

Beyond Hallmark Sdn Bhd

v

Leong Tuck Onn & Anor (sued as the partners of Messrs Megat Najmuddin Leong & Co)

High Court, Kuala Lumpur – Suit No. 22NCvC-242-05/2015

Nordin Hassan J

December 14, 2018

Contract – Sale and purchase – Breach – Claim for refund of earnest deposit held by stakeholder – Deposit paid out by stakeholder to third parties without consent – Whether defendants received refundable earnest deposit from plaintiff as stakeholders – Whether termination of agreement valid – Whether breach of stakeholdership – Whether defendants acted dishonestly and in breach of trust – Whether defendants as partners, jointly and severally liable

The first and second defendants are partners of the firm, Messrs Megat Najmuddin & Leong ("MNL") which had acted for one Cheah Theam Kheng ("CTK") who had entered into a MOA with the plaintiff to purchase 16 parcels of land at RM528 million from one City Centre Sdn Bhd ("CCSB"). At the material time, Messrs KL Lim & Lee ("KLLL") had acted for the plaintiff. In accordance with the MOA a sum of RM10.56 million was deposited by the plaintiff with MNL as earnest deposit. Subsequent thereto MNL issued two pre-signed cheques for RM10,338,335.25 and RM221,664.75 respectively to KLLL with the authorisation for KLLL to release or bank in the same in the event CTK fails to perform or breaches the MOA. CCSB had been wound-up and pursuant to the MOA, CTK was required to obtain a stay of the winding up order within three months of the signing of the MOA. CTK failed to do so within the said period and despite an extension of time having been given. Consequently the plaintiff terminated the MOA and sought the refund of the earnest deposit from MNL. MNL failed to refund the same and the two pre-signed cheques issued by it in favour of the plaintiff were dishonoured upon presentation for payment. Despite demand, MNL failed to make good the same whereupon the plaintiff commenced the instant proceedings to recover the earnest deposit.

In support of its claim, the plaintiff contended inter alia that MNL had breached its stakeholder's duties by disbursing the earnest deposit to third parties without its consent. It was further contended that in the circumstances and by reason of the defendant's failure to obtain a stay of the winding up, it is entitled to terminate the MOA and seek the refund of the earnest deposit.

1 The defendants in response argued inter alia that they, not being parties to the
MOA, are therefore not bound by the terms thereof; that they had not acted
dishonestly; that the monies were paid out to third parties by the first defendant
upon the instructions of CTK and with the plaintiff's consent; and that the
5 pre-signed cheques were "just for show". Additionally, the second defendant
argued that the MOA was handled by the first defendant without his knowledge
and that he only became aware of the same subsequent to the commencement of
the instant action.

10 **Issues**

1. Whether the defendants and/or MNL had received the refundable earnest
15 deposit from the plaintiff as stakeholders pursuant to the MOA.
2. Whether the termination of the MOA by the plaintiff is lawful.

Held, allowing the plaintiff's claim

- 20 1. As was laid down in *Kuldip Singh & Anor v Lembaga Letrik Negara & Anor*
[1983] 1 MLJ 256 solicitors holding money as stakeholders, hold the same
as trustee for both the vendor and purchaser. They do not hold it in a
contractual or quasi contractual capacity. It is an established fact that MNL
25 had received the said earnest deposit from the plaintiff bearing in mind the
first defendant's clear admission to having received the RM10.56 million as
a refundable earnest deposit for the sale transaction. Further and on the
evidence adduced, the said sum was paid to MNL as stakeholder and is
30 refundable in the event the sale is repudiated. The second defendant's
claim that MNL merely acted as agent for the vendor under the MOA, runs
counter to the oral and documentary evidence and the clear admission of
the first defendant. The fact that MNL was not a party to the MOA does not
35 exonerate it from liability. [see p 558 para 13; p 559 para 17 - p 562 para 28]
2. (a) The termination of the MOA is in accordance with the terms thereof and
was validly made and consequently, KLLL was empowered to release
40 the two pre-signed cheques. The contention that the pre-signed cheques
were "just for show" is devoid of any merit as the contemporaneous
document i.e. the letter from MNL to KLLL dated December 19, 2014 and
to which the pre-signed cheques were attached, clearly provides that the
said cheques are "to be utilized in the event the sale and purchase
transaction is aborted". [see p 563 para 35 - p 564 para 39]
- (b) On the evidence, the earnest deposit was paid out by MNL without the
consent of the plaintiff and in contravention of the terms of the MOA
which specifically provides that the MNL was to hold the same as
stakeholder in accordance with the terms of the MOA. MNL in the
circumstances had breached the stakeholdership with regard to the
refundable earnest deposit. [see p 566 para 48 - p 567 para 60]

- (c) As a stakeholder, MNL is a trustee to both CTK and the plaintiff and the consent of both parties is needed before any action can be taken with regard to the refundable earnest deposit. In this regard and by releasing the earnest deposit without the plaintiff's consent, MNL had thereby breached the stakeholdership and as trustees, had acted dishonestly and in breach of the trust. [see p 567 para 61 - p 568 para 65] 1
- (d) The defendants' contention of money laundering activity in this instance, is unsupported by evidence. [see p 568 paras 67-71] 5
- (e) The second defendant's defence of being unaware of the transaction does not absolve him of liability. In view of the provisions of ss 11 to 14 of the Partnership Act 1961, the first and second defendants as partners of MNL at the material time, are jointly and severally liable for MNL's breach of its stakeholder's duties. [see p 568 para 72 - p 570 para 75] 10

Cases referred to by the court

- Alan Michael Rozario (mengenal dalam firma Tetuan Shuhaiza & Partners) v Merbok MDF Sdn Bhd* [2010] AMEJ 0643; [2011] 1 CLJ 433, CA (ref) 20
- Datuk M Kayoas & Anor v Bar Council* [2013] 4 AMR 802; [2013] 7 CLJ 533, FC (ref)
- Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & 2 Ors* [1993] 2 AMR 3525; [1994] 1 MLJ 740, HC (ref) 25
- Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256 (ref)
- Kuwait Finance House Malaysia Bhd v Obnet Sdn Bhd & Ors (and Another Suit)* [2016] MLJU 1843 (ref) 30
- Lai Kee Peng (Tetuan Lai Kee Peng & Associates) v Tay Hup Lian* [2016] 2 AMR 705; [2016] 4 CLJ 1, FC (ref)
- Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794, FC (ref)
- Tan Sri Abdul Khalid b Ibrahim v Bank Islam Malaysia Bhd (and Another Suit)* [2009] 6 AMR 609; [2010] 4 CLJ 388, HC (ref) 35

Legislation referred to by the court

- Malaysia* 40
- Evidence Act 1950, ss 91, 92
- Partnership Act 1961, ss 11, 12, 13, 14
- Justin Voon Tiam Yu, Alvin Lai Kok Wing and Chiam Jia Yann* (Justin Voon Chooi & Wing) for plaintiff
- Lim Kian Leong and Janet Tang Yü Chi* (Lim Kian Leong & Co) for first defendant
- Jeffrey Lee Chi Hur and Navpreet Singh* (Ranjit Singh & Yeoh) for second defendant
- Judgment received: February 26, 2019*

1 **Nordin Hassan J**

Introduction

5 [1] The plaintiff filed the present suit against the defendants, amongst others, for breach of the defendants' stakeholders' duties and for failure to refund the refundable earnest deposit in the sum of RM10.56 million held by the defendants pursuant to a memorandum of agreement ("MOA") dated December 20, 2014.

10 **Background facts**

[2] The material facts in this case are the following:

15 (i) On December 20, 2014, the plaintiff entered into a MOA with Cheah Theam Kheng ("CTK") to purchase 16 parcels of lands from City Centre Sdn Bhd ("CCSB") at the price of RM528 million. In this sale and purchase transaction, Messrs KL Lim & Lee ("KLLL") acted for the plaintiff and Messrs Megat Najmuddin & Leong ("MNL") was acting for CTK.

20 (ii) Prior to the signing of the MOA, MNL by letter to KLLL dated December 8, 2014 has requested for plaintiff to deposit the sum of RM10.56 million as earnest deposit for the purchase price of the said lands and refundable if the sale is repudiated.

25 (iii) As such, on December 10, 2014, the plaintiff, through a Hong Kong company, Rich Hero Holdings Limited ("RHHL") has remitted HKD23,550,000 equivalent to RM10,338,335.25 and on December 24, 2014 another HKD520,000 equivalent to RM228,685.00 into MNL client's account. The total remittance was RM10,567,020.25.

30 (iv) Thereafter, upon request by KLLL, two official receipts dated December 12, 2014 for the sum of RM10,338,335.25 and dated December 31, 2014 for the sum of RM228,685.00 were issued by MNL in the plaintiff's name together with the surplus amount of RM7,020.25 which was refunded to the plaintiff.

35 (v) As regards the MOA, the material terms agreed by parties, amongst others are as follows:

40 (a) *Clause 1, schedule 7:*

BHSB has, prior to the execution of this Agreement, paid the sum of RM10,560,000.00 (Ringgit Malaysia Ten Million Five Hundred Sixty Thousand Only) representing two percent (2%) of the total purchase price being a refundable deposit (hereinafter referred to as the

'Refundable Earnest Deposit') to CTK's Solicitors as stakeholders, the receipt of which, the CTK acknowledges. A copy of the remittance slip is annexed herein as APPENDIX 'D'. CTK's Solicitors shall forthwith provide a duly signed Solicitor's cheque equivalent to the Refundable Earnest Deposit ('First Cheque') to BHSB's Solicitors as Stakeholder and BHSB's Solicitors are hereby authorised by the parties herein to forthwith release and/or to bank in the First Cheque to BHSB, should CTK fails to perform or in breach of any terms of this Agreement OR to return the First Cheque to CTK's Solicitors should the terms herein have been complied with accordingly;

(b) *Clause 1(b):*

CCSB is under Winding-Up order dated 25 April 2000 by virtue of Kuala Lumpur High Court D-6-228-9-2000 (hereinafter referred to as 'the Winding-Up Order'). Upon the execution of this Agreement, CTK shall, within seven (7) working days through his solicitors file an application to Court to seek a court order for the stay of the Winding-Up Order with the removal of the Official Receiver from being the liquidator of CCSB and shall obtain the stay order within three (3) months from the date of this Agreement (hereinafter referred to as 'the Stay of Winding-Up Order'), failing which, BHSB shall select either to grant an extension at its discretion or to terminate this Agreement by sending a notice of termination to CTK. In the later event, the First Payment stipulated in Schedule 7 herein shall be refunded by CTK's Solicitors as Stakeholder within three (3) working days from the date of the notice of termination to BSHB in the manner as prescribed by BHSB.

(vi) MNL by letter dated December 19, 2014 has issued two pre-signed cheques in favour of the plaintiff for the sum of RM10,338,335.25 and RM221,664.75 respectively to KLLL and KLLL was authorised to release or bank in the said cheques if CTK failed to perform or breached any of the terms of the MOA. This is pursuant to the said clause 1, schedule 7 of the MOA.

(vii) Further, CTK has failed to obtain a stay of winding up order within three months from the date of the MOA and after an extension of time given to CTK, the stay order has not been obtained.

(viii) Consequently, by letter dated April 24, 2015, KLLL, upon instruction by the plaintiff, has issued letter of termination of the MOA to MNL and demanded for the refund of the RM10.56 million of the refundable earnest deposit. KLLL also informed MNL that the two MNL's cheques will be released to the plaintiff within three working days.

- 1 (ix) On April 30, 2015, the two MNL's presigned cheques were deposited into
the plaintiff's Maybank account but were dishonoured with the remarks
"Payment stopped/Payment Countermanded".
- 5 (x) Thereafter, the plaintiff's former solicitors, Messrs Chan Tse Yuen & Co
issued a letter dated May 8, 2015 to MNL demanding MNL to make good
the MNL cheques on May 11, 2015 and failing which necessary action will
be taken.
- 10 (xi) As the plaintiff has not received any reply from MNL, on May 13, 2015,
the plaintiff filed the present suit against the defendants.

Issues to be tried

- 15 [3] The main issues in this case are the following:
- (i) Whether the defendants and/or MNL had received the refundable
earnest deposit of RM10.56 million from the plaintiff.
- 20 (ii) Whether the RM10.56 million was received by the defendants as
stakeholders pursuant to the terms of the MOA dated December 20, 2014.
- 25 (iii) Whether the defendants has breached the term of the MOA.
- (iv) Whether the defendants has failed to obtain a stay of winding up order
against CCSB.
- 30 (v) Whether the MOA was legally terminated by the plaintiff.
- (vi) Whether the defendants has breached the stakeholder's duties for
disbursing the RM10.56 million to third parties.
- 35 (vii) Whether the plaintiff is entitled to the refund of the RM10.56 million.

The plaintiff's case

40 [4] It is the plaintiff's case that the plaintiff has paid the refundable earnest
deposit of RM10.56 million into MNL's client's account as stakeholder in relation
to the purchase of the lands and in accordance with the terms of the MOA dated
December 20, 2014.

[5] The plaintiff contends that by disbursing the RM10.56 million refundable
earnest deposit to third parties without the plaintiff's consent, the defendants
have breached the stakeholder's duties.

[6] Further, the defendants have failed to obtained the stay of winding-up order
against CCSB and as such have breached clause 1(b) of the MOA which entitled
the plaintiff to terminate the MOA as provided under the said clause 1(b).

[7] The plaintiff therefore contends that the plaintiff is entitled for the refund of the refundable earnest deposit of RM10.56 million and also based on the equitable remedy of restitution of money had and received which inter-alia involves unjust enrichment by the defendants. 1

The first defendant's case 5

[8] The first defendant's case can be summarised as follows:

- (i) MNL is not a party to the MOA as the parties are plaintiff and CTK. As such, MNL is not bound by the terms of the MOA. 10
- (ii) MNL was not stakeholder of RM10.56 million and contends that there is no real stakeholdership under the MOA. 15
- (iii) The two pre-signed cheques issued by MNL to the plaintiff's former solicitor in the total amount of RM10.56 million were "just for show" to the plaintiff's financier that the terms of the MOA has been complied with. 20
- (iv) The first defendant has not acted dishonestly in releasing the RM10.56 million to the various parties. 25
- (v) The first defendant had paid out the monies to other parties and to MNL upon instruction of CTK by letter dated December 11, 2015 and with the plaintiff's consent. The payment are as follows: 30
- | | | | |
|-----|--------------------------------------|------------------------|----|
| (a) | On 11.12.2014 to Messrs Yahna SG | RM5,050,000.00 | |
| (b) | On 12.12.2014 to Messrs Yahna SG | RM1,000,000.00 | |
| (c) | On 15.12.2014 to Messrs KL Lim & Lee | RM3,000,000.00 | 35 |
| (d) | On 10.12.2014 to Cheah Siu Hui | RM 100,000.00 | |
| (e) | On 26.12.2014 to MNL | RM 450,000.00 | |
| (f) | On 14.12.2015 to Messrs Yahna SG | RM 200,000.00 | 40 |
| (g) | On 16.1.2015 to Messrs Thomas Philip | RM 554,663.16 | |
| | Total: | <u>RM10,354,663.16</u> | |
- (vi) The plaintiff's claim for the RM10.56 million is unenforceable as the money was brought into Malaysia as part of an illegal money laundering exercise, therefore it is tainted with illegality.
- (vii) MNL has not benefited from the RM10.56 million except for the small amount of fees and as such there is no issue of "money had and received" and "unjust enrichment".

1 (viii) It is also the first defendant's case that the MOA was wrongly terminated
by the plaintiff and in any event if it is validly terminated, the party to be
sued is CTK who is a party to the MOA and not the defendants.

5 **The second defendant's case**

[9] The second defendant's case or defence are the following:

10 (i) The MOA was handled by the first defendant and second defendant has
no knowledge of the transaction and only knew about it after the
commencement of this action and based on information provided by first
defendant.

15 (ii) The termination of the MOA by plaintiff was wrongful as there was no
agreement for its termination by CTK.

(iii) The stakeholdership in the MOA is a sham stakeholdership.

20 (iv) The sham stakeholdership and/or provision of MNL cheques in the
MOA were outside the ordinary business of MNL as advocates and
solicitor.

25 (v) Plaintiff and its former solicitor KL Lim were fully aware that the
RM10.56 million had been released by MNL.

30 (vi) The MNL cheques for the said amount of RM10.56 million was "just for
show" to plaintiff's funders that the terms of the MOA has been complied
with.

35 (vii) The RM10.56 million was deposited with MNL by Rich Hero Holding Ltd
from Hong Kong company and any refund of the said amount to plaintiff
would amount to illegal act of money laundering of foreign funds
through the client's account of MNL.

Decision of this court

40 [10] In deciding whether the plaintiff has proven its case against the defendants
on the balance of probabilities, aside from the oral testimony of witnesses, regard
must be had to relevant contemporaneous documents. This includes the MOA
dated December 20, 2014, correspondence between parties and other related
documentary evidence.

[11] In the present case, one of the core issue is whether the defendants and/or
MNL had received the refundable earnest deposit of RM10.56 million from the
plaintiff as stakeholders pursuant to the MOA.

[12] Before I proceed to analyse the evidence adduced in regard to this issue, it is
instructive to refresh our memory on the concept of stakeholder. In the case of

Kuldip Singh & Anor v Lembaga Letrik Negara & Anor [1983] 1 MLJ 256, the concept of stakeholder was explained as follows: 1

The question is: *What is a stakeholder? A stakeholder is a person who receives money and holds it in medio pending the outcome of a future event.* In *Burl v Claude Cousins & Co* [1971] 2 QBD 426 at 435 Lord Denning M R stated: 5

"If an estate agent or a *solicitor*, being duly authorised in that behalf, received a deposit 'as stakeholder', *he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor nor as agent for the purchaser. He holds it as trustee for both to await the event ...* Until the event is known it is his duty to keep it in his own hands." (Emphasis added.) 10

[13] As mentioned in *Kuldip's* case, when solicitors hold money as stakeholders, they hold it as trustee for both the vendor and purchaser. They also hold the money not in a contractual or quasi contractual capacity. This is further explained by the Federal Court in the case of *Datuk M Kayveas & Anor v Bar Council* [2013] 4 AMR 802 at 819-820; [2013] 7 CLJ 533 at 557-558: 15

[31] "*Solicitor who holds funds which are paid to them as stakeholders hold those funds as trustees for the client, whose properly the funds remains at all times. Such funds are not held in a contractual or quasi-contractual capacity*" (Halsbury's Laws of England, 4th edn, reissue vol 44(1), paragraph 126). "*... the obligations arising under a solicitor's undertaking go beyond contractual effect. They are obligations which a solicitor has a professional duty, as well as a contractual duty, to observe*" (*Bentley & Anor v Gaisford* [1997] 1 All ER 842 at 848 per Sir Richard Scott V-C). *When solicitors hold funds as stakeholders, they hold those funds as trustees and not in a contractual or quasi-contractual capacity* (see *Alimand Computer Systems Ltd v Radcliffes & Co*, The Times 6 November 1991). "If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the evidence: see *Skinner v Trustee of Property of Reed* ([1967] 2 All ER 1286 at 1287; [1967] Ch 1194 at 1200) per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank ..." (*Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426 per Lord Denning MR in his dissenting judgment, which statement of the law was accepted by the House of Lords in *Sorrell v Finch* [1977] AC 728, and referred in *Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* (supra), *Dato' Seri Au Ba Chi & Anor v Malayan United Finance Bhd & Anor* (supra) and *OCBC Bank (Malaysia) Bhd & Ors v Lee Lee Fah & Ors (and Another Appeal)* (supra), amongst others). "*Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust*" (*Selvaratnam Vellupullai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794; [2009] 1 CLJ 872 per Zaki Azmi CJ, delivering the majority judgment of the court). *Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.* 20 25 30 35 40

1 [14] It is also trite law that the disposal of the money held by a stakeholder must
be made in accordance with the terms under which the money is held. The
Federal Court in the case of *Lai Kee Peng (Tetuan Lai Kee Peng & Associates) v Tay*
Hup Lian [2016] 2 AMR 705 at 708; [2016] 4 CLJ 1 at 4-5 had this to say:

5 [1] This is a fairly straightforward case. It is a case involving a matter which any
conveyancing solicitor should be familiar with. It concerns *the duty and*
responsibility of a solicitor as a stakeholder in respect of money deposited by a
10 purchaser for the benefit of the vendor or his assignee pending the execution of
certain documents, including the transfer of ownership from the vendor to the
purchaser pursuant to the sale and purchase agreement ("SPA"). It is not
uncommon, as is the case before us, that *the dispute as to who is entitled to the money*
held by the solicitor as stakeholder ultimately depends on the terms under which the money
15 *is held and the due performance by the parties of their respective obligations under the*
SPA.

[15] Reverting to the present case, the evidence of Wong Sin Hua ("PW1") and KL
Lim ("PW2"), supported by contemporaneous documents has established the
20 fact that RM10.56 million has been paid by plaintiff to MNL client's account as
refundable earnest deposit in relation to the MOA.

[16] The said documents are as follows:

- 25 (i) a letter from MNL to the plaintiff's former solicitors, KLLL dated
December 8, 2014, requesting the said amount of RM10.56 million as
earnest deposit for the sale of the lands and fully refundable if the sale is
30 repudiated.
- (ii) a letter from KLLL to MNL dated December 10, 2014 informing that the
amount requested has been remitted into MNL client's account at RHB
Bank.
- 35 (iii) remittance form of the transfer of monies to MNL's bank account.
- (iv) two official receipts dated December 12, 2014 and December 31, 2014
40 acknowledging the receipt of the total amount of RM10.56 million issued
by MNL to the plaintiff.
- (v) two pre-signed MNL's cheques in the total sum of RM10.56 million
issued in the plaintiff's name.
- (vi) The MOA, clause 1, schedule 7, states that the plaintiff has paid RM10.56
million, being the refundable deposit to CTK's solicitors as stakeholder.

[17] Aside from the plaintiff's evidence, the first defendant in his testimony
clearly admitted the receipt of the RM10.56 million as refundable earnest deposit
for the sale transaction.

[18] As such it is an established fact that MNL has received the RM10.56 million refundable earnest deposit from the plaintiff. 1

[19] The next pertinent issue is whether the RM10.56 million was received by MNL as stakeholders pursuant to the terms of the MOA. 5

[20] On this issue, PW1 and PW2 in their testimony confirmed that the RM10.56 million was paid to MNL as stakeholder and is refundable if the MOA is terminated. The oral evidence of PW1 and PW2 are supported by the following documentary evidence: 10

- (i) the MNL's letter to KLLL dated December 8, 2014 which states that the RM10.56 million as earnest deposit and fully refundable if the sale of land is repudiated. 15
- (ii) KLLL's letters to MNL dated December 10, 2014 and January 5, 2015 which also state that the RM10.56 million as refundable earnest deposit.
- (iii) The MNL's official receipts for the payment of RM10.56 million states "being payment of earnest deposit". 20
- (iv) The MOA, which states the RM10.56 million paid to MNL who was CTK's solicitor as stakeholder. The clauses are as follows: 25

(a) *Clause 1(b):*

CCSB is under Winding-Up order dated 25 April 2000 by virtue of Kuala Lumpur High Court D-6-228-9-2000 (hereinafter referred to as 'the Winding-Up Order'). Upon the execution of this Agreement, CTK shall, within seven (7) working days through his solicitors file an application to Court to seek a court order for the stay of the Winding-Up Order with the removal of the Official Receiver from being the liquidator of CCSB and shall obtain the stay order within three (3) months from the date of this Agreement (hereinafter referred to as 'the Stay of Winding-Up Order?', failing which, BHSB shall select either to grant an extension at its discretion or to terminate this Agreement by sending a notice of termination to CTK. In the later event, the First Payment stipulated in Schedule 7 herein shall be refunded by *CTK's Solicitors as Stakeholder* within three (3) working days from the date of the notice of termination to BSHB in the manner as prescribed by BHSB. 30
35
40

(b) *Clause 1, schedule 7:*

BHSB has, prior to the execution of this Agreement, paid the sum of RM10,560,000.00 (Ringgit Malaysia Ten Million Five Hundred Sixty Thousand Only) representing two percent (2%) of the total purchase price being a refundable deposit (hereinafter referred to as the 'Refundable Earnest Deposit') to CTK's Solicitors as stakeholders,

1 the receipt of which, the CTK acknowledges. A copy of the
remittance slip is annexed herein as APPENDIX 'D'. CTK's
Solicitors shall forthwith provide a duly signed Solicitor's cheque
equivalent to the Refundable Earnest Deposit ('First Cheque') to
5 BHSB's Solicitors as Stakeholder and BHSB's Solicitors are hereby
authorised by the parties herein to forthwith release and/or to
bank in the First Cheque to BHSB, should CTK fails to perform or in
breach of any terms of this Agreement OR to return the First
Cheque to CTK's Solicitors should the terms herein have been
10 complied with accordingly;

(c) *Clause 3, schedule 7:*

15 This Refundable Earnest Deposit shall be deposited into an interest
bearing Account of CTK's Solicitors (hereinafter referred to as
"CTK's Solicitors Client' Account") being a stakeholder and the Further
Payment shall be deposited into the SPV Account (hereinafter
collectively referred to Deposit and the Further Payment being the
20 total sum of RM60,560,000.00 (Ringgit Malaysia Sixty Million Five
Hundred Sixty Thousand Only) shall hereinafter be referred to as
"The First Payment". The Parties mutually agree that the interest
accrued from the First Payment shall belong to the party who are
receiving the First Payment or payment toward the account of the
25 recipient.

[21] Most importantly, the first defendant who was involved in the drafting of
the MOA and thereafter witnessed the signing and execution of the MOA,
admitted that the RM10.56 million is to be held by MNL as stakeholder.
30

[22] Aside from the plaintiff's evidence, this admission by the first defendant,
demolished any contention that MNL is not the stakeholder for the said
RM10.56 million. The second defendant's submission that MNL only acted as
35 agent for the vendor under the MOA run counter the oral and documentary
evidence as well as the clear admission by the first defendant.

[23] In regard to the admission by the first defendant that MNL received the
RM10.56 million as stakeholder, its weight is high, especially made by the first
40 defendant in this case who was in charge of transaction on behalf of the MNL. In
the case of *Esso Malaysia Berhad v Hills Agency (M) Sdn Bhd & 2 Ors* [1994] 1 MLJ 740,
the judge said this:

*Admissions are the strongest evidence possible and even a wrong construction of a
document will be assumed to be correct in view of the admission. In the Privy
Council case of The Australian Widows' Fund Life Assurance Society Limited v The
National Mutual Life Association of Australasia Limited* [1914] 17 CLR
(Commonwealth Law Reports) 657, Lord Parker of Waddington delivering in
judgment of the board at p 662 said ...

"It was admitted by the appellant Society in the pleadings, and assumed throughout the proceedings in the Courts below and in the arguments before their Lordships' Board, that the effect of this recital was to incorporate in the policy all the terms of the proposal for re-insurance dated 2nd January 1908. Their Lordships are not satisfied that the recital has any such effect. The recital may very well mean that the directors of the Society have determined to accede to the application of the respondent Society for a policy of re-insurance, leaving the terms on which such policy was granted to be specified in the ordinary way in the policy itself. According to the preceding recital the policy is to incorporate the statement contained in the proposal and not the proposal itself. Having regard however to the admission in the pleadings, their Lordships will assume that the recital has the effect of incorporating in the contract the terms and conditions of the document of 2nd January 1908."

[24] The first defendant also admitted that the MOA is a real and not a sham agreement and MNL is a real stakeholder of the RM10.56 million.

[25] This is consistent with the plaintiff's evidence and the fact that there is no single document by the defendants to dispute the payment of the RM10.56 million and MNL as the stakeholder. As such the challenge as to the payment of the money and the stakeholdership in this case is devoid of any basis and a mere afterthought.

[26] The case of *Kuwait Finance House Malaysia Bhd v Obnet Sdn Bhd & 2 Ors (and Another Suit)* [2017] AMEJ 1400; [2016] MLJU 1843 emphasised this issue of non-challenge at the earliest possible opportunity when said this:

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

[27] In the circumstances, it is my finding that MNL who had received the RM10.56 million from the plaintiff is the stakeholder of the said amount pursuant to the terms of the MOA.

[28] Here, eventhough MNL is not party to the MOA, the action against MNL arising from the stakeholdership and not on any contractual agreement. Therefore, not being party to the MOA does not exonerate MNL from liability.

[29] The next issue is whether the termination of the MOA by the plaintiff is lawful.

[30] In this regard, clauses 8, 8A and 1(b) of the MOA provide that CTK has to obtain stay of the winding up order against CCSB within three months from the

1 date of the MOA. Failing to do this, the plaintiff is empowered to terminate the
MOA. The three months period expired on March 20, 2015.

[31] For easy reference, *clauses 8 and 8A* are reproduced as follows:

5 8. CCSB is under a Winding-Up order dated 25 April 2000 by virtue of Kuala
Lumpur High Court D-6-28-9-2000 (hereinafter referred to as 'the
Winding-Up Order'). Upon the execution of this Agreement CTK shall,
within seven (7) working days through his solicitors file an application to
10 Court to seek a court order for the stay of the Winding-Up Order with the
removal of the Official Receiver from being the liquidator of CCSB and *shall*
obtain the stay order within three (3) months from the date of this Agreement
(hereinafter referred to as 'the Stay of Winding Up Order'), failing which,
15 BHSB shall elect either to grant an extension at its discretion or to terminate
this Agreement. In the later event, the First Payment stipulated in Schedule
7 herein shall be refunded by both parties' Solicitors as Stakeholder within
three (3) working days from the date of the notice of termination.

20 8A. The Parties herein mutually agree that the Stay of Winding Up Order
granted by the Court within the stipulated time referred to in Recital 8
above, must be to the sole satisfaction of the Purchaser which must not be
unreasonable, *failing which the Purchaser shall have the absolute right to*
25 *terminate this Agreement by sending a notice of termination notice to CTK and*
upon termination, CTK shall refund and/or procure CTK's Solicitors to effect the
refund of the First Payment stipulated in Schedule 7 herein within three (3)
working days from the date of the notice of termination, and thereafter this
30 Agreement shall be have no further effect.

[32] In relation to this issue, by letter dated April 6, 2015, KLLL issued a notice to
MNL to obtain the stay order as agreed by parties, before April 9, 2015 in which
MNL has failed to do so.

35 [33] There is also no cogent evidence produced before this court to substantiate
the defendants' contention that plaintiff had requested to delay in obtaining the
stay order until plaintiff had received the necessary monies from the plaintiff's
funders.

40 [34] Beside, if this contention is true, there is no reason for the plaintiff through
its solicitors to issue the notice dated April 6, 2015 for MNL to obtain the stay
order and thereafter terminated the MOA by letter dated April 24, 2015.

[35] Therefore, it is also my finding that the termination of the MOA is in
accordance with the terms of the MOA and validly made.

[36] Consequently, upon termination of the MOA, the plaintiff's solicitors, KLLL
is empowered to released the two MNL's cheques which was issued to KLLL as
provided under *clause 1, schedule 7* of the MOA which states as follows:

1. BHSB has, prior to the execution of this Agreement, paid the sum of RM10,560,000.00 (Ringgit Malaysia Ten Million Five Hundred Sixty Thousand Only) representing two percent (2%) of the total purchase price being a refundable deposit (hereinafter referred to as the "Refundable Earnest Deposit") to CTK's Solicitors as stakeholders, the receipt of which, the CTK acknowledges. A copy of the remittance slip is annexed herein as APPENDIX "D". CTK's Solicitors shall forthwith provide a duly signed Solicitor's cheque equivalent to the Refundable Earnest Deposit ("First Cheque") to BHSB's Solicitors as Stakeholder and BHSB's Solicitors are hereby authorised by the parties herein to forthwith release and/or to bank in the First Cheque to BHSB, should CTK fails to perform or in breach of any terms of this Agreement OR to return the First Cheque to CTK's Solicitors should the terms herein have been complied with accordingly.

[37] On this issue, the defendants contend that the two cheques were only "just for show" to the plaintiff's funders that the terms of the agreement has been complied with.

In this regard, again, as mentioned earlier, the first defendant, who was involved in the drafting of the MOA and witnessed the execution of the same, categorically admitted that the MOA is real and not a sham agreement. As such the issuance of the two pre-signed cheques is in accordance with clause 1, schedule 7 agreed by parties on December 20, 2014. Therefore, the contention that the said cheques are just for show devoid of any merits.

[38] Further, aside from PW1 and PW2 evidence which vehemently deny that the said cheques is just for show there is also no cogent evidence to support the defendant's contention that the cheques were "just for show". On the contrary, the contemporaneous document which is a letter from MNL to KLLL dated December 19, 2014 which attached therewith the said cheques clearly states that the cheques "to be utilised in the event the sale and the purchase transaction is aborted".

[39] In addition, when the said cheques were dishonoured, the previous plaintiff's solicitors, Chan Tse Yuen & Co immediately issued a letter to MNL dated May 8, 2015 seeking explanation and demanded MNL to honour the said cheques. This is not an action of a party who has agreed that the cheques are "just for show".

[40] It is also trite law that no oral evidence shall be admitted to contradict, varying or adding to or subtracting from the terms of a written contract and in the present case the MOA as provided under ss 91 and 92 of the Evidence Act 1950.

[41] Therefore the defendant's evidence that the MNL's pre signed cheques are just for show contradicts clause 1, schedule 7 and as such is inadmissible.

1 [42] In the case of *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd (and*
Another Suit) [2009] 6 AMR 609; [2010] 4 CLJ 388, this issue of application of ss 91
and 92 was explained as follows:

5 [10] *Under s 92, when the terms of a contract have been reduced to the form of document,*
no evidence shall be given to prove the terms of the contract, except that it should be
construed within the four corners of the document itself. Under s 92, no oral evidence or
statement can be admitted for the purpose of contradicting varying, adding to or
substracting the written terms ...

10 ... *It is too preposterous to expect a person of such standing to rely on oral promises which*
contradict the agreements he signed freely and voluntarily. He surely must have
understood and was fully aware of the implications of what he signed. This is not an
15 *appropriate case where a party to a contract can be said to have relied on oral*
promises that run contradictory to what he has agreed in a written document. To
use oral evidence to contradict his written obligations under an agreement or to allow
extrinsic evidence be used to contradict or avoid obligations under the written agreements
will run foul of s 91 of the Evidence Act ...

20 [43] Hence, the contention that the two pre-signed cheques are just for show is untenable.

25 [44] As to the payments made by MNL to itself and other third parties, it is undisputed fact that the total amount paid out from the refundable earnest deposit was RM10,354,663.16.

30 [45] In this regard, PW1 and PW2 in their testimony clearly said that they have no knowledge and at no time consented for the said payments to the third parties by MNL.

35 [46] The first defendant in his testimony also admitted that there is no documentary evidence to show that the plaintiff has consented to the said payments by MNL.

40 [47] One glaring fact on this issue is that MNL's letter to KLLL dated December 8, 2014 which requested for plaintiff to pay the RM10.56 million earnest deposit clearly states that the deposit is subject to the terms and conditions of the MOA and is refundable if the sale is repudiated. However three days after the request made and the monies deposited into the MNL bank account, substantial amount of monies have been paid out by MNL which was RM5.05 million to Messrs Yahna on December 11, 2014. As first defendant in his testimony explained that the monies were paid as stakeholder which was also supported by documents alluded to earlier, the payment to Messrs Yahna and other third parties devoid of any justification and in contravention with the terms of the MOA.

- [48] Having analysed all the relevant evidence, it is my finding that MNL has paid out the monies from the RM10.56 million refundable earnest deposit without the consent of the plaintiff. 1
- [49] The payments are also clearly in contravention with the terms of the MOA where MNL was supposed to hold the RM10.56 million as stakeholder in accordance with the terms of the MOA which MNL has failed to adhere. 5
- [50] It is also the defendants' case that on December 15, 2014, MNL had paid out RM3 million to KLLL out of this RM10.56 million refundable earnest deposit. However, I find that this payment of RM3 million was deposited earlier into MNL's bank account by the plaintiff's previous shareholder Dato Foo Ming Lam as initial refundable earnest deposit and after PW1 took over the plaintiff, another RM10.56 million earnest deposit has been paid by plaintiff. 10
15
- [51] The evidence then shows that the RM3 million payment to KLLL was paid to Dato Foo Ming Lam.
- [52] Therefore, the payment of RM3 million on December 15, 2014 by MNL to KLLL is not from the refundable earnest deposit of RM10.56 million. 20
- [53] Next, the plaintiff has produced cause papers and court order with regard to High Court Civil Suit No. 22NCvC-433-08/2015 ("suit 433") which is in bundle 5. However, the defendants objected to the admission of this documents. 25
- [54] This suit 433 is almost identical to the present case where it pertains to an action by Mohamed Mustafa Co Pte Ltd and Mustafa Pte Ltd against MNL and CTK inter-alia for the refund of SGD2.85 million plus accrued interest which was deposited by the plaintiff with MNL as stakeholders pursuant to a MOA for the sale and purchase of lands which is the same lands in the present case. In this suit 433, consent judgment has been entered. 30
35
- [55] Further, at paragraph 10.1 of the statement of claim of suit 433, it states that the defendants has forwarded a cheque of RM554,663.16 in lieu of interest accrued on the earnest deposit and as consideration for an extension of time to repay the earnest deposit of SGD2.85 million to the plaintiff. 40
- [56] Aside from the case being similar with the present case and relating to the same lands, the first defendant admitted that MNL has paid the amount of RM554,663.16 to Messrs Thomas Philip, the plaintiff's solicitors in suit 433 from the refundable earnest deposit of RM10.56 million paid by plaintiff in the present case.
- [57] I find, these documents in bundle 5 are relevant facts and are public documents which are admissible in the present case.
- [58] I also find this payment of RM554,663 to Messrs Thomas Philip was unjustified as MNL's liability in suit 433 has nothing to do with plaintiff in the

1 present case and without the plaintiff knowledge and consent. In any event, there
is no reason for plaintiff to authorise this payment as it is MNL's liability in a
separate case.

5 [59] Apart from this, from the defendants' explanation in regard to the
RM10.56 million, a total of RM10,354,663.15 has been paid out however the
balance of RM205,336.83 is not accounted for and this supports the fact that the
defendants' justification on the payment out from the RM10.56 million is without
basis.

10 [60] Having decided that the payments by MNL to itself and other third parties
are without the consent of the plaintiff in the present case, I find, MNL has
breached the stakeholdership with regard to the refundable earnest deposit of
15 RM10.56 million.

[61] It is trite law that as a stakeholder MNL is a trustee to both CTK and the
plaintiff. Consent by both parties are needed before any action to be taken
20 pertaining to the refundable earnest deposit of the RM10.56 million.

[62] On this issue, the Federal Court in the case of *Selvaratnam a/l Vellupillai v*
Dr Jayabalan Karrupiah [2009] 1 MLJ 794 explained as follows:

25 [36] *So from these it can be concluded that whether the appellant held the money as*
stakeholder (or trustee) or not depends on the terms of the agreement between him and his
clients. We must not forget here that the appellant was acting as stakeholder for both the
vendors and purchaser. Both were his clients. It is not as if the was acting only for one party
to the transaction. That sum was held by him not just for the benefit of the respondent alone
but rather for the vendors as well. He was therefore a trustee for both parties. The money
he was holding in the client's account was meant to be paid to MOF Inc to redeem
the property in question. He was holding the monies to await the vendors to pay
him the difference and thereafter to pay MOF Inc to enable the property to be
redeemed or if the agreement was later repudiated, he was to refund the money to
the respondent. In this case, he was discharged from acting for the vendors and he
was required to transfer the file to the new solicitors. He was also terminated by
the vendors as their solicitors. The fact that the file was to be transferred to the new
solicitors and his appointment to act for the vendors was terminated, does not
make the sale and purchase agreement to mcome to an end. In fact, I agree with the
conclusion arrived at by Suriyadi J that the sale and purchase agreement was still alive. It
therefore means that the money that was held in the client's account was still trust money.
On the other hand, had the sale and purchase agreement been terminated, it would depend
on the terms of the sale and purchase agreement how such sum held in the client's account
was to be disposed of. If it was to be refunded to the respondent, and the vendors
ceased to be his clients, then perhaps that money may be utilised pursuant to r 7(a)
to settle the debt due to him from the respondent.

[63] The first defendant has also raised the issue that the first defendant has not
acted dishonestly in releasing the RM10.56 million refundable earnest deposit to
the third parties.

[64] In this regard, it has been proven that the monies were released without the plaintiff's consent and in breach of the stakeholder stipulated in the MOA. 1

[65] In the circumstances, the defendants as trustee, have acted dishonestly and in breach of the trust. 5

[66] As mentioned in *Datuk M Kayveas's* case (*supra*):

Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust. 10

[67] In regards the issue of money laundering, the defendants' contention amongst others is that any refund of RM10.56 million to plaintiff would amount to an act of money laundering of foreign funds through MNL's client account. The defendants further contend that the plaintiff has conspired with RHHL to unbalance RM60,560,000.00 to be brought into Malaysia under the guise of carrying out the MOA and proposed sales and purchase agreement. 15

[68] On this issue, firstly, PW1 has explained in his evidence that plaintiff and Rich Hero Holding Ltd (RHHL) are beneficially owned by PW1 and the RM10.56 million was from a term loan facility from Bank of Shanghai, Hong Kong. 20

[69] The defendants also have not lodged any police report if it is true that the transaction involved money laundering and to the contrary MNL has paid out the monies to third parties and to MNL itself for its legal fees. 25

[70] The first defendant in his testimony also is not sure whether there is any money laundering activity when asked during cross examination. 30

[71] There is also no evidence produced in court to support the contention of money laundering activity in the present case. 35

[72] Next, on the issue of liability of both defendants, they are both liable as partners of MNL at the material time. This is provided for under ss 11 to 14 of the Partnership Act 1961 which, for easy reference is reproduced below: 40

Liability of partners.

11. Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

Liability of firm for wrongs.

12. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused

1 to any person not being a partner in the firm, or any penalty is incurred, the firm is liable
therefore to the same extent as the partner so acting or omitting to act.

Misapplication of money or property received for or in custody of firm

5 13. In the following cases, namely:

(a) *where one partner, acting within the scope of his apparent authority, receives the
money or property of a third person and misapplies it; and*

10 (b) *where a firm in the course of its business receives the money or property of a third
person, and the money or property so received is misapplied by one or more of the
partners while it is in the custody of the firm, the firm is liable to make good the loss.*

15 *Liability for wrongjoint and several.*

14. *Every partner is liable jointly with his co-partners and also severally for everything for
which the firm while he is a partner therein becomes liable under section 12 or 13.*

20 [73] Therefore, both defendants are jointly and severally liable for MNL's action
in breach of the stakeholder's duties. The defence of second defendant of no
knowledge about the transaction as it was handled by the first defendant does
not absolve him from liability. This is also explained in the case of *Alan Michael*
25 *Rozario (mengenai dalam firma Tetuan Shuhaiza & Partners) v Merbok MDF Sdn Bhd*
[2010] AMEJ 0643 at pp 11-12; [2011] 1 CLJ 433 at 443 as follows:

[20] We are unanimous that *the allegation that the second defendant was not an equity
partner of the main branch of the legal firm and that he had no knowledge of the matter,
does not absolve him in law, under the Partnership Act 1961, of his liability as a partner
of the firm of Shuhaiza & Partners, at the material time.*

35 [21] *The second defendant's obligation and liability to the plaintiff under the letter of
undertaking is pursuant to his being a partner of Shuhaiza & Partners and not his
knowledge or express authorisation of it. There is no dispute the letter of undertaking
was issued by Shuhaiza & Partners. The legal firm had acted on the letter of
undertaking and accepted the monies as stakeholders.*

40 [22] There can be no dispute that there has been a breach of the stakeholder
arrangement and the legal firm's undertaking. *We are unanimous that the second
defendant cannot escape joint and several liability with his partners at the material time
the letter of undertaking was given. His civil liability to the plaintiff is distinct and
separate from any criminal consequences or disciplinary action under the Legal
Profession Act 1976. For which he may have an answer, based on the statutory
declaration of the first defendant. (Emphasis added.)*

[74] In the present case, the RM10.56 million was deposited into MNL's client's
account and the holding of this monies as refundable earnest deposit by MNL as
stakeholder is in the ordinary course of MNL's business and first defendant had
acted within the scope of his apparent authority.

[75] As such, both defendants are liable for the said breach of the stakeholdership by MNL in this case. 1

Conclusion

[76] Based on the aforesaid reasons, I find, on the balance of probabilities, the plaintiff has proved its case against the defendants. 5

[77] In the circumstances, the plaintiff's claim against the defendants is allowed.

[78] The defendants are to pay the plaintiff the amount of the refundable earnest deposit in the sum of RM10.56 million. 10

[79] The defendants also to pay interest on the said sum of RM10.56 million at the rate of 5% per annum from April 30, 2015 to the date of full realisation. 15

[80] The defendants are also to pay costs of RM30,000 to the plaintiff and costs is subject to payment of allocatur fee. 20

20

25

30

35

40