

Yayasan Wilayah Persekutuan

v

Pinnacle Homes SP Sdn Bhd

(formerly known as I-Con Empire Sdn Bhd)

High Court, Kuala Lumpur – Civil Suit No. WA-22NCvC-896-12/2019

Raja Ahmad Mohzanuddin Shah JC

August 23, 2024

Contract – Breach – Sale and purchase agreement ("SPA") – Plaintiff purchased land owned by third party – Land subsequently sold to defendant – Parties executed SPA and supplemental SPA – Claim for balance of purchase price of land – Counterclaim for expenses incurred in acquiring land – Whether there was oral agreement for defendant to bear expenses incurred – Whether negated by SPA and supplemental SPA – Whether expenses incurred were plaintiff's obligations – Whether claim should be set-off against counterclaim

A piece of land in Kuala Lumpur ("the property") was sold by the plaintiff to the defendant. The property was originally owned by Dewan Bandaraya Kuala Lumpur ("DBKL") and the plaintiff entered into a sale and purchase agreement with DBKL to purchase the property ("DBKL SPA"). The plaintiff then entered into a sale and purchase agreement ("the SPA") with the defendant wherein the latter agreed to purchase the property in the plaintiff's capacity as the beneficial owner of the property since the registered owner was still DBKL at that time. The plaintiff and the defendant also entered into a supplemental SPA ("the supplemental SPA") which governed additional terms and variations to terms under the SPA. The agreed purchase price of the property was RM35,484,011 ("the purchase price"). The plaintiff filed a suit seeking the balance sum of the purchase price, i.e., RM822,905.37 ("the balance sum") from the defendant ("the suit"). The defendant in turn, filed a counterclaim ("the counterclaim") for the sum of RM1,680,939.02 ("the counterclaim amount") for expenses/costs for relocation, stamp duty, real property gains tax ("RPGT") and legal fees, incurred by the defendant in acquiring the property which should have been done by the plaintiff. In this respect, the plaintiff argued that one Frankie Ng and one KS Wong agreed to bear the relocation costs as a reward to society based on their negotiations with the defendant ("the alleged oral agreement"). The defendant's letter dated February 27, 2014 allegedly agreed to pay all cost in relation to legal matters, transfer of the property, stamp duty and RPGT. The plaintiff also argued that it is a charitable organisation and provides assistance to the

- 1 needy which was the reason for it to be included in the whole deal in order to
gain some profit for this purpose.

Issue(s)

- 5 Whether the suit and/or the counterclaim ought to be allowed.

Held, allowing the plaintiff's suit subject to the defendant's right to claim
set-off against the plaintiff and allowing the defendant's counterclaim with
10 costs of RM75,000 against the plaintiff subject to allocatur

1. The defendant did not deny the plaintiff's right to the balance sum, but
argued that it was subject to its counterclaim which if granted, would
15 mean that the plaintiff would not get the money. Instead, the plaintiff
would need to pay the defendant an additional sum of RM858,033 to
cover the difference between the counterclaim amount and the balance
sum. In principle, there was no doubt that the plaintiff was entitled to
20 the balance sum. [see p 1019 para 19]
2. Frankie Ng was never proved to be a director or shareholder of the
defendant and KS Wong, despite being a former director, was not a
25 director of the defendant at the time of the SPA. There was no evidence
to demonstrate that KS Wong owned shares of the defendant. Even
assuming that there was a discussion on the purported free agreement,
the fact that the final version of the SPA did not touch on this issue
30 further revealed the trite legal position that the existence of the "entire
agreement clause" in the SPA had the effect of discounting any previous
negotiations and arrangement that allegedly occurred prior to its
execution. The plaintiff failed to prove the date when the alleged oral
35 agreement took place. In the premises, it was safe and reliable to rely on
the SPA and supplemental SPA which were specific and unambiguous
and entered voluntarily by the plaintiff without any objection.
40 [see p 1022 para 35 - p 1023 para 39; p 1024 para 43]
3. The plaintiff's status as a charitable organisation did not entitle it to any
blanket protection from performing its obligations under the contract.
45 There ought to be a specific and vital term in the SPAs if that was indeed
what was intended by all the parties, which was not the case here.
Hence, the plaintiff's compliance with the SPA and the supplemental
SPA remained absolute. [see p 1024 para 45 - p 1025 para 48; p 1025 para 50;
50 p 1026 para 53; p 1027 para 58 - p 1028 para 62]

4. The plaintiff was required to bear the relocation costs of the existing occupants and traders by way of constructing and settling the existing market facilities as provided by the DBKL SPA. Therefore, when the said obligation was later assumed by the defendant, it would seem unfair to allow the plaintiff to escape its obligation to pay these expenses. On the evidence adduced, the plaintiff failed to challenge the defendant's evidence despite attempting to show that all payments were proven. As such, the defendant's cause of action based on the principle of unjust enrichment ought to be allowed because if the plaintiff was not being compelled with any obligation to pay, it appeared that the plaintiff obtained the property without incurring any costs. [see p 1028 para 64; p 1029 para 67 - p 1030 para 67; p 1030 para 71; p 1032 para 74]

Case(s) referred to by the court

- Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor* [2010] AMEJ 0068; [2011] 7 MLJ 52, HC (ref) 20
- Chong Nge Wei & 6 Ors v Kemajuan Masteron Sdn Bhd* [2022] 4 AMR 674; [2022] 3 MLJ 135, FC (ref)
- Damansara Realty (Pahang) Sdn Bhd v Om Cahaya Mineral Asia Bhd* [2021] 5 MLJ 1, CA (ref) 25
- Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 AMR 601; [2015] MLJU 33, FC (ref)
- Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] All ER (D) 1100, ChD (UK) (ref) 30
- Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118, PC (ref)
- Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 1 AMCR 397; [2012] 1 CLJ 959, CA (ref) 35

Legislation referred to by the court

- Malaysia* 40
- Contracts (Malay States) Ordinance 1950, s 71
- Contracts Act 1950
- Evidence Act 1950, s 73A

Solicitors

- Abd Shukor Tokachil and Muhammad Zulfaqar Zikry* (Shukor & Associates) for plaintiff 45
- Justin TY Voon and Iris Lim Xin Yi* (Justin Voon Chooi & Wing) for defendant 50
- Judgment received: December 23, 2024*

1 **Raja Ahmad Mohzanuddin Shah JC**

Preliminary

5 [1] Initially, the plaintiff brought this action at the Sessions Court based on its original claim for RM822,905.37, being the balance of the purchase price of land it sold to the defendant.

10 [2] Following that, the defendant counterclaimed for the sum of RM1,680,939.02 for some other costs allegedly incurred by the defendant in acquiring such land, which allegedly should have been done and borne by the plaintiff under the relevant and applicable sale and purchase agreements.

15 [3] In light of this, the defendant filed an application to transfer the case to the High Court since the Sessions Court lacked monetary jurisdiction to hear it.

20 [4] On November 12, 2019, the High Court allowed this application.

An overview of the facts of the case

25 [5] Essentially, the plaintiff asserts that there has been a breach of contract over the sale and purchase of a piece of land known as PN 30956, Lot 37890 in the Mukim of Petaling, District of Kuala Lumpur ("property") sold by the plaintiff to the defendant, which was originally owned by the Dewan Bandaraya Kuala Lumpur ("DBKL").

30 [6] Prior to that, there had already been a sale and purchase agreement between the plaintiff and the Datuk Bandar Kuala Lumpur ("DBKL SPA") under which the plaintiff theoretically agreed to purchase the property from DBKL.

35 [7] The reason for this is that the property was purchased in accordance with some arrangements made between the plaintiff, DBKL and the defendant. At the time of negotiation of the deals with DBKL, the defendant was known as I-Con Empire Sdn Bhd.

40 [8] Since the plaintiff is a charitable organisation, DBKL then decided for the plaintiff to be a part of the transaction so that some profits could be used for its charity purposes.

45 [9] Almost immediately thereafter, the plaintiff entered into a sale and purchase agreement dated December 30, 2014 ("SPA") wherein the defendant agreed to purchase the property in the plaintiff's capacity as the beneficial owner of the property since the registered owner was still DBKL at that time.

[10] With the execution of the SPA, the plaintiff and the defendant also entered into a supplemental sale and purchase agreement dated December 30, 2014 ("supplemental SPA"), which governs additional terms and variations to the contractual terms in the SPA, and which should be read together with the SPA.	1 5
[11] Both parties agreed on a price of RM35,484,011 for the purchase of the property.	
[12] In the course of the dispute, the defendant counterclaimed RM1,680,939.02 as payments that the plaintiff should have made, which the defendant advanced on the plaintiff's behalf.	10
Issues to be tried	15
[13] The parties have raised common issues to be tried for both the plaintiff's claim and the defendant's counterclaim.	
[14] Therefore, this trial must address the following issues:	20
<i>Main claim</i>	
(a) Whether the defendant is liable to pay the plaintiff RM822,905.37 as the balance of the purchase price for the said property.	25
<i>Counterclaim</i>	
(b) Whether it is the plaintiff's obligation to bear the RM1,680,939.02 costs incurred by the defendant to the plaintiff's benefit.	30
(c) Whether the sum of RM1,680,939.02 which was paid by the defendant to the plaintiff was paid for "free".	35
(d) Whether the plaintiff was unjustly enriched from the sum of RM1,680,939.02 advanced by the defendant to the plaintiff's benefit.	
(e) Whether the defendant is entitled to its claim in paragraphs 28(i) to (vii) of the amended defence and counterclaim dated March 10, 2023.	40
[15] Although each of the above issues has its own merits, the court will take them all together because they are clearly interconnected, and any decision made by this court will also impact those issues collectively.	45
Court's analysis and findings	
<i>Main claim</i>	50
[16] It appears that the main claim has only one issue that needs to be decided by me.	

[17] As a starting point, it is essential to note that there is no dispute that a sale and purchase transaction has taken place between the parties. As a matter of fact, all payments have been made except for the final payment of RM822,905.37, which remains unpaid after the defendant issued a stop-payment order alleging that the plaintiff was supposed to cover relocation costs.

[18] As to this issue, the plaintiff argues that the defendant, through DW2, did not dispute the existence of the balance of the purchase price due and payable to the plaintiff. DW2 was one of the directors in the defendant's company who liaised and communicated with all parties throughout the entire transaction, including the plaintiff, DBKL and the appropriate authorities.

[19] In contrast, the defendant argues that the plaintiff's claim should be dismissed and set off against the defendant's counterclaim. In other words, the defendant does not deny the plaintiff's right to the balance sum, but it is subject to its counterclaim, which if granted, would mean that the plaintiff would not get the money. Instead, the plaintiff would need to pay the defendant an additional RM858,033.65 to cover the difference between the counterclaim amount and the balance of the purchase price amount.

[20] In this regard, there is no doubt that the plaintiff is entitled to RM822,905.37 in principle. The plaintiff's legal entitlement to the money, however, depends very much on whether the defendant is entitled to its counterclaim.

[21] Consequently, it will be determined in the subsequent analysis on whether or not the defendant is entitled to its counterclaim.

Counterclaim

[22] On the issue of counterclaim, the defendant argues that it had made RM1,680,939.02 in payments that should have been the plaintiff's responsibility under the DBKL SPA, SPA and supplemental SPA. It is alleged that the defendant advanced the plaintiff this sum of RM1,680,939.02.

[23] Here are the particulars that made up the sum of RM1,680,939.02:

- (a) There was a cost of RM304,794.32 incurred for the work done to relocate the hawkers, peddlers, tenants, or occupants to another location, including construction materials and relocation expenses;
- (b) There was a stamp duty of RM908,535 on the land transfer;

(c) There was also RM327,439.50 as real property gains tax (RPGT) in respect of the sale of the said land by the plaintiff to the defendant; and

(d) In connection with the DBKL SPA, SPA and supplemental SPA, the plaintiff has incurred legal fees of RM140,170.20.

[24] To this end, the defendant argues that it has already proven more than a prima facie case that the sum of RM1,680,939.02 had been expended on behalf of and for the benefit of the plaintiff in relation to the plaintiff's contractual obligations for relocation costs, stamp duty, RPGT, and legal fees. The evidence includes contemporaneous documents as well as contractual terms in the DBKL SPA, SPA and Supplemental SPA. Therefore, the plaintiff must prove its defence of "free" or "gratuitous" payments, according to the defendant.

[25] In its defence to the counterclaim, the plaintiff argues that the defendant has failed to prove the existence of evidence to show that all these expenses are advanced payments and that the plaintiff is required to pay back to the defendant.

[26] According to the plaintiff, the defendant paid the balance of the purchase price in which, when it sent the cheque for RM822,905.37, it did not indicate that it would offset any advance payment allegedly made on behalf of the plaintiff. Following the defendant's stop cheque payment order, it was only in its letter dated May 21, 2018 that the defendant alleged those expenses it wanted to recover from the plaintiff.

[27] The plaintiff further argues that even DW2 had admitted under cross-examination that such an amount allegedly owed by the plaintiff did not appear in the defendant's audited account. Additionally, there was no board of directors' resolution to show that the defendant had in fact agreed to advance its money on behalf of the plaintiff. In other words, the defendant is just following up on an afterthought, according to the plaintiff.

[28] Furthermore, the plaintiff argues that it has established a more reliable version of the facts surrounding this, dispute than the defendant has.

[29] However, before I proceed further on this issue, I must stress that given my earlier decision in not allowing the amendments to be made by the plaintiff, any reference to individuals named Frankie Ng and KS Wong as a line of defence and reference in the plaintiff's closing arguments would have the effect of invalidating the entire plaintiff's arguments. In essence, the plaintiff's submissions now constitute a departure from its own pleaded case. Therefore, this court should not entertain this since it would have a fatal

1 effect on the plaintiff's claim and its counterclaim defence. This would end
the plaintiff's arguments, which heavily relied on Frankie Ng and KS Wong.

5 [30] In order to be complete, I would like to clarify that the plaintiff's
application to amend its amended reply to defence and defence to
counterclaim dated June 28, 2022 was specifically related to changing or
adding the names of two individuals, as I alluded to earlier. As a result of this
10 application, I determined that there had been a change of fact that involved
the change from one individual to two individuals. Moreover, I found that
not only was there a long and inordinate delay in submitting such an
amendment application, but there were no material or cogent reasons for
15 doing so. This was after considering that the application was only filed four
years and eight months after the reply to defence and defence to
counterclaim were originally filed. Previously, the plaintiff had been entirely
relying on the existence of this sole individual named Frankie Wong in two
court proceedings that had gone through two appeal processes to the Court
20 of Appeal. It was unfortunate that this application was only filed on
February 27, 2024 after the plaintiff's case had been closed and in the midst of
a trial. It goes without saying that this fact should have been discovered
during the preparation of the case if due diligence or the preparation of the
25 case had been conducted thoroughly. In addition, PW2, the plaintiff's former
chief executive officer, affirmed the affidavit in support of this application
stating that, although this mistake was discovered before trial, they waited
until after PW2 finished his testimony to file this application despite the fact
30 that the trial began on April 19, 2023 and the plaintiff's witnesses have
already begun testifying.

35 [31] Despite this, let me still proceed to address the issue at hand. For the
purposes of assessing and analysing the counterclaim fully on its merits, I
would proceed to examine both the facts and the merits involved in this case
as if the plaintiff's two proposed names were taken into consideration.

40 [32] As I return to the plaintiff's earlier arguments, the plaintiff states that its
witnesses, PW1 and PW2, have consistently maintained that Frankie Ng and
KS Wong had agreed to bear the relocation costs as a reward to society based
on their meetings, discussions and negotiations with the defendant.
Moreover, it has been argued that the defendant's letter of February 27, 2014
45 allegedly agreed to pay all costs in relation to legal matters, transfer of land,
stamp duty and RPGT, the existence of which is not disputed by the
defendant. Taking a moment to pause here, PW1 is the plaintiff's solicitor
responsible for preparing the sale agreement.

50 [33] To evaluate the plaintiff's argument, it is necessary for me to first
identify to what extent the plaintiff is able to prove that there is such an

agreement or arrangement for the defendant to bear all those costs, which would entitle the plaintiff to its main claim if answered in the affirmative. Secondly, if the plaintiff does not prove that such an agreement exists, what other evidence will the court have at its disposal to convince the court that the presence of such evidence negates the plaintiff's claim and position?

[34] Accordingly, PW3 testified that he was only involved in the discussions and not in any formal meetings, so he was not in a position to confirm what the final terms were. As a matter of fact, even he agreed that all oral agreements discussed only through discussions should not be considered terms of the contract since they were not deliberated in a formal meeting and were not included in it. In addition, he explained that the final terms of the agreement were only determined after lawyers representing both sides negotiated the final terms.

[35] As for these two gentlemen, Frankie Ng and KS Wong, it is further evident that Frankie Ng has never been proven to be a director or shareholder of the defendant, whereas KS Wong, despite being a former director, was not a director at the time of the SPAs. There was also no evidence presented to demonstrate that he owned shares of the defendant.

[36] Having analysed the above, even assuming for a while that there was a discussion on the purported free agreement, the fact that the final version of the SPA did not touch on this issue further reveals the trite legal position that the existence of the "entire agreement clause" in section 10.11 of the SPA has the effect of discounting any previous negotiations and arrangements that allegedly occurred prior to its execution.

[37] Section 10.11 stipulates that the SPA constitutes the entire understanding and agreement between the parties with regard to the matters dealt with in the SPA. Thus, the SPA supersedes all other agreements, letters and correspondence between the parties, whether oral or written, express or implied, that were entered into prior to the SPA.

[38] Further, even though no credible evidence has been presented to prove that the alleged negotiations occurred after the SPA and Supplemental SPA were signed, if the plaintiff claims that the alleged negotiations occurred after the existence of the SPA and supplemental SPA, any amendment to the terms of those agreements must be made in writing. The plaintiff, as far as this issue is concerned, has also failed to prove the date when the alleged oral agreement took place because it must still be tied to the existing SPA and supplemental SPA. Unless the plaintiff provides the court with the necessary evidence on this, it is very difficult for the court to even entertain such an allegation. There is clearly an element of vagueness and uncertainty present.

[39] As a result of balancing the existence of an alleged oral agreement and the SPA and supplemental SPA themselves, I feel it is safe and reliable to rely on those agreements which are specific and unambiguous with their specific terms and conditions, which were entered into voluntarily by the plaintiff without any objection. As a matter of fact, PW3 even acknowledged that what was important would be the contract's terms. PW3 was the former director of the defendant's company when it was known as I-Con Empire Sdn Bhd.

[40] In this regard, there is no doubt that parties are bound by the terms of a contract which should be the only document governing the parties' relationship. Specifically, her Ladyship Aziah Ali JCA (as her Ladyship then was) held to the following effect at p 408 (AMCR); p 992 (CLJ) of *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 1 AMCR 397; [2012] 1 CLJ 959:

[97] It is trite that the rights, interests and obligations of all parties to the agreement are spelt out in the various sections of the agreement and it is within the four corners of the agreement that such rights, interests and obligations have to be interpreted and determined ...

[41] Additionally, it is trite that the court must give effect to the clear terms of the contract as agreed upon by the parties. As quoted at p 7 (AMEJ); p 60 (MLJ) of *Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor* [2010] AMEJ 0068; [2011] 7 MLJ 52, her Ladyship Zabariah Mohd Yusof JC (as her Ladyship then was) held that the following principles should be observed:

[18] It is settled law, that parties are bound by the terms of the contract that they have entered into at arm's length. The decision of the Court of Appeal in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357; [2003] 4 CLJ 294 is relevant for our purposes herein, where the court referred to the following in relation to the principles of construction of contract at p 363 (MLJ); p 301 (CLJ):

"In *Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995, Lim Beng Choon J said:

'In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p 560:

"The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the

date it was made; it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it."

In *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Son (St Helens) Ltd* case when it says at p 1290:

'Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.'

[42] Aside from this, PW3 agreed that the entire agreement clause negates the existence of any prior oral agreements or arrangements. In this case, it is clear that the existence of written agreements outweighed the existence of oral agreements as alleged by the plaintiff.

[43] The plaintiff's position is further complicated by the question of who agreed to such a deal. Could it have been KS Wong or Frankie Ng? Or is it both? As the plaintiff alleges, KS Wong and Frankie Ng were the ones who agreed to this arrangement. However, PW1 testified at one point in the proceeding that it was only KS Wong who had agreed to this agreement, but at a later stage, it appears that he changed his mind and claimed Frankie Ng was also involved when he was present at another meeting. However, not only PW1 seems to be in conflict with his testimony but PW2 further testified that there was only one meeting to this effect attended by him together with KS Wong and Frankie Ng along with another person by the name of "Syed Fadzil bin Hashim Al Habshee". Suddenly, the existence of this person was changed to "Syed Binyamin Al Sagoff", PW3. The court cannot ignore these conflicting and confusing facts.

[44] In light of the above, it is clear that the testimony of the plaintiff's witnesses was not only inconsistent but also needs to be viewed with caution and further compared with other evidence, including the SPA and Supplemental SPA.

[45] The plaintiff also argues that the plaintiff is a charitable organisation that provides assistance to the needy, and that is the reason it was included in the whole deal in order to gain some profit for this purpose.

[46] On this issue, I find that although I have no doubt of the plaintiff's noble role in executing the functions for which it was created, the plaintiff's status as a charitable organisation does not entitle it to any blanket protection from

1 performing its obligations under the contract. There ought to be a specific
and vital term in the SPAs if that is indeed what was intended by all parties.
As it turned out, this was not the case. I believe this says a lot about the entire
situation. As a result, the plaintiff's compliance with the SPA and
5 supplemental SPA remains absolute.

[47] As highlighted above, the plaintiff in relying on the letter from the
defendant dated February 27, 2014, which allegedly agreed to pay all costs
10 relating to legal matters, land transfer, stamp duty and RPGT, asserts that
since this letter was not disputed, it indicates that the defendant is liable for
the costs mentioned above.

[48] As a result of listening to the respective positions of the parties on this
matter, I have concluded that the plaintiff failed to introduce this letter
through its witnesses to reflect the plaintiff's position despite having ample
opportunity to do so. This letter surfaced only during the cross-examination
20 of the defendant's witnesses but merely to ask whether they were aware of
such a letter.

[49] As a result, no effective cross-examination was conducted on those
witnesses regarding the effect and nature of these facts or the background of
25 these alleged agreements to pay on behalf of the defendant that appear to
conflict with the final terms of the SPA and supplemental SPA. After
presenting such limited and confined suggestions to the defendant's
witnesses, the plaintiff proceeded to submit a full-blown submission on this
30 letter and its alleged contents. I believe this should not be allowed as the
defendant is now being prejudiced after only being confronted with this new
issue at closing arguments. This is not the end of it. Due to KS Wong's failure
to testify to this effect, the defendant was further deprived of the right to
35 cross-examine him.

[50] Going even further on this issue, I find that even if I were to consider the
existence of such a letter, I would still not be able to ignore the fact that the
40 letter was issued well before the terms of the SPA and supplemental SPA had
been finalised, which did not seem to have taken such alleged agreements to
pay into account. It is clear from the analysis above that the entire agreement
clause negates any earlier negotiations or discussions between the parties in
45 this regard.

[51] As the Chancery Division of the High Court observed in *Inntrepreneur
Pub Co (GL) v East Crown Ltd* [2000] All ER (D) 1100, the entire agreement
50 clause should be strictly construed as follows:

7. The purpose of an entire agreement clause is to preclude a party to a written
agreement from threshing through the undergrowth and finding in the course of

negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence as is suggested in *Chitty on Contract* 28th ed. Vol 1 para 12-102: it is to denude what would otherwise constitute a collateral warranty of legal effect.

[52] A similar sentiment applies to the defendant's audited accounts. The plaintiff's contentions can only be addressed from a simplistic perspective. Even in the absence of audited accounts, the defendant is still entitled to file a counterclaim.

[53] There is another issue on which the plaintiff relies. When the defendant forwarded the cheque for the sum of RM822,905.37, it had, in fact, paid for the balance of the purchase price, but shortly after the defendant issued a stop cheque payment order. In this regard, I need to take a deeper look at the whole letter in order to better understand the underlying issue. As a result of reviewing this letter, I find that it was not issued unconditionally. The clause made it clear that the defendant's release of payment to the plaintiff would not be deemed a waiver of the provisions of the SPA, which simultaneously allowed the defendant to exercise its rights and remedies.

[54] There is more to it than that. In subsequent letters dated August 7, 2015 and January 13, 2016 from the defendant's solicitors to the plaintiff's solicitors, the defendant made it clear that the balance purchase price was payable upon the fulfilment of all the conditions precedent in the SPA and supplemental SPA, including receiving a written confirmation from the defendant that the vacant possession of the property was ready for delivery.

[55] I must pause here to point out that one of the condition precedents is a written confirmation from the defendant of the vacant possession of the property. Hence, the plaintiff must deliver a "vacant" possession instead of a possession per se, as the parties had agreed.

[56] The above factual circumstances support the conclusion that there was no afterthought on the defendant's part in regard to the entire scenario.

[57] In addition, the plaintiff argues that the costs of stamp duty of RM908,535 and the legal fees of RM140,170.20 were related to the plaintiff's

1 DBKL SPA, which the defendant is not privy to. Therefore, the defendant
cannot bring an action based on an SPA that has nothing to do with it.
According to the agreement, the plaintiff's relationship with DBKL was the
only thing covered by it.

5 [58] Regarding this matter in more detail, it appears that not only was this
defence not pleaded by the plaintiff, but also none of the defendant's
witnesses had this issue asked of them. In this regard, the legal position is
trite that in order for a party to put in effective closing arguments all of the
10 issues that the party intended to raise must be pleaded in the first place and
must also be put to the relevant witnesses, otherwise the very purpose of
having a trial in the first place is defeated. There is no point in holding a trial
15 if each party can raise any issue at his or her whim and fancy without
limitation. That is just not how it works. Thus, I am unable to accept such an
argument, particularly given the findings I discussed earlier.

20 [59] A further issue raised by the plaintiff was that even the legal fee of
RM140,170.20 was not addressed to the plaintiff. It is even more interesting
given the defendant never even pleaded to the fact that this payment was
made by Terra Mirus Sdn Bhd, including the payment of the stamp duty.
25 Additionally, the plaintiff argues that the defendant allegedly failed to prove
Terra Mirus was its sister company. Rather, it was addressed to Terra Mirus
Sdn Bhd, a stranger who is not even a party to this action.

30 [60] In this sense, I find that on the issue that the defendant had allegedly
failed to prove that Terra Mirus was the defendant's sister company, the
Companies Commission of Malaysia search indicates that not only do Terra
Mirus and the defendant have the same directors but they also have the same
shareholders. In any event, the defendant has repaid Terra Mirus based on
35 documentary evidence and the testimony of DW2, who also stated that the
defendant at the time was having cash flow issues. The fact that both PW1
and PW2 agreed under cross-examination that Terra Mirus was only making
payment on behalf of the defendant in its capacity as a sister company is
40 further evidence of the validity of Terra Mirus' position. Furthermore, the
plaintiff is obligated to pay the fees of the solicitors appointed by it,
especially since the defendant had its own solicitors. As clearly provided in
Section 10.07 of the SPA, the plaintiff is responsible for paying its own legal
45 fees.

50 [61] Concerning RPGT, the plaintiff stresses that the defendant was
supposed to pay this amount. According to PW1, although the SPA claims
that the plaintiff is responsible for paying, it was a fairly standard SPA, and
the plaintiff did not receive instructions specifically stating that RPGT is the
plaintiff's responsibility.

[62] This argument seems rather bizarre to me. According to the SPA, it is the plaintiff's responsibility to pay the RPGT. Hence, it is irrelevant whether the plaintiff received instructions explicitly stating that this would be the plaintiff's responsibility. The fact that the SPA and supplemental SPA have rather standard terms does not alter the fact that they are valid, genuine, and binding. In my opinion, it can be dangerous for me to determine that just because the terms are standard, they are simply incorporated into the contract, and the parties can still agree on other arrangements outside of it. Therefore, I find that it is trite that the plaintiff must pay the RPGT after irrevocably agreeing, covenanting, and undertaking to do so under section 10.20 of the SPA.

[63] According to the plaintiff further, the relocation costs are not mentioned anywhere in the SPA between the plaintiff and the defendant. Furthermore, the defendant did not construct any new space for hawkers and traders to relocate, and the parking spaces already belonged to DBKL. Additionally, the work was done as a result of additional requests and requirements by the hawkers who have started their businesses and out of the defendant's goodwill. Additionally, it has been alleged that the defendant failed to state during the trial which expenses incurred on behalf of the plaintiff and which expenses the defendant was willing to incur on behalf of the hawkers, such as jet fans, metal refuse bins, fire extinguishers, and roller shutters. Furthermore, the defendant provided no proof of payments other than the invoices and receipts produced during trial.

[64] From this perspective, I find that the plaintiff was required to bear the relocation costs of the existing occupants and traders by way of constructing and settling the existing market facilities as provided by the DBKL SPA. Therefore, when the obligation was later assumed by the defendant, it would seem unfair to allow the plaintiff to escape its obligation to pay these expenses. In fact, it was even admitted by PW1 that the plaintiff was responsible for relocating and settling the hawkers. In this regard, the SPAs specifically provide that one of the conditions precedents imposed on the plaintiff is that the registered proprietor provides written confirmation that all the hawkers, peddlers, tenants, occupiers and squatters have been relocated from the property. It goes without saying that it is the plaintiff's obligation to deliver vacant possession of the property to the defendant free of any encumbrances; therefore, when the defendant has advanced the amount, the defendant is entitled to recoup the same. I further find that the defendant has proven such relocation costs.

[65] In this regard, I find guidance in the case of *Damansara Realty (Pahang) Sdn Bhd v Om Cahaya Mineral Asia Bhd* [2021] 5 MLJ 1 in admitting all payment vouchers, purchase orders, receipts and payment certificates as

1 Part B documents to support the defendant's claim for relocation costs on the
basis that they are genuine and admissible (see also s 73A of the Evidence Act
1950). As a result, I find it impossible and unreasonable to call everyone who
was involved in the relocation process, which would significantly delay the
5 smooth and expeditious progress of the trial. Thus, what remains to be
decided is the weight of such documents in proving the contents in relation
to the works performed and the amounts involved.

10 [66] I would like to pause here to reflect on the case of *Damansara Realty*
(*Pahang*) *Sdn Bhd* (supra). In that case, his Lordship Nantha Balan JCA made
some constructive and practical observations regarding the status and
position of documents being challenged. As his Lordship succinctly
15 explained at pp 45 & 46:

[152] Part C documents are documents which are disputed as to their authenticity,
existence and contents. Thus, the original documents have to be produced and
marked as "ID" and later converted to exhibits. The process requires the maker to
20 be called to establish the authenticity and contents of the documents. Part C
documents are usually for documents which are of suspicious or dubious
provenance. As a rule of thumb, Part C documents are for documents which are
said to be fake, forged or fictitious. But in practice, it is not unusual for parties to
insist on innocuous or benign documents being placed in Part C.
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[153] The reasons for doing so may be spurious, strategic or tactical. It is also
possible that the purpose of placing documents in Part C is just to make life
difficult for the other side who intend to rely on those documents. Trial judges
30 have an overriding duty to conduct active case management to ensure that
documents in Part C are "genuinely disputed". Trial judges should not passively
allow to dictate that documents should be in Part C. Parties who insist on placing
documents in Part C must therefore satisfy the judge that there is a valid and
acceptable reason for doing so. The reason is obvious. It would be unjust to allow
35 parties to impose an unfair burden on the other side by tactically insisting on
documents being placed in Part C. To allow parties to indiscriminately insist on
documents being placed in Part C would also be an unfair burden on the court and
a waste of judicial time.

40 [67] To address these issues, the defendant has produced three (3) specific
witnesses. The first was DW3, who was responsible for organising,
managing and supervising all relocation activities. Additionally, DW4 was
the quantity surveyor responsible for valuing the relocation works and the
45 various amounts involved. Last but not least, DW5 was one of the
subcontractors who installed the roller shutters. As a result of all the
evidence presented by the defendant, I find that the plaintiff has failed to
challenge their evidence despite attempting to show that all payments were
unproven. As a result of weighing the two positions by the parties herein, I
50 find that the plaintiff's attempt failed due to the existence of various

documents that remain unambiguously credible in view of the plaintiff only making bare allegations and suggestions towards the whole issue.

[68] As a basis for holding as such, I refer to the principle established in the case of *Chong Nge Wei & Ors v Kemajuan Masteron Sdn Bhd* [2022] 4 AMR 674; [2022] 3 MLJ 135, where the Federal Court found, after finding that the respondent failed to produce evidence of calculation to the contrary, that the appellant's evidence by way of quotation should be taken into account. The following is what his Lordship Abdul Rahman Sebli FCJ (as his Lordship then was) observed about this legal position at pp 154 & 155:

[62] The respondent did not produce any evidence to the contrary. It did not even provide any alternative figure as was done by the first defendant in *Strange & Ors*. As the developer of the housing project, it would have been easy for the respondent to determine if the sum quoted by the appellants' contractor was reasonable or otherwise. It should have been able to determine if, for example, it was reasonable for the remedial cost of replacing the flexcore with autoclaved aerated concrete building block to be in the sum of RM380,500 (RM63,416.66 for each unit) as claimed by the appellants, and if not, why not. It was, after all, its own housing project.

[63] In the face of the quotation, which remains uncontradicted by any other evidence, it was futile for the respondent to make the bare and unsubstantiated allegation that the sum of RM380,500 claimed by the appellants was "excessive and unreasonable" and that more than one quotation was required to prove the cost of replacing flexcore with autoclaved aerated concrete building blocks. The sum of RM380,500 must therefore be taken as representing the reasonable cost of the remedial works.

[69] Furthermore, the fact that DBKL imposed this obligation on the plaintiff further indicates that DBKL did not even exclude the plaintiff's obligation because it is a charitable organisation. In other words, the plaintiff must assume all responsibilities and obligations imposed on it since it's still profiting easily from this transaction.

[70] To this end, I find it trite that the plaintiff is contractually obligated to pay all those sums.

[71] In light of the above, I also allow the defendant's cause of action based on the principle of unjust enrichment. This is because if the plaintiff is not being compelled with any obligation to pay, it appears that the plaintiff obtained the property without incurring any costs.

[72] In *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118, the Privy Council held that four conditions must be satisfied to establish a claim under s 71 of the Contracts (Malay States) Ordinance 1950. This is equivalent

1 to our current Contracts Act 1950, which provides for unjust enrichment
claims:

5 Susur Rotan has not sought to challenge the findings of both courts against the
existence of an oral agreement and the sole question therefore before their
Lordships is whether the Federal Court were right in holding the Susur Rotan
had a valid claim against Mr. Siow under section 71 in respect of their expenditure
upon the road. That section is in these terms:-

10 "Where a person lawfully does anything for another person, or delivers
anything to him, not intending to do so gratuitously, and such other person
enjoys the benefit thereof, the latter is bound to make compensation to the
former in respect of, or to restore, the thing so done or delivered."

15 That section is in terms identical with section 70 of the Indian Contract Act upon
which there is some authority to which their Lordships will later briefly refer.

It has been common ground before their Lordships that four conditions must be
satisfied to establish a claim under section 71.

20 The doing of the act or the delivery of the thing referred to in the section:

(1) must be lawful

25 (2) must be done for another person

(3) must not be intended to be done gratuitously

30 (4) must be such that the other person enjoys the benefit of the act or the
delivery.

[73] His Lordship Azahar bin Mohamed FCJ (as his Lordship then was)
analysed the Malaysian position when it came to the claim for unjust
enrichment in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2
35 AMR 601; [2015] MLJU 33. In response to the issue, his Lordship provides the
following analysis:

40 [117] The above, passages from the judgments of the House of Lords are
instructive and are significant contribution to the development of law of unjust
enrichment. The principle underlying the cases of *Banque Financiere de la Cite
Appellants v Parc (Battersea) Ltd. And Others Respondents* (supra) and *Sempra Metals
Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners and Another*
45 (supra) is that, in the context of the present case, a cause of action in unjust
enrichment can give rise to a right to restitution where it can be established that:

(1) The Plaintiff must have been enriched;

50 (2) The enrichment must be gained at the Defendant's expense;

(3) That the retention of the benefit by the Plaintiff was unjust; and

- (4) There must be no defence available to extinguish or reduce the Plaintiff's liability to make restitution. 1

[118] Nearer home, there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief can be seen in *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229 and in *Air Express international (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59. Nevertheless, it has to be said that despite the increase in judicial reference to the expression of unjust enrichment to justify an award of restitutionary reliefs, the law of unjust enrichment is still in its formative stage in our jurisdiction (see article entitled "*An Introduction to the Law of Unjust Enrichment*" [2013] 5 MLJ 1 by Alvin W-L See). In our view, the time has come for this court to recognize the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice." 5 10 15

Conclusion

[74] Based on these findings, the plaintiff's claim is allowed subject to the defendant's right to claim set-off against the plaintiff. 20

[75] The defendant's counterclaim is also allowed with costs of RM75,000 against the plaintiff, subject to allocatur. 25

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