RoC 2012 allows statements of information of belief to be deposed in an affidavit sworn for the purpose of interlocutory proceeding such as the Order 14A application, a close examination of the affidavits affirmed by the deponent Wong I Wei shows that the facts related in the affidavits are facts which the deponent claim to have personal knowledge and not facts based on information or belief.
- (v) I am of the view the affidavits filed by the Plaintiffs are defective and ought not to be admitted. Although the Defendant did not object to the affidavits, the Defendant's failure to object to inadmissible evidence, does not admit such evidence (*Syarikat*

Jengka Sdn Bhd v. Abdul Rashid bin Harun [1980] 1 LNS 125; [1981] 1 MLJ 201).

- (vi) I am mindful of Order 41 rule 4 of the RoC 2012 which provides discretionary power to the court to grant leave for a defective affidavit to be used. In this respect I am of the view that the defective is fatal as it goes against the fundamental requirement of sworn statement in the form of affidavits filed and used in court to serve justice. The deponent Wong I Wei failed to state in what capacity he affirmed the affidavit, namely, whether she is a director or shareholder of the 1st to the 2nd Plaintiffs and her status vis-à-vis the other Plaintiffs are concerned. This particular fact will in turn indicate how she became personally acquainted with the facts and/or has access to the records relating to such facts. Furthermore there is no evidence produced by the deponent Wong I Wei to support her averment that she was authorised by all the Plaintiffs to affirm the affidavits on their behalf which, in the case of the 2nd and 3rd Plaintiffs, I find it is simply not possible for the said Plaintiffs to authorise the deponent Wong I Wei, for reasons stated below.

(b) The 2nd Plaintiff is in liquidation

- (i) The corporate information dated 22 November 2016 obtained from the MMC in respect of the 2nd Plaintiff, Eastern Global Link Sdn Bhd (Exhibit WIW-1 to Enclosure 8) shows that the status of the 2nd Plaintiff as being in the process of winding up and the Official Receiver is the liquidator.

- (ii) Since the 2nd Plaintiff is in liquidation, its board of directors is effectively *functus officio*. The power to run the 2nd Plaintiff vests with the Official Receiver who is the liquidator, which includes the power to bring or defend any action or other legal proceeding in the name and on behalf of the 2nd Plaintiff (s. 236(2) Companies Act 1965). Thus it would be the Official Receiver's call whether to file any action against the Defendant or any other party for any matter whatsoever. Thus the deponent Wong I Wei's averment that she is authorised to affirm all the affidavits in the OS on behalf of the 2nd Plaintiff raises serious doubt as to the truthfulness of such averment.
- (c) The 3rd Plaintiff is dissolved
 - (i) Based on the corporate information dated 22 November 2016 obtained from the MMC in respect of the 3rd Plaintiff Instant Reliance Sdn Bhd (Exhibit WIW-1 to Enclosure 8) shows that the status of the 3rd Plaintiff is dissolved.
 - (ii) It cannot be ascertained on what ground the 3rd Plaintiff was dissolved, whether due to completion of a winding up process (s. 240 of the CA 1965), pursuant to a merger or amalgamation (s. 178(1)(d) of the CA 1965) or struck off by the Registrar (s. 308 of the CA 1965).
 - (iii) Whatever the reason behind the dissolution of the 3rd Plaintiff, the dissolution of the 3rd Plaintiff simply means the corporate existence of the 3rd Plaintiff is destroyed. It therefore follows that it cannot



commence legal proceedings and neither can any person act on behalf of the dissolved 3rd Plaintiff. Simply put the 3rd Plaintiff is no longer a body corporate with a legal entity which can sue or be sued. Thus the deponent Wong I Wei averment that she is authorised by the 3rd Plaintiff to affirm affidavits on behalf of the 3rd Plaintiff is not credible at all.

- (d) The status of the 7th Plaintiff
- (i) In his affidavit Enclosure 17 at paragraph 6, the Defendant averred that the 7th Plaintiff has passed away and that he reserved his right to raise objection in respect of that issue. There was no objection raised by the Defendant at the hearing of Enclosure 9.
 - (ii) The Plaintiffs in their affidavit in reply Enclosure 18 did not respond to the said claim made by the Defendant. It is pertinent to note that the Plaintiffs through the deponent Wong I Wei specifically denied, in paragraph 4 of Enclosure 18, the Defendant's averment in paragraphs 5, 7 and 8 of Enclosure 17. However the said deponent was completely silent in respect of the Defendant's claim in paragraph 6 of Enclosure 17 (that the 7th Plaintiff has since passed away).
 - (iii) Since the Plaintiffs fail to contradict the positive assertion made by the Defendant that the 7th Plaintiff has passed away the Plaintiffs are deemed to have admitted the fact that the 7th Plaintiff is a deceased

(*Ng Hee Thong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281).

- (iv) Thus it is the personal representative of the 7th Plaintiff who must represent the estate of the 7th Plaintiff in the OS against the Defendant. This call into question the averment made by the deponent Wong I Wei that she is authorised by the 7th Plaintiff to depose the affidavit on behalf of the 7th Plaintiff when in actual fact the 7th Plaintiff is a deceased person.

[29] Having regard to the above issues in totality, I am of the view the affidavits affirmed by the deponent Wong I Wei is fatally defective and inadmissible. On this ground alone the OS ought to be dismissed *in limine*.

Question of law

[30] However for completeness I will proceed to consider the question of law posed by the Plaintiffs on the assumption that the deponent Wong I Wei has the *locus* to affirm the affidavits on behalf of all the Plaintiffs and that the 2nd and 3rd Plaintiffs are a going concern.

[31] As the basis of the Plaintiffs' claim against the Defendant is premised on Suit 761, I have perused the Statement of Claim filed by the Defendant and my finding is as follows –

- (a) The Defendant's pleaded case was that he was the true and beneficial owner of the 50% of the issued and paid up shares in the 1st, 2nd and 3rd Plaintiffs. Based on the said statement of claim, it appears that the 50% entitlement is premised on the mutual agreement reached between the



Defendant and the 7th Plaintiff in their joint collaboration in setting up the 1st, 2nd and 3rd Plaintiffs' companies.

- (b) It was pleaded by the Defendant that the 75,000 of the issued and paid up shares held by the 5th Plaintiff in each of the 1st, 2nd and 3rd Plaintiffs' companies are held by the 5th Plaintiff as the Defendant's nominee and in trust for the Defendant. As such the Defendant sought for a court order that the 5th Plaintiff held the said shares in each of the 1st, 2nd and 3rd Plaintiffs as the Defendant's nominee and held in trust for the Defendant. Accordingly the Defendant also sought for an order that the transfer by the 5th Plaintiff of 74,999 units of shares out of the said 75,000 shares in the 1st Plaintiff to the 7th Plaintiff and 74,999 units of shares out of the said 75,000 shares in the 3rd Plaintiff to the 4th Plaintiff without the Defendant's knowledge and consent is null and void *ab initio*.
- (c) The Defendant also pleaded that his 50% of the issued and paid up shares in the 1st Plaintiff was initially held by his daughter Selina Chan who is his nominee. Via a Trust Deed dated 22 May 2001 and on the instruction of the Defendant, Selina Chan appointed the 5th Plaintiff to hold the 75,000 of the issued and paid up shares in the 1st Plaintiff in trust for the Plaintiff. Further thereto, on the instruction of the Defendant, Selina Chan transferred 50,000 and 75,000 units of shares (which Selina Chan holds in trust for the Defendant) to Gary Chan and the 5th Plaintiff respectively on 27 October 2006. From a search conducted with CCM on 16 February 2011, the Defendant discovered that the 5th Plaintiff without the Defendant's consent has wrongfully transferred 74,999 units of shares



out of the 75,000 units of shares he holds in trust for the Defendant in the 1st Plaintiff to the 7th Plaintiff.

- (d) Via a Trust Deed dated 22 May 2001 (Exhibit CKC-1 to Enclosure 17) the Defendant appointed the 5th Plaintiff to be his nominee to hold 30,000 units of issued and paid up shares in the 2nd Plaintiff in trust for the Defendant. Pursuant to the Trust Deed the 5th Plaintiff executed a Power of Attorney (Exhibit CKC-1 to Enclosure 17) where the 5th Plaintiff appointed the Defendant as his attorney in respect of the said 30,000 units of shares.
- (e) The Defendant also transferred 75,000 units of the issued and paid up shares in the 3rd Plaintiff to the 5th Plaintiff who holds the said shares as Defendant's nominee and in trust for the Defendant. From a search conducted with CCM on 16 February 2011, the Defendant discovered that the 5th Plaintiff without the Defendant's consent has wrongfully transferred 74,999 units of shares out of the 75,000 units of shares he holds in trust for the Defendant in the 3rd Plaintiff to the 4th Plaintiff.
- (f) The Defendant and the 7th Plaintiff had jointly purchased 3 pieces of lands which were individually registered in the name of the 1st, 2nd and 3rd Plaintiffs. The Defendant has lodged caveat over the three pieces of land.
- (g) The Defendant pleaded that the 1st and 7th Plaintiffs are indebted to the Defendant in the sum of RM265,231.50 as at 10 October 2006. Whilst the 3rd and 7th Plaintiffs are indebted to the Defendant in the sum of RM268,627.99 as at 31 January 2007. The said sums are still due and payable by the 1st, 3rd and 7th Plaintiffs to the Defendant.



[32] Based on the Statement of Claim it is clear that Suit 761 was filed by the Defendant in his capacity as the true and beneficial owner of 50% of the issued and paid-up shares in the 1st, 2nd and 3rd Plaintiffs. The basis of such claim is premised on the agreement or understanding that he had with the 7th Plaintiff (the 5th Defendant in Suit 761) when both of them decided to become business partner and set up companies for investment purposes. The Defendant's pleaded position is that shares in the companies incorporated by them will be divided equally amongst them. This means both the Defendant and 7th Plaintiff holds 50% each of the shares in the 1st, 2nd and 3rd Plaintiffs.

[33] In respect of the Defendant's shares in the 2nd Plaintiff, a Trust Deed was executed by the Defendant and the 5th Plaintiff where it was stipulated that the 5th Plaintiff (referred to as the 'Trustee' in the said Trust Deed) holds in trust 30,000 of the issued and paid-up shares in the 1st Plaintiff for the benefit of the Defendant (referred to as the 'Beneficiary' in the said Trust Deed). The relevant provision of the said Trust Deed includes the following –

NOW THIS DEED WITNESSETH between the parties hereto as follows:-

1. *The Trustee BOTH HEREBY DECLARES, ACKNOWLEDGES and CONFIRMS that the Trust Shares together with all rights and entitlement attaching to each and every of the Trust Shares in accordance with the Articles of Association of the Company, together with all dividends, interests, bonuses, bonus and rights issue shares and other distribution and benefits in respect thereof, shall and are hereby held in trust for the benefit of the Beneficiary ABSOLUTELY.*
2. *The Trustee HEREBY AGREES COVENANTS AND UNDERTAKES with the Beneficiary in relation to the Trust*

Shares so registered in his name and all rights and benefits aforesaid as follows:-

- (1) The Trustee shall not sell, transfer, charge or otherwise subject the Trust Shares or any part of parts thereof, to any lien or other encumbrances or in any way deal with the Trust Shares or any rights attaching thereto except as expressly directed or approved in writing by the Beneficiary;*

...

- 5. Notwithstanding anything herein contained the Beneficiary shall be entitled at will by notice in writing to the Trustee to terminate this Trust created herein and to substitute a nominee(s) of the Beneficiary in place of the Trustee as the registered holder(s) of the Trust Shares.*

[34] On the same date, the Power of Attorney (Exhibit CKC-1 to Enclosure 17) was executed between Defendant and the 5th Plaintiff where the 5th Plaintiff who is the donor appointed the Defendant who is the donee as the 5th Plaintiff's attorney to deal with the 30,000 shares in the 2nd Plaintiff. The said Power of Attorney was registered at Kuala Lumpur High Court on 25 May 2001.

[35] In respect of his shares in the 1st Plaintiff, the 75,000 issued and paid-up capital was held by his daughter Selina Chan who is his nominee who holds the shares in trust for the Defendant. Vide Trust Deed dated 22 May 2001 Selina Chan, upon the Defendant's instruction, appointed the 5th Plaintiff as her nominee to hold 75,000 units of the Defendant's shares in the 1st Plaintiff. The Trust Deed between Selina Chan and the 5th Plaintiff contain the same provision as stated in paragraph 32 above.

[36] Whereas the Defendant's shares in the 3rd Plaintiff are held by his nominees, namely, the 5th Plaintiff (75,000 units of shares) and his wife Chu Kam Sau Carries (50,000 units of shares). It is the Defendant pleaded case that both 3rd Plaintiff and Carrie Chu hold the said shares in trust for him.

[37] It was in February 2011 that the Defendant discovered that the shares which the 5th Plaintiff held in trust for the Defendant in the 1st Plaintiff and 3rd Plaintiff were transferred to the 7th Plaintiff and 4th Plaintiff respectively. As such Suit 761 was instituted by the Defendant for, among others, the following orders –

- (a) that the 5th Plaintiff holds 75,000 of the issued and paid-up shares in each of the 1st, 2nd and 3rd Plaintiffs as the Defendant's nominee and/or in trust for the Defendant;
- (b) the transfer of 75,000 of the issued and paid-up shares in each of the 1st Plaintiff and the 3rd Plaintiff by the 5th Plaintiff to the 7th Plaintiff and the 4th Plaintiff is null and void ab initio;
- (c) that the 7th and 4th Plaintiffs transfer the 74,449 shares they each held in the 1st and 3rd Plaintiff respectively to the Defendant.

[38] In respect of the 1st Plaintiff's Land, the 2nd Plaintiff's Land and the 3rd Plaintiff's Land the Defendant claims the said lands were bought by him and the 7th Plaintiff. As such the Defendant is seeking for an order, *inter alia*, that the 1st, 2nd and 3rd Plaintiffs transfer half of the Defendant's share in the said lands to the Defendant.

[39] It is therefore clear that the Defendant's cause of action against the Plaintiffs in Suit 761 was premised on the trust created by the Defendant in respect of his shares in the 1st to the 3rd Plaintiffs. The

said shares were held by the 5th Plaintiff who is appointed as the Defendant's nominee to hold the said shares in trust for the Defendant. However in breach of the trust, the 5th Plaintiff transferred the said shares to the 4th and 7th Plaintiffs. Consequently the Defendant who is the beneficiary under the trust surely has the *locus* to take legal action claiming back the said shares against the 5th Plaintiff who is supposed to be the trustee and the other Plaintiffs who were in one or another involved in the transfer. As rightfully pleaded by the Defendant, he is the true and beneficial owner of the said shares.

[40] The Plaintiffs alleged the Defendant has falsely represented to them that the Defendant has a power of attorney given by the shareholders of the 1st to the 3rd Plaintiffs for purpose of filing Suit 761 against the Plaintiffs on behalf of the shareholders. The Plaintiffs said because of the false representation made by the Defendant, the Plaintiffs agreed to embark on a negotiation which resulted in the Consent Order. The Plaintiffs averred the power of attorney which the Defendant was alleged to have relied on is of no effect as it was not registered with the High Court of Malaya.

[41] This is what the Plaintiffs said in the affidavit Enclosure 10 supporting the Order 14A application –

5. *Saya menyatakan Defendan pada semua masa mantan telah membuat satu representasi yang salah terhadap Plaintiff-Plaintiff dan Mahkamah yang mulia dengan menyatakan bahawa Defendan mempunyai Wakil Kuasa Peguam daripada pemegang saham didalam Defendan Pertama hingga ke 3 untuk memfailkan saman terhadap Plaintiff-Plaintif bagi pihak Pemegang Saham. (Sesalinan Pernyataan Tuntutan Kes Guaman No: 22NCC-761-2011 bertarikh 05/05/2011 dilampirkan di sini dan ditandakan sebagai Eksibit "WIW-2").*

8. *Defendan pada semua masa yang matan adalah bukan merupakan pemegang saham yang berdaftar atau mempunyai sebarang kepentingan di dalam syarikat Plaintiff-Plaintif.*

15. *Saya menyatakan bahawa Defendan yang bukan merupakan pemegang saham yang berdaftar mahupun mempunyai sebarang kepentingan di dalam syarikat Plaintiff-Plaintif ini telah menyalahi undang- undang dengan menfailkan saman bagi pihak pemegang saham yang sah tanpa sebarang Wakil Kuasa Peguam yang sah.*

Identical paragraphs as the above are also found in the Plaintiffs' affidavit Enclosure 2 in support of the OS.

[42] It is my considered opinion that such allegation is flawed for the following reasons –

- (a) there is nothing in the Statement of Claim which indicate that Suit 761 was filed by the Defendant on behalf of the shareholders of the 1st to the 3rd Plaintiffs as alleged by the Plaintiffs. For all intent and purposes Suit 761 was filed by the Defendant to seek remedy for the wrong done to him (as beneficial owner of the shares held by the 5th Plaintiff in trust for the Defendant) by the Plaintiffs, in particular the 5th Plaintiff, the trustee. As such there is no basis for the Defendant to file Suit 761 on behalf of the shareholders of the 1st to the 3rd Plaintiffs. In this respect I do not see how the Plaintiffs were misled by the Statement of Claim and concluded that Suit 761 was filed on behalf of the shareholders of the 1st, 2nd and 3rd Plaintiffs. This is especially so when the Plaintiffs were represented and advised by their solicitors.

- (b) The Impugned Power of Attorney was executed by the Defendant's son Gary Chan who appoints the Defendant as his attorney to deal with 50,000 shares Gary Chan held in Ultra Benchmark Sdn Bhd (Ultra Benchmark). The Impugned Power of Attorney was executed in Hong Kong on 21 July 2015. The Defendant admits that said power of attorney has yet to be registered in the High Court of Malaya but he denied having to rely on the Impugned Power of Attorney to enforce the Consent Order as it has no relevance to the Consent Order.
- (c) Going by the date the Impugned Power of Attorney was executed, it is apparent that the said power of attorney did not even exist at the time the Consent Order was recorded in Suit 761. In this respect, how a power of attorney that was executed in 2015 can affect and influence the Plaintiffs in deciding whether or not to embark on a negotiation with the Defendant in 2011 in a civil action filed by the Defendant in 2011, 4 years before the execution of the Impugned Power of Attorney, is indeed baffling.
- (d) The fact as gathered from the affidavits shows the Defendant need not obtain a power of attorney from the shareholders of the 1st to the 3rd Plaintiffs to file Suit 761. The subject matter of the Impugned Power of Attorney is the 50,000 shares holds by the Gary Chan in Ultra Benchmark and the power of attorney granted by Gary Chan to his father namely the Defendant to deal with the 50,000 shares. Neither Gary Chan nor Ultra Benchmark is a party to Suit 761. The Defendant's complaint and the relief sought by the Defendant in Suit 761 does not relate to shares in Ultra Benchmark. Under the circumstances the

Plaintiffs' allegations that the Defendant has no legal capacity to represent Gary Chan because the Impugned Power of Attorney is not registered is not an issue at all.

- (e) Although the Consent Order provides a land in the name of Ultra Benchmark is to be put up for auction, this is a term of the Consent Order which has been mutually agreed by the Plaintiffs and the Defendant in 2011 and there is no dispute of the mutual agreement. What is disputed by the Plaintiffs is the *locus* standi of the Defendant to file Suit 761 and the Plaintiffs are relying heavily on this particular issue to have the Consent Order dissolved. The Consent Order is in essence a contract between the Plaintiffs and the Defendant and the parties are bound to honour the terms of the Consent Order unless there is fraud which must be specifically pleaded and particularised.
- (f) It is not disputed that the Defendant is not a registered shareholder of the 1st and 3rd Plaintiffs as can be seen from the CCM search dated 21 November 2016. In fact, such position is the very reason which caused the Defendant to file Suit 761, seeking among others, for court order that the 5th Plaintiff held the shares in the 1st, 2nd and 3rd Plaintiffs in trust for him. In this respect, no affidavit was filed by the 5th Plaintiff to deny or refute the Defendant's claim that the 5th Plaintiff held the shares in the 1st, 2nd and 3rd Plaintiffs in trust for the Defendant in order to support the deponent Wong I Wei's averment that the Defendant has no interest whatsoever in the 1st, 2nd and 3rd Plaintiffs and accordingly has no *locus* standi to file Suit 761 against the 1st, 2nd and 3rd Plaintiffs.

Conclusion

[43] Based on the aforesaid I am of the view that the Defendant has the *locus standi* to file Suit 761 and considered to enter into the Consent Order dated 5 December 2011. The first question of law is therefore answered in the affirmative. Since the Defendant has the necessary *locus standi* to file Suit 761, the Consent Order is good and valid and enforceable.

[44] Since the issue of the Defendant's *locus standi* in Suit 761 ultimately determine the final conclusion of the OS I therefore dismiss Enclosure 9 and consequently Enclosure 1, the OS, with costs.

(KHADIJAH IDRIS)
Judicial Commissioner
High Court
(Commercial Division)

Dated: 31 DECEMBER 2017

COUNSEL:

For the plaintiff/applicant - Nurul Syazreen Mohd Yahya; M/s Ramli Yusuff & Co

For the defendants/respondents - Lily Chua; M/s M Manoharan & Co

Case(s) referred to:

Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062

Legislation referred to:

Rules of Court 2012, O. 14A r. 1