IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR
WILAYAH PERSEKUTUAN, MALAYSIA
CIVIL SUIT NO: WA-22NCVC-668-10/2016

BETWEEN

1 APEX MARBLE SDN BHD
Company No: 669745-X

2 MCORE SDN BHD
Company No: 599497-H **…PLAINTIFFS**

AND

LEONG TAT YAN **… DEFENDANT**
(IC No: 670730-04-5087)

JUDGMENT
(Enclosure 1)

INTRODUCTION

[1] The First Plaintiff (P1) and the Second Plaintiff (P2), collectively referred to as the Ps, in this suit, are duly incorporated Malaysian companies, and the Defendant (D) is a Malaysian businessman operating in Vietnam.

A. The First Plaintiff / Apex Marble Sdn Bhd (P1)

1.1. 60% of shares in P1 were owned by CRG Incorporated Sdn Bhd (CRG).
1.2 CRG later became a publicly listed company named CRG Incorporated Berhad.
1.3 CRG is a wholly owned subsidiary of a publicly listed company, Bonia Corporation Berhad (BCB).
1.4 The defendant (D) owned 40% of shares in P1.

B. The Second Plaintiff / Mcore Sdn Bhd (P2)

1.5 60% of shares in P2 are owned by BCB.
1.6 40% shares in P2 are owned by the D through 388 Venture Corporation Sdn Bhd (388 Venture).
1.7 The D is a director and shareholder of 388 Venture, holding 80% of the shares in 388 Venture.
1.8 The D is also a director of P2.

[2] In this suit:

2.1 The Ps seek losses arising from breach of contract, general and exemplary damages, interest, and costs from the D.

2.2 The D denies the claim grounded on the premise that there is no legal basis or cause of action and filed a counterclaim against the Ps for damages.

2.3 On 30.08.2023:

(a) In my considered judgment, I found the Ps had succeeded in proving their claim against the D and entered final judgment in their favour and costs of RM100,000.00 (global) to be paid within 30 days.

(b) The counterclaim by D is dismissed with costs for lack of merit and wanting in compelling evidence.

2.4 Aggrieved, the defendant filed this appeal against my decision, and these are my reasons:

BRIEF FACTS:

[3] Parties have filed agreed facts, and in narrating the brief facts, I will also refer to a series of correspondences and documents available before me.

A. The Joint Venture

3.1 In early 2000, the Bonia Group of Companies (Bonia Group) started selling goods to D in Vietnam through his nominee, Van Thuy Hanh (Hanh).

3.2 Sometime at the end of 2002:

(a) The D approached BCB to propose a joint venture (JV).

(b) The Bonia Group would sell their products to the D's nominee in Vietnam.

(c) They would share in the revenue from the sales.

(d) The D would be exclusively responsible for all operational aspects of the Vietnam business.

3.3 It was agreed with further negotiations to refine the JV.

B. Implementation of the JV

The First Plaintiff / Apex Marble Sdn Bhd (P1)

3.4 P1 was incorporated on 18.10.2004:

(a) Its original purpose was to market and distribute specific Bonia Group licensed brand menswear apparel (including Valentino Rudy, Carven, Saville Row, John Langford, Ungaro, Santa Barbara, and Polo Racquet Club).

(b) By 2009, P1 had stopped undertaking this business.

(c) In mid-2009, P2 injected its Carlo Rino business into P1.

(d) Under the JV, on 28.09.2009, P1 and Pham Thi Minh Phuong (Phuong) entered into a Non-exclusive Dealership Agreement, where Phuong was once again merely the D's nominee acting on his instructions.

(e) On 26.04.2010, the D took up 40% of P1's shares.

The Second Plaintiff / Mcore Sdn Bhd (P2)

3.5 Under the JV, P2 was incorporated on 22.11.2002, with the D holding a 40% stake as a shareholder and director (5.2.2003) through 388 Venture:

(a) P2 sold the Bonia Group's products under the Bonia, Sembonia, Bonia Uomo and Carlo Rino brands.

(b) P2 commenced business with D via a Non-exclusive Dealership Agreement (09.12.2003) between P2 and D's nominee, Hanh (L.141, pp.3-23).

(c) On 05.05.2005, D replaced Hanh with another nominee, Pham Thi Minh Phuong (Phuong), via a new Non-Exclusive Dealership Agreement with P2 (L.141, pp.26-45).

(d) On 28.09.2009, the Ps entered into separate Non-Exclusive Dealership Agreements with Phuong because Phuong was the D's nominee acting on his instructions.

(e) The Agreements appointed Phuong as a non-exclusive dealer to sell and market the Bonia Group's products in Vietnam (L.141, pp.88-107, pp.153-170)

[4] In a nutshell, the present case revolves on the issue of:

4.1 Non-Exclusive Dealership Agreement (09.12.2003) between P2 and the purported nominee of the defendant (Van Thuy Hanh, which was subsequently replaced with Pham Thi Minh Phuong (05.05.2005) in a new Non-Exclusive Dealership Agreements that incorporates an automatic renewal clause unless it is expressly terminated. This is to promote and sell Bonia Group products in Vietnam.

4.2 The D:

(a) Denies the alleged agency/nominee relationship in these Non-Exclusive Dealership Agreements.

(b) The Ps pointed out five pertinent circumstances to support their arguments:

(i) The 2008 Guarantee signed by the D that recited the position.
(ii) The negotiation on behalf of Phuong for compensation in the buy-out episode.
(iii) The D's involvement in Phuong's operation in Vietnam.

(iv) The D's director's fee paid in Vietnam from Phuong's Vietnam operations and
(v) The use of 388group.com and/or 388group.com.vn domain name, where the D and Phuong operated from a 388 Joint Stock Company.

4.3 In pursuit of this venture:

(a) The D had acquired a 40% equity stake in P1.
(b) Was a duly appointed director in P2.
(c) As a director of the company, it is trite law that he owes fiduciary duties and must at all times act in the best interest of the company that he sits in and, accordingly, in law, must avoid any potential conflict in interest as mandated by common law and the Companies Act 1965/2016.

4.4 The Ps alleged that the D, by himself and/or through his alleged nominee Phuong, breached the express and/or implied terms of the agreements when:

(i) They failed to furnish the required financial records of the operation to the Ps as agreed,
(ii) They failed to remit the sums to the Ps.
(iii) They prevented the Ps from retrieving sales and stock data.
(iv) They denied access to the Goldsoft Consignment and Inventories system (server disconnected), and
(v) They removed Ps' representatives from the Vietnam office.

4.5 Several letters of demand to remedy the defaults were ignored, leading to the termination of the Agreements (21.06.2011). An attempt to subsequently conduct inventory and stock take was denied. The plaintiffs' claims for breach of contract, general damages, exemplary damages, and costs are as set out in the SoC.

[5] On 18.03.2021, the plaintiffs filed the present suit against the D, the prayers stated in the Statement of Claim (SoC).

[6] The witnesses at the trial are as follows: -

(a) Plaintiffs' witnesses:

PW1: Datuk Chiang Heng Kieng (Director of BCB)
PW2: Dato' Sri Chiang Fong Yee (Group MD CRG/Director (Non-Independent Non-Executive) of BCB
PW3: Ong Boon Huat (Exec. Director of CRG)

(b) Defendant's witnesses:
DW1: Leong Tat Yan (the defendant)
DW2: Van Thuy Hanh (Vietnamese businesswoman)
DW3: Lu Ngoc Da Lan (Chief Accountant to Phuong)
DW4: Hua Thi Ngoc Ha (Employee of Phuong)
DW5: Vu Thi Thu Hien (Employee of Phuong)
DW6: Nguyen Phi Giao (Employee of Phuong)
DW7: Pham Thi Minh Phuong (Vietnamese businesswoman)

THE PLAINITIFFs' CASE

[7] I observed the Ps' arguments (L.202 & L.206) in canvassing and ventilating their position as follows:

7.1 The Ps argued that:

(a) Phuong is, in the circumstances of the case, undoubtedly the D's agent in the foregoing transactions with the Ps (see s.135 Contracts Act 1950).
(b) As the principal to Phuong, the D is the actual contracting party therein, and action can be taken against him (see s.179 Contracts Act 1950).
(c) Notice(s) issued to Phuong shall be as if it had been given to the D (see s.182 Contracts Act 1950).
(d) As an officer and director of P2, the D owed fiduciary duties under section 132 of the Companies Act 1965 (at the time). He is to act in the best interest of the company at all times.
(e) **Zaharen bin Hj Zakaria v Redmax Sdn Bhd & other appeals [2016] 5 MLJ 91, CA** was cited that ruled a director and an employee must discharge their responsibilities in a manner

that befits the interest of the company and not in a way, detrimental to the interest of the company.

(f) **Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209, SC** was also cited that as a fiduciary in law, a director is precluded from acting in a manner which brings a conflict of interest between him and the company.

7.2 The Ps raised specific preliminary legal and evidentiary objections set out in (L.202, annexures 2-5, pp.60-75) concerning the Ds at the trial.

My observation:

From the evidence at the trial, I am inclined to believe the appropriately set out arguments of the Ps on these objections. It is for the D to conduct his defence to refute those objections and to tilt the scale of evidence concerning the following issues, which I find unconvincing. Rules are meant to be complied with saved in justifiable circumstances. Consequently, I allowed the objection against the D in the following sub-paragraphs (a)-(d):

(a) **Pleading Objections** (L.202, annexure 2, pp.60-62): Raising non-pleaded issues. The Ps pray that they be disallowed.

(b) **Hearsay Objections** (L.202, annexure 3, pp.63-65): Hearsay evidence. The Ps pray that several hearsay evidence of the D and his witnesses be disallowed.

(c) **Failure to cross-examine** (L.202, annexure 4, pp.66-68): The Ps witnesses were not cross-examined on certain parts of the D's case that Phuong had testified. The Ps pray that her evidence in this regard must be disallowed.

(d) **Part C Documents** (L.202, annexure 5, pp.69-75): The D produced three recordings and a transcript which were of

questionable origin (IDD1 and IDD2). The Ps pray that they should not be admitted for reasons stated in the annexure.

7.3 The Ps argued:

(a) The Ps argued that Hanh and Phuong were, in fact, the nominees who fronted and carried out the instructions and business affairs of the D in Vietnam. In establishing this fact, the Ps relied on the following evidence:

(i) The evidence of PW1 (BCB's former MD) testified that the business transaction with D started in 2000, who began dealing in Bonia's products in Vietnam on a cash-and-carry basis.

The D later met PW1, seeking a favourable discount on bulk purchases to develop Bonia's business in Vietnam. This led to a proposal by the D for a proposed joint venture (JV), leading to a site visit in Vietnam.

During this visit to Vietnam, PW1 was introduced to Hanh, D's girlfriend (the retail manager of D's company in Vietnam). The D informed PW that he conducted his business in Vietnam through Hanh.

After a thorough deliberation between them, it was agreed that (1) the Bonia Group would supply Bonia's products to the D's nominee (Hanh), who would be under the direct supervision of the D, (2) the D would be exclusively responsible for all operational aspects of the business in Vietnam, (3) the parties would share the profits from the proceeds of the sale after the usual deduction of operational costs and expenses, and capital expenditure (PW1, WS L.168 QA 4-9).

The D objected to the evidence of PW1, saying that the Ps did not plead these. I, however, agree with the Ps that these constitute evidence. It is clear that O.18 r.7(1) RC 2012 only requires material facts, not evidence, to be pleaded. It has always been the Ps case that Hanh and

Phuong were the nominees of the D. I find no basis for the D's objection. **RHB Bank Berhad v Dong Haeng Industries Sdn Bhd [2002] MLJU 657, HC**; and **YKL Engineering Sdn Bhd v Sungei Kahang Palm Oil Sdn Bhd & Anor [2022] 6 MLJ, FC** was cited in support that only material facts in a summary form need to be pleaded and not evidence. It has been discovered that this is the first time the D objects to this issue. It was never raised at the trial. As ruled by the Supreme Court in **Superintendent of Lands and Survey, 4th Division & Anor v Hamit B. Matusin & 6 Ors [1994] 3 MLJ 185, SC,** it is too late to raise the objection now and take the other party by surprise. The D should have objected right there and then at the trial.

(ii) The evidence of PW1 (BCB's former MD) above was corroborated by the evidence of PW2 (director of BCB and Group MD of CRG). (see L.169, PW2's WS, Q&A 9-10) and Notes of Evidence (NOE).

(iii) The Ps also argued that the D had:
(1) had introduced Hanh as his nominee in Vietnam,
(2) Hanh was readily interchangeable with Phuong in 2005 by the D.

(iv) In his email (18.11.2005) to PW3, the D referred to himself and his nominee Hanh as "Leong & Partners". (L.142 pp.33-35)

(v) When Phuong was appointed under the Non-Exclusive Dealership Agreements with the Ps, she executed the Agreements as instructed by the D. Even though she claimed to have discussed possible amendments, no evidence to support that argument was produced. It was merely a bare assertion.

The D objected to the evidence of PW2 (director of BCB and Group MD of CRG) corroborating the evidence of PW1, as the events transpired before PW2's time and constituted hearsay

evidence. The Ps argued that contemporaneous had been adduced (L.167, pp.3-10; L.142, pg.213, 215-217). PW3 (ED of CRG and former Senior Corporate Finance Manager of BCB) on the disconnection of the server to Malaysia are grounded on letters by BCB, CRG, P1 and P2 (L.167, pp.3-5, 6-7, 8-10; L.142, pg.17-20, 21-24, 215-217). These are not hearsay evidence. I find no merits in this objection.

(b) Under the proposed JV, P2 was established on 22.11.2002. The D was appointed as a director on 5.2.2003. The D acquired a 40% equity stake in P2 through his company in Vietnam, 388 Venture, by capitalising his business assets in exchange for the paid-up shares of P2. Effectively, P2 acquired the D's Vietnam's retail business. (L.142, pp.8-9)

(c) The D claimed that he had purchased the Vietnam business from Hanh, but no compelling evidence was produced in support thereof. Throughout the trial, he could not prove that he owned any business in Vietnam. Even Hanh could not corroborate the D's position. In his email to PW3 on 18.11.2005, he said*, "We opted to divest 60% of our interest to Bonia Corp and come to a JV several years ago.* "We" clearly refer to himself and Hanh (the nominee) (L.142, pp.33-35).

(d) Before the execution of the Agreements (Non-Exclusive Dealership Agreements) on 19.05.2008) by Phuong and P2, the D had 20.03.2008 executed a letter of Guarantee to guarantee the performance of Phuong unconditionally and to provide an indemnity to P2 (L.141, pp.66-85). The D never denied he executed the Guarantee. PW2 (director of BCB and Group MD

of CRG) gave evidence that the Guarantee was required because (1) there was an increase in trading volume and stocks in Vietnam, (2) the D and Phuong had slowed down the remittance of net sales proceeds to Malaysia causing an accumulation of substantial outstanding amount, (3) P2's stocks and sales proceeds were kept and controlled by D and Phuong in Vietnam, and (4) they made withdrawals unknown to nor consented to by P2.

D had requested P2 to enter into the Agreements, as seen in the said Guarantee. The D undertook to indemnity on a full indemnity basis against all losses, damages, costs, expenses or otherwise which may be incurred by the principal because of any default on the part of Phuong. It was argued that D had no reason to undertake these heavy financial obligations if D was merely Phuong's introducer to the Ps. He had to because he was Phuong's principal. (Letter of Guarantee, L. 142, pp.10-12)

(e) An email on 23.07.2009 by Phuong's staff (Tuong Vi) to PW3 concerning the new Non-Exclusive Dealership Agreement that shows Phuong and Hanh were easily exchangeable. (L.142 pg 55)

(f) The D was heavily invested in Phuong's daily operations:
   (i) The D frequently remitted payments from Phuong to the Ps.
   (ii) Emails addressed to Phuong were answered by the D.
   (iii) The D is fully authoritative over Phuong and other employees in Vietnam's retail operations.
   (iv) The D determined the sub-dealers' commission rates.
   (vi) The D secured counters and outlets and negotiated rent rates.
   (vii) The D decides on advertising and promotional activities for the Vietnam retail business.
   (viii) The D makes administrative determinations on workforce issues in Vietnam.

(ix) When details for unremitted commissions were requested, D and not Phuong addressed the issue.

(x) the D approved four volumes: the Ps payment vouchers, debit advice, credit advice, and receipt vouchers.

(xi) Even Phuong, in her evidence, supports the position that the D (together with Alex and Liew) controlled most of the dealership activities in Vietnam.

The D objected to the foregoing evidence by saying that the Ps did not plead these. Similarly, as I have observed in paragraph 7.3(a)(i) above, these constitute evidence. It is clear that O.18 r.7(1) RC 2012 only requires material facts, not evidence, to be pleaded. It has always been the Ps case that Hanh and Phuong were the nominees of the D. I find no basis for this objection by the D. There was no objection raised at the trial. To do it now would be to take the other party by surprise.

(g) The D and all the other staff of the Vietnam operation use the "388group" domain name (388group.com and/or 388group.com.vn), which is related to the Vietnam company that the D and Phuong operated from (388 Joint Stock Company). Although Hanh and Phuong are supposedly separate businesswomen, they use the domain name "388group.com", owned by the D in Malaysia.

(L.142, pp. 26-30, 36-39, 41-45, 49, 52-59, 62-63, 70, 73-77, 81-87, 90, 94, 95, 100, 117, 126, 130,133-135,138-142,146-147,150-151,167,168-172, 175-176,201)

(h) It is not disputed that D received his directorship fees via debit notes issued by Phuong at his request. That was the extent of his control in the Vietnam retail operations.

(i) Phuong's position as a nominee is further magnified by the fact that D took an active role in bargaining to secure Phuong's compensation during the buy-out negotiations with BCB and CRG. This buy-out (the D's 40% equity stake in the Ps) was

caused by the many breaches committed by the D and Phuong as set out in paragraph 47 of the SoC. When the Ps opted not to compensate Phuong, the D said he would pay Phuong's compensation himself. It must be noted that Phuong is supposedly the principal in the Agreements, and she sought no compensation, yet he takes it upon himself to ask for it. It raises questions. It has to be that Phuong is the nominee. No evidence was tendered at the trial to show that Phuong had asked D to seek compensation for the significant losses that she was supposed to have suffered. It reflects adversely on the credibility of their evidence at the trial, particularly the evidence of the D.

(L.142, pg.216; L.178, Q&A 4, para 10, L.198 Q&A 12, para7)

My observations at the trial:

(i) In my considered judgment, taking the facts established at the trial in the foregoing paragraphs (a)-(i) in its totality allows me to come to a safe conclusion that D was more than just coordinating the retail business in Vietnam, he was to state the obvious from this evidence having the authoritative control of the retail business through his nominee, first Hanh, and followed by Phuong.

(ii) To hold otherwise would not accord with the facts in the above paragraphs (a)-(i). The totality of the evidence led me to arrive at this conclusion.

(iii) I also find the evasive demeanour of the D at the trial had adversely impacted the credibility of his evidence. This was appropriately captured by the Ps in Annexure 6 hereof. (L.202 pg 76-83).

7.4 It is the Ps case that the D and Phuong in which I agree that they colluded with each other to breach the Agreement with the Ps:

(a) Failure to provide financial records promptly. This is well recorded in the P's contemporaneous correspondence. It is a breach of Clause 7.3(b) of the Agreements that the dealer shall further furnish daily evidence of receipts of proof of sales and

bank in slips no later than the next working day from the day the said bank-in slip is issued.

(L.142, pp.14-15, 17-20, 21-24, 93, 156):

(i) There was no response from D or Phuong to any of the letters issued to them, which can be taken as a tacit admission of the truth in those letters. The Ps cited in support, **Wong Hin Leong David v Noorazman Bin Adnan [1995] 3 MLJ 283, CA** ruled that the party receiving the letter must answer it if he means to dispute the facts. The Federal Court in **Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 CLJ 453, FC** said that it is in the ordinary nature of a businessman to immediately refute any proposition injurious to him contained in the letter and not to let it stand.

(ii) The Ps also argued that in the context of this case, a term can be implied where it is necessary to give business efficacy where the term is evident that the financial records should be furnished promptly. The Federal Court ruling in **Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697, FC** was cited that an implication of this nature can be made in two situations: (1) where it is necessary to give business efficacy to the contract, and (2) where the term implied represents the obvious, but unexpressed, intention of the parties.

(iii) Those financial records are being withheld by D and Phuong. The Ps would be grappling in the dark on the state of affairs and the financial aspects of the retail business in Vietnam. Clause 7.3(a) of the Agreements requires that sales proceeds that exceed the pre-determined cash float are required to be remitted to the Ps immediately. But that cannot be ascertained without the necessary financial records. Clause 16.2 says that the Ps shall have absolute access to the Dealer's books of accounts.
(L.141, pp.93, 97-98 156, 95, 158, 160-161)

(iv) D and Phuong had breached Clause 7.3(b) of the Agreements.

(b) The D and Phuong failed to remit sums above the pre-determined cash float of USD200,000 for the Ps:

(i) The auditor found that D and Phuong, in breach, had retained a cash float of USD 565,194.49 in Vietnam. A request by the board of directors of BCB for D and Phuong to remit the excess money, together with handing over the cash books every week, was ignored.
(L.142, pg.13)

(ii) In March of 2011, the Ps discovered that D and Phuong had failed to remit USD365,088.60, which should have been remitted between 7.8.2009 and 21.5.2010. Despite not remitting the money, D and

Phuong deducted the sum from the Ps cash books. When queried, the D quickly remitted USD 367,259.68 in several tranches (4th, 8th, and 10th March 2011) to the Ps. It is clear evidence of impropriety. In a meeting on 1.6.2011 in Vietnam, Da Lan and Tuong Vi admitted to PW3 (ED of CRG and former Senior Corporate Finance Manager of BCB) that they failed to remit the money, though it had been deducted from the Ps cash book. This evidently breaches Clause 7.3(a) of the Agreements.
(L.167, pg.4; L.193 PW3's WS, Q7A 8)

(c) The D and Phuong severed the server communication with Malaysia. They denied access to the Goldsoft System (designed to track consignment stock levels) from 14.05.2011 onwards, preventing the Ps from retrieving the sales and stock data in Vietnam. There was no response from the d or Phuong. In his email (13.06.2011), the D admitted that the server had been disconnected but claimed it had nothing to do with him. He elected not to rectify the situation with the server. Without access to the Goldsoft System, the Ps could not track the stock level in Vietnam. This breaches Clause 9.1.10 of the Agreements for failing to keep true and accurate sales and inventory records of the outlets and/or the implied terms of the Agreements.

(L.167, pg.4, pg.6, L.142, pp.17-20, pg.217)

(d) BCB had two Representatives in the Vietnam office to assist D with the retail business (Alex & Liew). They were removed by D and Phuong on 16.5.2011, as explained by PW2 (director of BCB and Group MD of CRG). A letter on 15.06.20111 to the D sought an explanation but was ignored. In his email dated 30.05.2011, the D admitted that Phuong had removed them. This breaches Clauses 7.2(a) and 9.1.14 of the Agreements (on

the requirements for authorised representatives in the retail office.

(L.169, pg.24, Q&A 34(ii); L.142, pp.17,1, 2139)

In my observation at the trial:

(i) These alleged breaches in the foregoing by D and Phuong had been satisfactorily proven.

(ii) The explanation afforded by D and his witnesses is devoid of merits and unconvincing.

(iii) It is apparent from the evidence that the actions of the D and Phuong were deliberate and calculated in their resulting consequences.

(iv) Evidently, as a director of P2, he had breached his fiduciary duties. There are sufficient materials before me to conclude that his interest has been brought into conflict with the interest of the company he is bound to protect. His breach of duty adversely impacted the Ps and, by law, must account for it.

(e) The D had objected to the admissibility of BCB's without prejudice letters from being admitted into evidence at the trial. However, as pointed out by the Ps:

(i) I had already considered this issue before the trial and admitted the without prejudice documents in evidence.

(ii) After considering the parties' submissions on the issue, on 27.09.2023, I allowed these documents to give the Court a more apparent appreciation of the facts between the parties.

(iii) The D is estopped from attempting to relitigate this issue.

(iv) **See Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC**; and **Hartcon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA**.

7.5 The D:

(a) Seek to invoke section 114(g) of the Evidence Act 1950 (adverse inference) for the failure by the Ps to call CSS, Alex and Liew as witnesses for the Ps:

(i) The Ps argue that CSS, Alex and Liew do not feature in their case. They were key figures in D's defence, yet he elected not to call them to offer evidence to establish his claim of the facts.

(ii) It is misguided for the D to attempt to reverse his burden of proof and place it on the Ps. Nothing can stop the D from calling them to offer evidence if he thinks they are crucial.

(iii) Section 114(g) only applies when there is withholding or suppression of evidence, but not for failing to produce evidence: See **Siew Yoke Keong v PP [2013] 4 CLJ 149, FC**.

(iv) The Ps pointed out that the D relied heavily on CSS to establish his defence, which supposedly would supply the allegedly crucial evidence on the background to the formation of the JV and the position of Hanh and Phuong. It was also pointed out that CSS was mentioned 35 times in the D's Amended Defence and 41 times in his Witness Statement (DWS). If at all, section 114(g) should be invoked against the D for his failure to call CSS.

(v) By failing to call CSS, the D cannot provide any basis for his claim of having a personal JV arrangement with the Bonia Group and the position of Hanh and Phuong. It becomes merely speculative with unfounded assertions in his defence.

I find this argument to be without merit. The submission by the D on section 114(g) concerning the facts above will not stand legal scrutiny.

(b) The D argues that the Ps are prohibited from introducing evidence that Hanh and Phuong are the D's nominee on account of sections 91 and 92 of the Evidence Act 1950:

(i) The D submitted that Ps cannot introduce evidence to contradict, vary, add to, or subtract from the Agreements.

(ii) The Ps took the position that they never disputed the written terms of the Agreements. That is not the issue. What they are saying is that Hanh and Phuong are nominees for the D. In this instance, at the trial, the D (1) never objected to the admissibility of the evidence at the trial, (2) Sections 91 and 92 do not apply in the circumstances, and (3) the evidence is admissible under section 92(f).

(iii) In his evidence (DW1), the D expressly disputed in his Amended defence that Phuong was his nominee contrary to the Ps case, rendering it an issue to be tried. At the trial, the D led evidence to disprove the claim that Phuong was his nominee.

(vi) He, therefore, had waived his objection. The proper time to object was when the evidence was introduced, not at this juncture: **Annie Solomon v BHMF Realty Sdn Bhd & Ors [2014] 1 MLJ, 57, HC.**

In the circumstances of the case, I find the D's submissions on the issue to be overreaching. There is no error in the Ps adducing evidence to establish that Phuong was the nominee of the D. The terms of the Agreements are not in dispute, nor are the Agreements. There is no attempt to vary or contradict the Agreements.

7.6 In the Ps final argument:

(a) The Ps no longer pursue the tort of inducement of breach of contract against the D, leaving only an action for breach of contract and breach of fiduciary duties (applicable to P2 as he is a director).

(b) Contrary to the position taken by the D, the Ps position is that the D's JV was with BCB, as explained at the trial. While the Ps dealings post-incorporation was under the understanding between BCB and the D, their contractual relationship for the sale of the products was with the D.

(b) The D's arguments that he did not receive the letters (15.06.2011 and 21.06.2011) that were not copied to him were untenable, as it was served on his nominee (s.182 Contracts Act 1950).

(c) The Ps argued that the D did not adduce any evidence other than claiming that the criminal investigation against Phuong by the Vietnamese authorities ended up with no further action. It is purely a bare assertion.

I find this issue by the D does not adversely impact this proceeding. It is two separate issues, one civil and one criminal, procedurally distinct from each other and carries different burden. One is in a foreign jurisdiction (Vietnam), while the present proceeding is in local jurisdiction. I am only concerned with the current proceeding before me.

(d) In response to D's assertion that the evidence of PW1 (BCB's former MD PW2 (director of BCB and Group MD of CRG), PW2 (director of BCB and Group MD of CRG), and PW3 (ED of CRG and former Senior Corporate Finance Manager of BCB) should be taken with caution as they are not disinterested parties.

However, no plausible evidence was produced except conjectures to establish this accusation. As mere bare assertions, it is trite law that there will be no evidential foundation to support this argument by the D.

7.7 Occasioned by the breaches and wrongful conduct of the D, the Ps claims to have suffered losses:

(a) P1: Unremitted sales proceeds: RM946,496.39.
(L.146, pp.76-99)

(b) P2: Unremitted sales proceeds: RM2,249,751.08
(L.126, pg.47, para 56; Enclosure 146, pp.100-151)

The D had offered no evidence to contest or contradict these figures.

(c) Unreturned consignment stocks after the termination of the Agreements:

(i) P1: RM3,303,671.00
(L. 112, pg.47, para 55)
Phuong admitted to holding on to the consignment stocks. She sold most of the stocks but did not remit the sales proceeds.
(L.157, pg.70, lines 1-19).

(ii) P2: RM14,871,167.03
(L.112, pg.47, para 57).
Phuong admitted to holding on to the consignment stocks. She sold most of the stocks but did not remit the sales proceeds.
(L.194, pg.70, lines 1-19).

In the circumstances, the Ps prays for an order in terms of its prayers in the SoC with costs.

THE DEFENDANT'S CASE

[8] I observed the Ds (l.200 AND l.204) in canvassing and ventilating for their defence as follows:

680 8.1 The D version of the facts are as follows:

(a) The D met with the big boss of the Bonia group of Company (BGC), Chiang Sang Sem (CSS), where they supposedly entered into an oral JV agreement to carry out business in Vietnam. He claimed that CSS wanted him to assist in running
685 and expanding BGC's business in Vietnam. At this time, the Ps were not yet a subsidiary or a member of BGC.

(b) The oral JV arrangement with CSS allegedly required the D to act as a local intermediary and co-ordinator for BGC in Vietnam. He was also responsible for scouting for Vietnamese
690 businesspersons to act as dealers for BGC and to assist in resolving disputes or issues between them. In this instance, the D introduced Phuong (DW7) and her brother, Phan Ngoc Binh.

(c) In the seven agreements that D arranged, he was only asked to execute a letter of guarantee for the agreement involving
695 Phuong (19.05.2008). This letter of Guarantee was witnessed by CSS (L.142, pp.10-12).

(d) The JV arrangement went smoothly until 2011, when disputes over the retail business in Vietnam arose between BGC's management and the D.

700 My observation at the trial:

(i) CSS was never called to offer evidence to corroborate the facts above as alleged by the D. Without any supporting evidence, the allegations of facts on CSS are rendered unfounded. It has no foundation.

(ii) In the circumstances, in my considered judgment, I place no weight on these allegations.

(iii) As rightly pointed out by the Ps, he should have been called since CSS is crucial to establish the allegation of facts by the D. If the Ps elected not to call CSS because he is not critical to the Ps' case, then if needed, there is nothing to prevent the D from calling CSS to support the D's facts. That was not done.

8.2 The D, in his submissions, raised the issue of the admissibility of BCBs without prejudice letters that had already been ruled admissible for the Court after considering the submissions of both parties on the matter on 27.09.2023. The D cannot be allowed to relitigate the issue at this juncture.

8.3 The D raised the issue of the supposed criminal investigation of Phuong (DW7) by the authorities in Vietnam after the criminal complaint lodged by the Ps. It was alleged that after the failure of this criminal complaint, the Ps took out three civil actions against the D in the Kuala Lumpur High Court in (1) 22NCVC-678-2011, (2) 22NCVC-49-01/2012, and (3) 22NCVC-586-07/2012. At the filing of the present suit, none of the three earlier cases had been withdrawn or discontinued by the Ps.

As I had observed:

(i) The criminal matter in Vietnam is not the concern of this present proceeding.

(ii) As for the earlier three civil suits, the D failed to adduce any evidence that the Ps did not have the genuine purpose of seeking redress against the D, nor has he suffered any damage from it.

(iii) The first two suits could not be served on the D, and all three cases were discontinued well before the present suit was filed.

(iv) As pointed out by the Ps, the D failed to meet the requirements for the tort of abuse of process.

(v) I find the issue of the previous three civil suits inconsequential to the present proceedings.

8.4 The D argued that the evidence PW1 (BCB's former MD PW2 (director of BCB and Group MD of CRG), PW2 (director of BCB and Group MD of CRG), and PW3 (ED of CRG and former Senior Corporate Finance Manager of BCB) must be treated with caution as they are an interested parties in the proceedings.

In my judgment, casting adverse aspersions on the credibility of these witnesses with speculative assertions or conjectures is not good enough. As I have said, no plausible evidence or compelling evidence was adduced but for these speculations. It is trite the Court will not act on speculations. There is no reason for the Court not to accept their evidence.

8.5 The D argued the issue of un-pleaded facts by the Ps being raised at the trial, (1) PW1 being introduced to Hanh (DW2) as the D's girlfriend, (2) PW2's evidence that Phuong (DW7) was the D's nominee in Vietnam, and (3) PW3's allegation that Phuong was introduced by the D as his nominee during a visit at the HCMC in 2005.

As I had earlier observed, I agree with the submissions of the Ps that these issues constitute evidence. It is clear that O.18 r.7(1) RC 2012 only requires material facts, not evidence, to be pleaded. It has always been the Ps case that Hanh and Phuong were the nominees of the D. I find no basis for this objection by the D. There was no objection raised at the trial. To do it now would be to take the other party by surprise and is unfair.

8.6 The D argued that the allegation of Phuong (DW7) being his nominee is unsupported by any documentary evidence. As a matter of fact, (1) the Agreements clearly stated that Phuong was the appointed dealer in Vietnam and not the nominee of the D, (2) the letter of Guarantee (20.03.2009) described her as a dealer, (3) various letter by the Ps on the waiver of fee payment refers to he as the dealer, (4) the BBC's without prejudice letters do not refer to her as the nominee of the D, (5) there no reference to any trust deed

between Phuong and the D on that position, (6) the Annual Reports of BCB and P2, does not report on director related transactions. In the circumstances, D further argues that section 91 and 92 of the Evidence Act 1950 applies to deny any attempt by the Ps to vary or contradict the Agreements involving Phuong as a dealer and not a nominee of the D.

I found the arguments of the Ps compelling to negate the D's arguments above:

(i) PW2 (director of BCB and Group MD of CRG) testified at the trial that referencing Phuong as a dealer in all the Agreements and waiver letters was structured by the D, who had pre-arranged all the documents.

(ii) In the letter of Guarantee, D clearly stated that, at his request, the Agreement was executed with Phuong. This indicated his position as a principal in the transaction.

(iii) BCB and CRG are major shareholders in the Ps. PW2 is a director of the Ps BCB and CRG who had executed several letters addressed and copied to the D. What allegation made by BCB equally applies to the Ps.

(iv) PW2 explained that there was no need for the Annual Reports to declare director-related transactions since all dealings were through the D's nominee (Phuong).

(v) Even the D agreed that there was no need for the Ps Annual report to report this.

8.7 The D argued that the alleged five indicators in the Ps submissions do not establish Phuong as the D's nominee:

(a) The letter of Guarantee clearly says that Phuong was a dealer. The D's obligations under the Guarantee were in his capacity as a guarantor, not as a principal. The D only guaranteed one of the Agreements (2008), not all.

The Ps argued that the Guarantee in 2008 clearly says that the dealership agreement with Phuong was entered at the request of the D. Though the Guarantee was limited to the 2008 Agreement, for all intent purposes, the Ds was referred to as the guarantor of Phuong to the Ps even after the expiry of the 2008 Guarantee. It has no objection from the D. The heavy financial obligations undertaken by the D to guarantee the performance of Phuong are indicative of the D's authoritative position over Phuong. The

D did not call CSS to support his argument that the Ps auditors requested the 2008 Guarantee.

(b) The D was merely negotiating on behalf of Phuong when she asked him to seek compensation for her during the buy-out negotiations for the D's equity stake. However, as addressed earlier, neither adduced any evidence supporting this allegation.

(c) The D's involvement in the operation of Phuong only reflects his role and function as the intermediary and co-ordinator of the business in Vietnam.

It was responded to the Ps that the above argument was misguided by the D. It has always been the P's position that the D was the principal to all the Agreements, which is why the D was heavily involved in Phuong's operations. There was no objection at the material time since his involvement was consistent with his obligations as the principal to Phuong.

(d) 388group.com and/or 388group.com.vn was used since DW2's business involvement with P2 (2000-2011) with no complaint. Local representatives (Liew and Chai) also used such domain names in their business dealings and communications in Vietnam. Phuong, not the D, owns the 388 Joint Stock Co.

The Ps responded that there are two different versions of this issue by the D. In his amended defence, he claimed the domain names were created to ease communication between the D, Phuong, and the Ps agents. In his witness statement, he claimed that Hanh (DW2) made the email with the domain name for her use in her business communication with P2 and other third parties. When Phuong replaced Hanh, she inherited the email with the domain name and created another one for her business use. His discrepancy in this evidence must be taken with caution.

(e) The D's director's fee was an agreed arrangement between the Ps and Phuong where the business accounts in Vietnam can be used to settle the P's costs and expenses in Vietnam, including the D's director's fee from P2.

The Ps responded that the D was able to get his director's fees and dividends through Phuong in Vietnam, which shows the extent of his control over the Vietnam operations.

8.8 The D denied there had been any breach of the Agreements:

(a) All the Non-Exclusive Dealership Agreements had expired on 30.06.2010 as stated in Section 2, Schedule 1 of those Agreements. There was no extension to those Agreements. Therefore, the Ps letters of demand (04.05.2011 and 15.06.2011) are of no consequence. There could not have been a breach at the material time the LOD was issued.

The Ps argued that the D never pleaded this issue, and his witnesses never led any evidence on it. The D is misguided since Clause 5.1 of the Agreements says that both Agreements are renewed annually on an automatic basis unless they are terminated in writing.

(b) The D also argued that there is no credible evidence to support the allegation of breach of contract. Even if there are breaches of the Agreements, it was not by the D, but Phuong (DW7). In the present case, it has always been the case of the Ps that the D is the principal to Phuong.

(c) It was also argued that there was no evidence to support the allegation that the D/Phuong failed to deliver the financial records promptly, as requested by the Ps.

It was put in evidence at the trial by the Ps that there was no rebuttal from either the D or Phuong concerning the letters issued by BCB and CRG on the issue, which amounts to a tacit admission of the truth in those letters.

If they were concerned with the accuracy of the allegations, they should have refuted them by replying to those letters, which they never did.

(d) Regarding the failure to remit the predetermined cash float, D argued that, though delayed, the remittances had been duly completed by 10.03.2011. The burden is on the Ps to prove that the actual amount of collection above the predetermined cash float that Phuong failed to remit to the Ps.

The Ps responded to it:

(i) The sum of USD365,088.60 was not remitted between 07.08.2009 and 21.05.2010, but a year later, in several tranches on 10.03.2011, after the Ps discovered that the sum was not remitted. That is already evidence of a breach.

(ii) The D and Phuong did not respond to BCB's letter (27.10.2010) that detailed the auditor's findings that they had unlawfully retained USD 565,194.49 over the agreed cash float.

(iii) They also failed to respond to BCB's and CRG's letters dated 04.05.2011, 15.06.2011, and 21.06.2011 on their failures to remit the money.

(e) The D argued that there is no evidence that the server connection was severed on 14.o5.2011, and the Ps were denied access to the Goldsoft System by Phuong or himself.

It was pointed out by the Ps that:

(i) The D himself admitted that the server was disconnected in his email on 13.06.2011 to Chong.

(ii) The Ps, BCB, and CRG letters to them (Phuong and the D) confirm that they have been locked out of the Goldsoft System since 14.05.2011. Phuong and the D failed to respond.

(f) Removal of the Ps two representatives from Vietnam's office is based on inadmissible hearsay evidence of PW2 (director of BCB and Group MD of CRG).

However:

(i) The Ps showed that the D contradicted himself when he admitted in his email (30.05.2011) that Phuong and not him removed Alex and Liew.

(ii) This removal was recorded in BCB's and CRG's letter (26.05.2011) and the Ps letter (15.06.2011) to the D.

(iii) Neither D nor Phuong responded. PW2 evidence corroborates this position. In the circumstances, it was unnecessary to call Alex and Liew.

(g) The D counterclaim and seek compensation for the four separate legal actions based on the same facts to oppress him, where none had been withdrawn or discontinued. It is an abuse of process by the Ps.

It bears repeating what was pointed out by the Ps:

(i) As for the earlier three civil suits, the D failed to adduce any evidence that the Ps did not have the genuine purpose of seeking redress against the D, nor has he suffered any damage from it.

(ii) The first two suits could not be served on the D, and all three cases were discontinued well before the present suit was filed.

(iii) As pointed out by the Ps, the D failed to meet the requirements for the tort of abuse of process.

I find the issue of the previous three civil suits inconsequential to the present proceedings and is a distraction, and there is no merit in this counterclaim by the D. This counterclaim is not proven.

In the circumstances, the P failed to discharge its burden, and its action must be dismissed with costs.

THE LAW

[9] It is trite in law that all cases are decided on the legal burden of proof being discharged. It is the acid test applied in any particular case.

9.1 The burden of proof in establishing its case is on the plaintiff. It is not the Ds' duty to disprove it. The evidentiary burden is trite that those who allege a fact are duty-bound to prove it (see **s.101, 102, and 103 of the Evidence Act 1950**).

9.2 In **Selvaduray v Chinniah [1939] 1 MLJ 253, 254** (CA) held:
"The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side and accordingly, the plaintiff must establish his case. If he fails to do so, it will not avail him to turn around and say that the defendant has not established his. The defendant can say it is wholly immaterial whether I prove my case or not. You have not proved yours".

9.3 **Johara Bi bt. Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139**, (FC) held:
"It was all a matter of proof and that until and unless the plaintiff has discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant, and no matter if the defendant's case was completely unbelievable, the claim against him must in these circumstances be dismissed. With respect, we agree with this judicial approach."

[10] Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd [2010] 1 CLJ 269, FC. The distilled principles, among others, are:

10.1 Where an agreement is not regulated by statute, parties are at complete liberty, under the doctrine of freedom of Contract, to agree on any terms they think fit.

10.2 The role of the Court is to interpret the Contract sensibly (a commercially sensible construction). See **Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 1 LNS 37, PC**.

10.3 The starting point is for the Court to recognise that in an action for a breach of Contract, it is for the Court to determine who is the innocent party and who is the guilty party.

10.4 A contract breaker must pay damages to the innocent party. However, if he has made any payment under a contract (not being a true deposit for the purchase of movable or immovable property), the contract breaker is entitled to have that payment set off against the damages he has to pay. However, he cannot seek to recover

any benefit he may have conferred upon the innocent party where he is guilty of breach of Contract. Were it otherwise, a contract breaker could take advantage of his wrong. This is against the principle and the policy of the law.

10.5 The FC cited Attorney **General of Belize v. Belize Telecom Limited [2009] UKPC 11**, where when delivering the Advice of the Board, Lord Hoffmann said:

> *"The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913**. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument."*

10.6 A contract is to be interpreted under the following guidelines:

(a) A Court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background of the transaction.

(b) The factual matrix that forms the transaction's background includes all material reasonably available to the parties.

(c) The interpreting Court must disregard any part of the background that is declaratory of subjective intent only and

(d) The Court should adopt an objective approach when interpreting a private contract.

See **Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98**. As Lord Clyde said in **Bank of Credit and Commerce International SA v. Munawar Ali [2001] 2 WLR 735**:

> *"The knowledge reasonably available to them (that is to say, the parties to the Contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they*

intended. It is the imputed intention of the parties that the Court is concerned to ascertain…. The meaning of the agreement is to be discovered from the words they have used and read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances".

[11] The Federal Court in **Michael C. Solle v United Malayan Banking Corporation [1986] 1 MLJ 45, FC** observed that the principles of construction to be applied are that the parties' intentions are gathered from the language used. They are presumed to have intended what they say. The common universal principle is that an agreement ought to receive that construction, which its language will admit, that will best effectuate the parties' intention to be collected from the whole arrangement. The Courts are to give effect to the terms of the Contract (if any).

FINDINGS

[12] I have examined all-cause papers, the evidence at the trial, and the parties' respective submissions in canvassing for their position in the present suit. Considering my observation in the totality of the evidence and my observations in the parties' respective arguments in the above paragraphs [7] 7.1-7.7 and [8] 8.1-8-7, I find that:

12.1 In line with the principles stated by the Federal Court in **Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd [2010] 1 CLJ 269:**

(a) The starting point is for the Court to recognise that in an action for a breach of Contract, it is for the Court to determine who is the innocent party and who is the guilty party.

(b) A breach of Contract is said to occur when a party to a Contract expressly or impliedly fails or refuses to perform or fails to

perform satisfactorily one or more of his contractual obligations. I am satisfied with the Ps' evidence at the trial that Phuong is the nominee of the D. They (Phuong and the D) have colluded and are collectively in breach of the Agreements to the detriment of the Ps.

(c) I find D has failed to establish his defence to exonerate himself from this suit. I take his evidence with abundant caution. His evasiveness and farfetched testimony at the trial adversely impacted the credibility of his evidence.

(d) The D needed to adduce the required genuine and compelling evidence to tilt the scale of evidence in his favour but failed to do so. Besides bare assertions and suggestive evidence, no convincing materials were adduced to establish D’s case.

(e) I have examined the Bundles of Documents of parties (L.136-L.153) and considered the respective learned counsels' arguments. However, I can't find such probative materials that can persuade me to find in favour of the D.

12.2 All things considered; it is my findings that:

(a) The D's demeanour at the trial and his evidence are suspect. It led me to take it with abundant caution. It is my considered view that the evidence of the defendant is primarily untenable and cannot refute the allegations against him.

(b) The facts at the trial convinced me that Van Thuy Hanh and Pham Thi Minh Phuong, under the Non-Exclusive Dealership Agreements, acted in the D's interest and benefit. There is

irrefutable evidence that they acted upon the instruction of the D. To hold otherwise would be against the evidence at the trial. As, as a director of P2, it is apparent that the D's action was not in the best interest or benefit of the company.

(c) I find that the breaches under the Agreements, as argued, had been committed to the Ps' detriment. I find the farfetched arguments by the D unconvincing to challenge the Ps' evidence.

(d) I am guided by the Federal Court **in Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd [2010] 1 CLJ 269**; the starting point is for the Court to recognise that in an action for a breach of Contract, it is for the Court to determine who is the innocent party and who is the guilty party. In the circumstances of the case, I hold the D as the principal to Phuong liable to the Ps in this suit.

12.3 Legal and Evidential Objections:

(a) **Pleading Objections**: I find no merit in the D's argument. I agree with the Ps provided under O.18 r.7(1) RC 2012. Only material facts need to be pleaded and not evidence. That legal position is trite. The D failed to object to these issues promptly at trial and cannot now be allowed to raise this issue in his submission.

(b) **Hearsay Evidence**: Similarly, I find this argument by the D unsustainable in the circumstances of this case.

(c) **Without Prejudice letter**: As rightly pointed out by the Ps, I had ruled on 27.09.2022 in dismissing the preliminary

objection that these letters are to be admissible to give the court, the whole appreciation of the facts between the parties. This is no longer an issue and should not be relitigated in the D's submission.

(d) **Failure to call Witnesses**: I find this argument untenable. If the Ps fail or refuse to call those named witnesses, it does not prevent the D from issuing them a subpoena to attend court to offer their evidence if they are pertinent to the D's case.

(e) **Sections 91 and 92 EA 1950**: it is evident that the Ps does not dispute the Agreements or the terms therein. They argue that Phuong executed those Agreements as a nominee of the defendant. The D disputed this allegation in his amended pleadings. Sections 91 and 92 EA do not come into play in the circumstances. Evidence is produced to establish that allegation by the Ps and not to contradict or vary the Agreements.

12.4 Audio Recordings and the transcript in IDD1 and IDD2 are not admitted for uncertainty and incompliance with the evidentiary requirements. The recordings were clearly edited/tampered and was not a continuous recording. In **Lim Peng Hock & Anor v Chuah Peng San & Anor [2021] 1 LNS 119, CA**, it was ruled that the Court cannot take it lightly as to digital evidence. It is very fragile and could be easily altered. Therefore, the issue of authenticity and reliability are essential for digital evidence. The defendant had not proved the issue of non-tempering. Therefore, any reference to them is disallowed and does not carry any evidential weight in my determination.

CONCLUSION

[13] After appraising the evidence, all the relevant cause- papers and the submissions by the respective parties, I find that the Ps had discharged their burden on a balance of probabilities. Accordingly, I entered final judgment for the Ps as follows:

13.1 P1/Apex Marble Sdn Bhd:

(i) The sum of RM946,496.39, being the unremitted proceeds of the sale of the stock.
(ii) The sum of RM3,303,671.00 is the retail value of the unreturned stock.
(iii) Interest from the date of judgment at 5% until full realisation.
(iv) Costs.

13.2 P2/Mcore Sdn Bhd:

(i) The sum of RM2,249,751.08 is the unremitted proceeds of the sale of the stock.
(ii) The sum of RM14,871,167.03 is the retail value of the unreturned stock.
(iii) Interest from the date of judgment at 5% until full realisation.
(iv) Costs.

13.3 Global costs of RM100K will be paid to the Ps within 30 days from the date hereof. Since damages were quantified, the Ps are not proceeding with prayers 2 (an inquiry into damages) and 3 (an account of profits). The Counterclaim is dismissed with costs for want of compelling evidence and is evidently without merit.

Dated 19.11.2023.

HAYATUL AKMAL ABDUL AZIZ
JUDGE
HIGH COURT OF MALAYA
KUALA LUMPUR

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