

1 **Lim Kuan Chyin**

v

5 **Chu Hoi Ming**

**High Court**, Kuala Lumpur – Appeal No. WA-12ANCC-71-05/2022  
Atan Mustaffa Yussof Ahmad J

10 May 26, 2023

*Civil procedure – Striking out – Statement of claim – Sessions Court denied striking out of claim for inter alia specific performance and damages – Breach of sale and purchase agreements of shares – Whether agreements valid and binding – Whether second agreement superseded first agreement – Whether clause in second agreement restricted specific performance and other remedies – Whether claim obviously unsustainable – Contracts Act 1950, s 29 – Rules of Court 2012, Order 18 r 19*

*Contract – Sale and purchase agreement – Breach – Damages – Sessions Court denied striking out of claim for inter alia specific performance and damages – Breach of sale and purchase agreements of shares – Whether agreements valid and binding – Whether second agreement superseded first agreement – Whether clause in second agreement restricted specific performance and other remedies – Whether claim obviously unsustainable – Contracts Act 1950, s 29 – Rules of Court 2012, Order 18 r 19*

The respondent ("the plaintiff") and the appellant ("the defendant") were each 50% shareholders and directors of a company. The parties executed an agreement in July 2018 for disposal of the plaintiff's said shares to the defendant ("the first agreement"). Subsequently, a sale and purchase agreement was executed between the parties for the purchase of the plaintiff's said shares by the defendant on detailed terms contained therein ("the second agreement"). The defendant paid a specific amount towards the same to the plaintiff ("first sum"). The plaintiff issued notices to the defendant to demand compliance of terms and conditions of the second agreement regarding payment of certain sums. The defendant informed his inability to perform the obligations and the plaintiff was at liberty to terminate the second agreement under section 5.03(1) thereof. The plaintiff filed an action against the defendant before the Sessions Court seeking inter alia declaration that the first and second agreements were valid and binding; specific performance of the agreements; and damages and compensation in the alternative for the defendant's breach of the agreement terms. The defendant filed an application under Order 18 r 19 of the Rules of Court 2012

to strike out the plaintiff's claim on the grounds that: the remedy of specific performance under section 5.03 of the second agreement was only available to the defendant for the plaintiff's breach and not vice versa; the second agreement superseded the first agreement; since section 5.03 provided for clear consequences for either parties' breach, oral evidence was irrelevant; the claim was unsustainable; declaratory reliefs were unnecessary since it was undisputed that the agreements were valid and binding and the defendant's breach was already acknowledged. The Sessions Court dismissed the defendant's application. Hence, the present appeal by the defendant.

### Issue(s)

1. Whether remedy of specific relief was available to the plaintiff in presence of a contractual remedy.
2. Whether the plaintiff was entitled to liquidated, general and exemplary damages.
3. Whether the plaintiff's claim was obviously unsustainable.

**Held**, allowing the appeal and reversing the decision of the Sessions Court

1. The plaintiff was bound by section 5.03(1) of the second agreement even when the first agreement and second agreements were read harmoniously and there was no conflict between the said agreements. The plaintiff had not demonstrated as to why the terms of the first agreement would support his claim for specific performance. A plain reading of section 5.03 showed that the remedy of specific performance was only available to the defendant upon the plaintiff's breach and not vice versa. The court must give effect to the plain meaning of the words however much it may dislike the result. When a specific remedy for a particular anticipated breach is provided in an agreement, the contractual remedy must be seen as a substitute for the common law remedies. Hence, specific performance was not available to the plaintiff. Based on the interpretation of the contract, oral evidence by witnesses was irrelevant and unnecessary. [see p 751 para 20; p 752 para 23; p 753 paras 28-29; p 754 para 31; p 754 para 33]
2. As the first sum was already paid by the defendant, there was no need for the plaintiff to sue for liquidated damages. The plaintiff's argument on the contravention of s 29 of the Contracts Act 1950 was not valid. The plaintiff could only forfeit the first sum which was a specific amount and this rendered the claim for general damages unsustainable. The

- 1 claim for exemplary damages lacked a legal basis as criteria for such  
damages was not met. [see p 753 para 30 - p 754 para 30; p 754 para 34 -  
p 755 para 35]
- 5 3. By refusing to comply with section 5.03(1) of the second agreement, the  
plaintiff was attempting to benefit from its own breach, which could not  
be allowed. The declaratory reliefs are discretionary and should be  
10 granted only when reasonable and necessary. In the present case, the  
reliefs sought were not productive of any benefit and would be  
infructuous and useless. They were either irrelevant, unsustainable or  
academic. The plaintiff lacked a valid cause of action and failed to  
15 establish a proper basis for reliefs sought in its claim. In the premises,  
his claim was obviously unsustainable. [see p 755 para 36; p 755 para 38 -  
p 757 para 43]

#### Case(s) referred to by the court

- 20 *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3  
AMR 2871; [1995] 3 MLJ 331, FC (ref)
- Catajaya Sdn Bhd v Shoppoint Sdn Bhd & 2 Ors* [2021] 2 AMR 1; [2021] 2 MLJ  
25 374, FC (ref)
- Cheng Hang Guan & 2 Ors v Perumahan Farlim (Penang) Sdn Bhd & 3 Ors*  
[1994] 1 AMR 201; [1993] 1 MLRH 142, HC (ref)
- CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 1 AMR 421; [2019] 2  
30 MLJ 1, FC (ref)
- Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2015] 3 AMR 104;  
[2016] 3 MLJ 122, CA (ref)
- Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1996] 3 AMR 3765; [1997]  
35 11 MLJ 587, CA (ref)
- Goh Joon @ Kia Jew v Kerajaan Negeri Johor & 3 Ors* [1998] AMEJ 0114; [1998] 7  
MLJ 621, HC (ref)
- James Hugh Hutchison & Anor (Pursuers) v Mary Graham's Executrix (Defender)*  
40 [2006] SCLR 587, Ct of Sess (Scotland) (ref)
- Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh b Mamat &*  
*353 Ors* [2010] 1 AMR 285; [2009] 4 MLJ 610, CA (ref)
- Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)* [2016] 3 AMR 101;  
45 [2016] 3 MLJ 689, FC (ref)
- MBf Insurans Sdn Bhd v Lembaga Penyatuan & Pemulihan Tanah Persekutuan*  
*(FELCRA)* [2007] 5 AMR 778; [2008] 2 MLJ 398, CA (ref)
- 50 *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 AMR 3074; [1999]  
3 MLJ 489, CA (ref)
- Raja Singam a/l Velu v Affin-ACF Finance Bhd & Lain-Lain* [2007] 6 MLJ 430, HC  
(ref)

<i>SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor</i> [2015] AMEJ 1795; [2016] 1 MLJ 464, FC (ref)	1
<i>Scottish Power UK Plc v BP Exploration Operating Co Ltd</i> [2016] 1 All ER (Comm) 536, QBD (UK) (ref)	5

### Legislation referred to by the court

#### *Malaysia*

Contracts Act 1950, s 29	10
Rules of Court 2012, Order 18 r 19, 19(1)(a), (b), (d)	

### Solicitors

<i>Justin Voon Tiam Yu and Caroline Lim Seah Le</i> (Justin Voon Chooi & Wing) for appellant	15
<i>Cynthia Lee Mei Fei and Muhammad Azrul Haziq</i> (Nazmi Zaini Chambers) for respondent	20
<i>Judgment received: May 29, 2023</i>	

### Atan Mustaffa Yussof Ahmad J

[1] This is an appeal against the decision of the Sessions Court dated May 24, 2022, dismissing the appellant's application to strike out the respondent's action pursuant to Order 18 r 19(1)(a), (b) or (d) of the Rules of Court 2012 ("ROC") with costs in the cause. The writ action concerned the appellant's breach of a sale and purchase agreement of shares wherein the respondent is seeking various declarations and specific performance from the defendant, as well as damages and costs.

[2] I allowed the appellant's appeal on August 23, 2022 with costs of RM6,000. These are my grounds of judgment. The parties shall be referred to as they were identified in the Sessions Court i.e. the appellant is referred to as "the defendant" and the respondent is referred to as "the plaintiff".

### Brief facts

[3] The defendant and the plaintiff were shareholders and directors of Glamour Sound Sdn Bhd ("the company") which was incorporated in 2003. The defendant and the plaintiff each owned 50% of the shares in the company and both the plaintiff and the defendant were the directors for the company.

[4] On or around July 25, 2018, the plaintiff prepared a written agreement ("the first agreement") for the disposal of the plaintiff's shares to the

1 defendant which was executed by both the plaintiff and the defendant. The  
first agreement is a one-page document containing only basic terms.

5 [5] Subsequently a sale and purchase agreement dated November 7, 2019  
("the second agreement") was executed between the defendant and the  
plaintiff where the defendant being the purchaser agrees to purchase the said  
company's shares from the plaintiff as the vendor based on the detailed terms  
set out therein.

10 [6] The defendant then paid a sum of RM80,000 pursuant to  
section 4.01(1)(a) of the second agreement. This was defined as "the first sum"  
under the second agreement.

15 [7] On November 7, 2019 the defendant and the plaintiff executed a shares  
sale agreement for the sale of the plaintiff's 250,000 units of ordinary shares in  
the company. On November 11, 2019 the plaintiff resigned as a director of the  
company and on December 3, 2019 the plaintiff transferred his shares in the  
20 company to the defendant.

25 [8] The plaintiff did not comply with clauses 4.01(b), 4.02, 4.03, 4.04 and 4.05  
of the second agreement which were related to the defendant's obligations to  
pay the plaintiff a sum of RM40,000, causing the discharge of the plaintiff as  
a guarantor for the company's credit facilities, the payment of 50% of the  
monthly director's fee by the defendant to the plaintiff, the defendant's  
30 purchase of the plaintiff's shares in the properties jointly owned by the  
plaintiff and defendant and the payment to the plaintiff from the payments  
collected from the company's debtors.

35 [9] On July 17, 2020 and February 7, 2022 the plaintiff issued notices of  
demand through his solicitors, to demand for the compliance of the terms  
and conditions under the second agreement. On February 11, 2022, the  
defendant through his solicitor replied to the notice of demand dated  
February 7, 2022 and informed that the defendant is unable to perform his  
40 obligation under the second agreement and the plaintiff is at liberty to  
exercise his remedy to terminate the agreement pursuant to section 5.03(1) of  
the second agreement. It is also stated in the letter that the defendant at all  
material times is ready to transfer back the company shares to the plaintiff  
45 and to reinstate the plaintiff as the director of the company pursuant to  
section 5.03(1) of the second agreement.

50 [10] Subsequently, the plaintiff filed an action against the defendant at the  
Sessions Court on February 28, 2022 and prayed for various reliefs, including  
a declaration that the first agreement and second agreement are valid and  
binding, a declaration of the defendant's breaches, specific performance of  
the agreements' terms, damages, and in the alternative, for the defendant to

pay compensation to the plaintiff if the court finds that the defendant has committed breached the agreements. 1

[11] On March 23, 2022, the defendant filed an application in encl 6 pursuant to Order 18 r 19 of the ROC to strike out the plaintiff's claims. On May 24, 2022, the learned Sessions Court judge dismissed the striking out application with order for costs in the cause. On May 27, 2022, the defendant filed an appeal against the whole of this decision. 5

### **The reliefs sought by the plaintiff in the Sessions Court** 10

[12] The reliefs sought by the plaintiff in the Sessions Court in paragraph 18 of the statement of claim are reproduced below in English for convenient reference: 15

18. Therefore, the Plaintiff seeks the following reliefs against the Defendant, jointly and/or severally:

- a. A declaration that the Sale and Purchase Agreement dated 25.7.2018 and the Share Purchase Agreement dated 7.11.2019 (collectively referred to as "the said Agreements") are valid and legally binding upon the Plaintiff and Defendant. 20
- b. A declaration that the Defendant has breached the terms and conditions of the said Agreements by failing and/or refusing and/or neglecting to: 25
  - i. Settle the remaining purchase payment to the Plaintiff in the amount of RM40,000.00; 30
  - ii. Discharge and/or if necessary, replace the Plaintiff as a guarantor for all financing facilities obtained by Glamour Sound Sdn. Bhd. in his capacity as a director and shareholder of the company; 35
  - iii. Reimburse a sum of money as director's fees to the Plaintiff in the amount of RM92,500.00, calculated from the period of 1.1.2019 to 31.1.2022; and 40
  - iv. Execute the transfer process, including signing the sale and purchase agreement for the jointly-owned properties by the Plaintiff and Defendant, and making the necessary payment for the sale and purchase of the said properties in the amount of RM525,000.00 to the Plaintiff. 45
- c. Specific performance against the Defendant based on the terms and conditions of the said Agreements to carry out the following:
  - i. Discharge and/or if necessary, replace the Plaintiff as a guarantor for all financing facilities obtained by Glamour Sound Sdn. Bhd. in his capacity as a director and shareholder of the company within thirty (30) days from the date of this Court order; 50

- 1                   ii. Execute the transfer process, including signing the sale and  
purchase agreement for the jointly-owned properties by the  
Plaintiff and Defendant, and completing the payment for the sale  
and purchase of the said properties in the amount of RM525,000.00  
5                   to the Plaintiff within thirty (30) days from the date of this Court  
order;
- iii. Settle the outstanding purchase payment and director's fees based  
on the terms and conditions of the said Agreements claimed by the  
Plaintiff in the amount of RM132,500.00 within thirty (30) days  
10                   from the date of this Court order.
- d. Damages;
- e. Exemplary damages;
- f. Alternatively, if the Court finds that the Defendant has committed a breach,  
the Defendant shall pay specific damages to the Plaintiff together with  
interest at the rate of five percent (5%) per annum from the date of breach  
20                   until the date of full settlement.
- g. Costs of this action; and
- h. Any further and/or other relief deemed appropriate and just by this  
25                   Honorable Court.

### **The defendant's submissions**

- 30 [13] The defendant's main submissions are as follows:
- (a) The second agreement has superseded the first agreement due to  
inconsistencies between the two agreements, and maintains that  
section 5.03(1) of the second agreement is binding, rendering the  
35                   plaintiff's claims for specific performance baseless;
- (b) A plain reading of section 5.03 of the second agreement shows that the  
remedy of specific performance is only available to the defendant in  
40                   case of the plaintiff's breach, not vice versa, and that the clauses  
should be interpreted together to mean that specific performance is  
an option only for the defendant;
- (c) As the remedies outlined in section 5.03 provide clear and  
unambiguous consequences for breaches by either party the  
45                   interpretation of the contract renders oral evidence irrelevant;
- (d) The plaintiff's claim and prayers for reliefs, including specific  
50                   performance, general damages and exemplary damages in  
paragraph 18(c), 18(d) and 19(e) of the statement of claim are

unsustainable and in breach of section 5.03 of the second agreement;  
and 1

- (e) The declaratory reliefs requested in paragraph 18(a) and 18(b) of the statement of claim are unnecessary and serve no purpose since there is no dispute regarding the validity and binding nature of the agreements and the defendant has expressed willingness to comply with section 5.03(1) of the second agreement, and the breach by the defendant is already acknowledged. 5  
10

### **The plaintiff's submissions**

[14] The plaintiff's main submissions are as follows: 15

- (a) Both the first agreement and the second agreement are valid and binding, with no conflict between them and claims that the defendant is estopped from denying the binding status of the first agreement; 20
- (b) Clause 5.03(1) does not limit his ability to seek reliefs or remedies, including specific performance, as otherwise it would be illogical and contrary to business common sense; and 25
- (c) The plaintiff's claims should not be struck out without a full trial to properly examine the evidence and resolve legal and factual matters. 25

### **Issues before the court**

[15] From examination of the facts and the respective positions taken by the plaintiff and the defendant, I frame the following issues for the determination of the court in this application: 30  
35

- (a) Whether the second agreement supersedes the first agreement, rendering section 5.03(1) of the second agreement binding on the plaintiff and prevents the plaintiff from pursuing specific performance; 40
- (b) Whether clause 5.03 of the second agreement restricts the plaintiff from seeking specific performance and other remedies for a breach of contract; 45
- (c) Whether the plaintiff's claims for specific performance, general damages, and exemplary damages in paragraph 18(c), (d), and (e) of the statement of claim are unsustainable under section 5.03 of the second agreement on the ground that the plaintiff's actions constitute a breach of the agreement; and 50

- 1 (d) Whether the declaratory relief sought in paragraph 18(a) and 18(b) of  
the statement of claim should be granted considering the lack of  
dispute on the validity and binding nature of the agreements.

## 5 Key provisions for consideration

[16] The key contractual provisions for the consideration of the court are  
found in section 5.03 of the second agreement. For convenient reference this  
is reproduced below:

### Section 5.03. *Non-completion*

15 (1) Notwithstanding any provisions to the contrary in this Agreement, in the  
event the Purchaser shall fail to pay any of the Considerations in accordance  
with Article IV, the Vendor shall be entitled to terminate this Agreement and  
forfeit the First Sum as agreed liquidated damages in which event the  
Purchaser shall retransfer the Sale Shares to the Vendor and to reinstate the  
Vendor's position as a director of the Company whereupon this Agreement  
shall be deemed as null and void and of no further effect and neither party  
hereto shall have any rights hereunder against the other party hereto (save  
in respect of any antecedent breach of this Agreement).

25 (2) Notwithstanding any provisions to the contrary in this Agreement, in the  
event the Vendor shall fail to comply with any of the provisions of this  
Agreement, the Purchaser shall be entitled, at the Purchaser's option, to:-

30 (i) specific performance of the sale and purchase hereunder of the Sale  
Shares;

or

35 (ii) by notice in writing (hereinafter referred to as "the Election  
Notice") served on the Vendor to elect to accept a sum in an amount  
equivalent to the First Sum as agreed liquidated damages (which  
amount shall hereinafter be referred to as "the Liquidated  
Damages") from the Vendor who shall, on or before the expiry of  
seven (7) days from the date of the Election Notice, pay the  
Liquidated Damages to the Purchaser and cause all the monies  
paid by the Purchaser pursuant to this Agreement to be refunded  
to the Purchaser, the Purchaser shall retransfer the Sale Shares to  
the Vendor and to reinstate the Vendor's position as a director of the  
Company whereupon this Agreement shall be deemed as null and  
void and of no further effect and neither party hereto shall have  
any rights hereunder against the other party hereto (save in respect  
of any antecedent breach of this Agreement)

## Analysis and findings of the court

### *Section 5.03(1) of the second agreement is binding*

[17] The plaintiff argued that the first agreement and the second agreement remain valid and binding and there is no conflict between the two agreements. It is contended that there is no evidence to suggest any intention to supersede or terminate either agreement. There is also an absence of a superseding clause or an entire agreement clause in the second agreement as evidence that it does not override the first agreement. The plaintiff further argued that the defendant is estopped from claiming the non-binding status of the first agreement (I note that in the plaintiff's written submissions, the plaintiff stated, "the Appellant is estopped from alleging now that he is not bound to the *Second Agreement*." which I believe is a typographical error).

[18] The plaintiff's submissions appear to stem from the pleadings of the defendant in paragraphs 7 and 8 of the defence. In gist, the defendant pleaded that the second agreement has superseded the first agreement and it is impossible for both agreements to exist simultaneously. The defendant pleaded certain inconsistencies and lack of coherence between the terms of both agreements relating to the manner of payment of the purchase price, the release of the plaintiff as a guarantor and the transfer of shares and properties. The defendant pleaded that since the second agreement is a new written agreement that supersedes any terms in the first agreement, the prayer for a declaration that both the first agreement and the second agreement are valid and binding at the same time as in paragraph 18(a) of the statement of claim is baseless and without merit.

[19] However, the thrust of the defendant's submissions is that section 5.03(1) of the second agreement is binding to the extent that the reliefs for specific performance as prayed for by the plaintiff cannot be sustained. That section 5.03(1) of the second agreement is binding on the plaintiff is consistent with the plaintiff's own stand that section 5.03(1) of the second agreement is a definite agreement to extend and supplement the second agreement which is enforceable and binding on both parties. This is borne out in paragraph 17 of the plaintiff's written submission dated May 13, 2022 at the Sessions Court which is produced here in its entirety:

17. The Plaintiff's claims against the Defendant in this proceeding are premised on the Agreements signed by the Parties in 2018 and 2019 respectively wherein: -

- (a) The First Agreement whilst untitled is understood to be a settlement agreement between the Parties and contains the main terms and conditions. This infers that Parties had executed the First Agreement with the intention of executing a definite agreement subsequently.

1 (b) The Second Agreement is titled "Sale and Purchase Agreement" and was  
prepared as an extension of the First Agreement for the purpose of  
supplementing inter alia the terms relating to the sale and purchase of the  
sale of shares in GSSB under the First Agreement.

5 (collectively referred to as "Agreements").

[20] Given the above, the plaintiff is bound by section 5.03(1) of the second  
agreement even when the first agreement and the second agreement are read  
10 harmoniously as there is no conflict between the two agreements. In any  
event, the plaintiff has not demonstrated to the court either in the affidavits  
or his submissions as to why the terms and conditions of the first agreement  
would support his position that he is entitled to the relief of specific  
15 performance as prayed for. The submissions of the plaintiff on this issue are  
therefore inconsequential to the issue of whether the plaintiff can claim for  
the reliefs for specific performance in this action. Whether the declaratory  
relief in paragraph 18(a) of the statement of claim can be ordered will be  
20 addressed below in paragraphs [37] to [41] of this judgment.

*Interpretation of section 5.03(1) of the second agreement*

25 [21] The plaintiff argued that clause 5.03(1) does not restrict the plaintiff  
from any reliefs or remedies, particularly for specific performance, as it  
would be illogical and contrary to business common sense. The plaintiff also  
submitted that it is against the interest of justice to bar a party from seeking  
30 legal remedies. The plaintiff referred to the Federal Court case of  
*SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2015] AMEJ 1795;  
[2016] 1 MLJ 464 and the Court of Appeal case of *MBf Insurans Sdn Bhd v  
Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA)* [2007] 5 AMR  
35 778; [2008] 2 MLJ 398 for the proposition that contractual interpretation  
should be guided by the reasonable expectations of sensible businessmen  
and a commercially sensible construction. The plaintiff maintains that  
clause 5.03(1) of the second agreement grants the plaintiff the entitlement to  
40 exercise his rights to terminate the agreement, and it does not bar the plaintiff  
from seeking specific performance. It is submitted that the defendant's  
interpretation lacks contemporaneous evidence and fails to justify striking  
out the plaintiff's claims. The plaintiff argued that there are arguable issues  
45 that require a full trial for proper examination of evidence and resolution of  
legal and factual matters. As such, according to the plaintiff, there are  
arguable issues that require a full trial for proper examination of evidence  
and resolution of legal and factual matters.

50 [22] I find the plaintiff's submission to be without merit.

[23] A plain reading of section 5.03 of the second agreement as a whole will show that the remedy of specific performance is only available to the defendant when the plaintiff breaches the second agreement. The remedy of specific performance was specifically agreed to be taken out or omitted in this clause for the breach of the second agreement by the defendant. My reasons for coming to this conclusion are stated below.

[24] Section 5.03 of the second agreement read as a whole contains clear and/or direct terms and there is no ambiguity in respect of the rights or remedies to the plaintiff and/or the defendant and what definite and/or specific consequences are available to the parties in case of the breach by either party of the terms and conditions under the second agreement. In *Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)* [2016] 3 AMR 101; [2016] 3 MLJ 689 the Federal Court held that a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract.

[25] As the remedy of specific performance is available to the defendant (the purchaser) when there is breach of section 5.03(2) by the plaintiff but was not available to the plaintiff (the vendor) when the defendant breaches section 5.03(1), it is only logical and commonsensical to interpret the two clauses together to mean that the option for specific performance is only available to the defendant when the plaintiff breaches the second agreement, but it is not an option nor election available to the plaintiff.

[26] The remedies available to the plaintiff and defendant as set out in section 5.03 of the second agreement are as follows:

(a) In section 5.03(1), when there is a breach by the defendant (purchaser), no remedy of "specific performance" is set out nor available, but the plaintiff (vendor) "shall" be entitled to terminate the agreement (where the agreement is deemed null and void), forfeit the first sum i.e. a sum of RM80,000 already paid by the defendant to the plaintiff as liquidated damages, retransfer the shares to the defendant and have his directorship reinstated.

(b) In section 5.03(2), when it comes to the breach by the plaintiff (vendor), the remedy of the specific performance is specifically set out in section 5.03(2)(i) or payment of the liquidated damages (amount equivalent to the first sum), retransfer the shares to the defendant and have the plaintiff's directorship reinstated as set out in section 5.03(2)(ii) and the agreement is deemed null and void

1 (i.e. terminated) pursuant to an election by the defendant (purchaser)  
via an "election notice".

5 [27] Section 5.03 of the second agreement is a termination clause and ought  
to be construed strictly. See *Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors* [2021]  
2 AMR 1; [2021] 2 MLJ 374, Federal Court. When section 5.03 is given a strict  
10 construction, this will result in an interpretation that the clause specifies the  
definite and/or specific consequences or remedy available to the parties in  
case of the breach by either party of the terms and conditions under the  
second agreement. Where a particular breach averred is anticipated by an  
agreement and a specific remedy is provided in that event, the contractual  
15 remedy must be seen as being intended as a substitute for, and not as a  
supplement to, those at common law. See *James Hugh Hutchison & Anor*  
(*Pursuers*) v *Mary Graham's Executrix (Defender)* [2006] SCLR 587.

20 [28] The plaintiff is unhappy with an interpretation that excludes the  
remedy of specific performance as it will result in his not being able to wash  
his hands clean of the directorship and ownership of shares in the company.  
However, it is not meritable for the plaintiff to argue that such interpretation  
of the terms in the second agreement would result in an outcome which the  
25 plaintiff now dislikes. In *Dato' Sioananthan a/l Shanmugam v Artisan Fokus Sdn*  
*Bhd* [2015] 3 AMR 104; [2016] 3 MLJ 122, it was held that the court must give  
effect to the plain meaning of the words however much it may dislike the  
result.

30 [29] The first agreement and the second agreement can be read  
harmoniously and there is nothing in the first agreement which contradicts  
and/or affect section 5.03(1) of the second agreement. Given this, based on  
the interpretation of the contract, oral evidence by witnesses is irrelevant and  
35 unnecessary.

40 [30] The plaintiff also argued that the defendant's interpretation of  
clause 5.03 would preclude the plaintiff from claiming remedies for a breach  
of contract based on the second agreement and this would contravene s 29 of  
the Contracts Act 1950. The plaintiff referred to the Federal Court case of  
*CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 1 AMR 421; [2019] 2  
45 MLJ 1 for the proposition that a contractual clause that eliminates a party's  
right to seek remedies, including damages, for breach of contract or  
negligence is void under s 29 of the Contracts Act 1950. However, in the  
*Bourke* case, the clause in question attempted to prohibit the borrower from  
suing the bank for any loss or damage incurred by the borrower including  
50 loss of income or profit, savings, and various other indirect, incidental,  
consequential, exemplary, punitive, or special damages. This was an  
absolute restriction against the customer against suing the bank for all

remedies of damages against the bank. Clause 5.03 in the instant case is not an absolute restriction against the defendant. When the defendant as the purchaser breaches his obligations to pay the considerations as provided in the second agreement, the plaintiff is entitled to liquidated damages when terminating the agreement. However, in the circumstances, as the first sum has already been paid by the defendant to the plaintiff, there is no need for the plaintiff to sue the defendant for liquidated damages in the event of such a breach. Therefore, the plaintiff's argument on the contravention of s 29 of the Contracts Act 1950 is not valid.

[31] The plaintiff also argues that as the words "shall be entitled" is used in clause 5.03 of the second agreement the term does not confine the plaintiff's rights to a claim for liquidated damages alone and the right to action for damages for breach of contract is not taken away since this was not expressly provided. However, the court finds this argument erroneous as it is clear from a comparison of section 5.03(1) and section 5.03(2) that as the remedy of specific performance is available in the latter and not the former, the right of the plaintiff to claim for specific performance was contractually removed when the breach is by the defendant.

*The plaintiff's claim is in breach of section 5.03(1) of the second agreement*

[32] I find that the plaintiff's claim and reliefs are in breach of section 5.03 of the second agreement. The main prayers for specific performance, general damages, and exemplary damages in paragraph 18(c), (d) and (e) of the statement of claim are unsustainable.

[33] As decided in the case of *James Hugh Hutchison and Another v Mary Graham's Executrix* [supra] the Court of Session, Outer House held that when a particular breach is anticipated by an agreement and a specific remedy is provided, the contractual remedy must be seen as a substitute for common law remedies. Therefore, specific performance is not available to the plaintiff, as stated in paragraph 18(c)(i) to (iii) of the statement of claim.

[34] Regarding the claim for general damages in paragraph 18(d) of the statement of claim, the plaintiff can only forfeit the first sum already paid by the defendant, which is a specific amount. This renders the claim for general damages unsustainable. In *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2016] 1 All ER (Comm) 536, the Queen's Bench Division held a party can only maintain a claim for damages if they can prove that the amounts they would have nominated for delivery, had the breach not occurred, exceed the amounts they actually nominated. No argument has been raised or evidence has been led by the plaintiff to that effect. Here, the plaintiff only prays for general damages, and in the face of the defendant's application to strike out paragraph 18(d) says nothing more on why general damages

1 should be given. It is clear that the plaintiff is limited to the remedy provided  
by section 5.03(1) of the second agreement and cannot maintain a claim for  
damages.

5 [35] The plaintiff's claim for exemplary damages in paragraph 18(e) of the  
statement of claim also lacks a legal basis, as the criteria for such damages are  
not met. The authorities of *Lembaga Kemajuan Tanah Persekutuan (FELDA) &*  
10 *Anor v Awang Soh bin Mamat & Ors* [2010] 1 AMR 285; [2009] 4 MLJ 610 and  
*Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd* [1994] 1 AMR  
201; [1993] 1 MLRH 142 provide the factors to be considered in awarding  
exemplary damages, and none of them are present in this case. These are  
15 conduct of the wrongdoer which is outrageous, elements such as malice,  
cruelty, fraud, or insolence, oppressive actions by officers of the state, when  
a defendant intentionally disregards the plaintiff's rights and calculates that  
the profits from the wrongdoing will likely exceed the potential damages  
and when exemplary damages is expressly authorised by statute.

20 [36] Lastly, it is clear that the plaintiff, by refusing to comply with  
section 5.03(1) of the second agreement, is attempting to benefit from their  
own breach. The word "shall" in the phrase "shall be entitled" found  
25 section 5.03(1) of the second agreement is interpreted to mean that the  
remedy of termination of the second agreement and forfeiture of the first  
sum as agreed liquidated damages is mandatory in nature in the  
construction of contract. Therefore, by refusing to comply with  
30 section 5.03(1) of the second agreement and initiating a legal action instead  
on the basis of the breach of sections 4.01(b), 4.02, 4.03 and 4.04 under  
article IV of the second agreement against the defendant at the Sessions  
Court and claiming for the reliefs which contradicts with the reliefs provided  
35 under section 5.03(1) of the second agreement, the plaintiff is breaching the  
second agreement. The plaintiff cannot be allowed to take advantage of his  
own breach. The authority of *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn*  
*Bhd* [1999] 3 AMR 3074; [1999] 3 MLJ 489 establishes that a litigant should not  
40 be permitted to benefit from his own wrongdoing.

*Declaratory relief in paragraph 18(a) and 18(b) of the statement of claim*

45 [37] The declaratory relief sought in paragraph 18(a) and 18(b) of the  
statement of claim is unnecessary and infructuous.

50 [38] The declaration in paragraph 18(a) seeks that both the first agreement  
and the second agreement are valid and binding although there is no dispute  
by the defendant that both are valid and binding and also that section 5.03(1)  
is binding on the plaintiff. The defendant through his previous solicitors, in  
the letter dated February 11, 2022 had already stated that he is willing to

comply with section 5.03(1) of the second agreement. Therefore, the declaratory relief is academic and serves no purpose.

[39] The declaration in paragraph 18(b) that the defendant purportedly "breached" the terms and conditions of the said agreement also serves no purpose as there is no issue on this as given that the defendant had breached the agreement, the plaintiff only has to follow the remedy in section 5.03(1) of the second agreement i.e. to terminate the agreement, forfeit the first sum, liquidated damages, retransfer the shares to the defendant and have his directorship reinstated.

[40] The High Court cases of *Raja Singam a/l Velu lwn Affin-ACF Finance Bhd dan lain-lain* [2007] 6 MLJ 430 and *Goh Joon v Kerajaan Negeri Johor & Ors* [1998] AMEJ 0114; [1998] 7 MLJ 621 (High Court) establish that declaratory relief is discretionary and should be granted only when reasonable and necessary. In this case, the relief sought is not productive of any benefit and would be infructuous or useless.

[41] As the main relief of paragraph 18(c), 18(d) and 18(e) of the statement of claim are also unsustainable as held above, the declaratory reliefs sought in paragraph 18(a) and 18(b) of the statement of claim are academic.

### Conclusion

[42] After careful consideration of the submissions and affidavits, I am persuaded to agree that the plaintiff lacks a valid cause of action and fails to establish a proper basis for the reliefs sought in the statement of claim. The plaintiff's claim is obviously unsustainable. The interpretation of the terms in the second agreement, with due regard to their plain and ordinary meaning, supports this finding. In the case of *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1996] 3 AMR 3765; [1997] 1 MLJ 587 it was recognised that the primary duty of a court in construing a written contract is to ascertain the intention of the parties from the words of the instrument. If the language used is unambiguous, the court must give effect to it, even if the result may appear capricious or unreasonable. The court does not possess the power to amend or alter a contract to avoid inconvenient or unjust outcomes.

[43] In line with this principle, both parties are bound by the specific reliefs set forth in the second agreement, and the plaintiff is estopped from contravening section 5.03(1) of the agreement, which outlines the agreed-upon specific remedies in the event of a breach by the defendant. When parties proceed on the basis of an underlying assumption, neither party should be permitted to depart from that assumption when it would be unfair or unjust to do so. The Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 AMR 2871; [1995] 3 MLJ 331 held

1 that when parties proceed on the basis of an underlying assumption, neither  
party should be allowed to deviate from that assumption when it would be  
unfair or unjust to do so. In such cases, the courts will provide the  
appropriate remedy as dictated by equity.

5 [44] Consequently, based on the aforementioned analysis and authorities,  
I reverse the decision of the learned Sessions Court judge and allow the  
appeal.

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