DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
GUAMAN NO.: WA-22NCC-97-03/2017

ANTARA

KUAN SHIN @ KUAN NYONG HIN
(No. K/P: 410426-10-5275) ...PLAINTIFF

DAN

1. **NG AIK KEE**
   (No. K/P: 701008106796)

2. **KAMAL BIN MOHD NOOR**
   (No. K/P: 570104715401)

3. **CHUA WYE MAN**
   (No. K/P: 650928105091)

4. **LER CHENG CHYE**
   (No. K/P: 531103105757)

5. **LIM SWEE GEOK**
   (No. K/P: 590413106130)

6. **QUAH HOE PHANG**
   (No. K/P: 600906715117)

7. **LEE CHEE KHENG**
   (No. K/P: 590711085665)

8. **AHMAD TEJUDDIN BIN ABDUL MAJEED**
   (No. K/P: 500131085771)

9. **KOH KWEE CHAI**
   (No. K/P: 660204016201)

10. **NYANASEKERAN A/L MURUGAN**
    (No. K/P: 590110106651)

11. PARAMESWARAN A/L SUPRAMANIAM
(No. K/P: 701113105805)

12. CHERNG CHIN GUAN
(No. KP: 640802085647

13. YEO JOSEPH
(Beramal di bawah nama dan gaya
Tetuan Joseph Yeo)

14. ALVIN JOHN
(Beramal di bawah nama dan gaya
Tetuan Alvin John & Partners) ...DEFENDAN-DEFENDAN

DI HADAPAN
YANG ARIF TUAN MOHD NAZLAN BIN MOHD GHAZALI
HAKIM

JUDGMENT

Introduction

[1] This is an application by the 14th Defendant to strike out the writ and the statement of claim of the Plaintiff documented as enclosure 67. At the conclusion of the hearing, I allowed the application and highlighted the principal grounds for the same. This judgment contains the full reasons for my decision.

Key Background Facts

Parties & Context

[2] The underlying writ action instituted by the Plaintiff is against fourteen (14) defendants, the 1st to the 12th of whom were at the material time directors or officers of either one or both of Chin Foh Bhd ("CFB") and Chin Foh Trading Sdn Bhd ("CFT").

[3] The Plaintiff founded and set up CFT in 1976, dealing in the trading of non-ferrous metal products, which corporatisation and subsequent business expansion led to the incorporation and listing of

CFB as the holding company. Both CFT and CFB have now been wound up.

[4] The Plaintiff had during 1996 to 2004 made various advances of monies to CFT at the request of CFB. On 19 October 2005, the Plaintiff entered into an assignment agreement with CFT where, as repayment of the amount due to the Plaintiff, CFT agreed to assign debts due to CFT from several debtors to the Plaintiff ("the Assignment").

[5] Following a change in ownership, the boards of directors of CFT and CFT were reconstituted in August 2005 which however led to CFB rescinding the Agreement. This in turn resulted in the Plaintiff commencing proceedings against CFT and CFB, more on which will be referred to later.

[6] The 13th and 14th defendants are firms of solicitors. The Plaintiff's pleaded claim against the 14th Defendant concerns the following allegations:

(a) That the 14th Defendant failed to account for interest accrued on the stakeholder sum held by the 14th Defendant in Kuala Lumpur High Court Suit No: D8-22-192-2006 ("Suit 192").

(b) That the 14th Defendant failed to deposit the sum of RM1,000,000.00 received from K3 Metal Service Center Sdn Bhd ("K3 Metal") in the Shah Alam High Court Suit No: MT4-22-1560-2006 into the stakeholders account ("Suit 1560").

[7] Given the allegations, the Plaintiff has prayed for the following reliefs against the 14th Defendant:-

(a) An Order that the 14th Defendant produce an account of monies received (inclusive of interest accrued) during the period of tenure as the stakeholder;

(b) An Order that the 14th Defendant return the sum of RM1,000,000.00 collected from K3 Metal to the Plaintiff; and

(c) Interest of 5% on the RM1,000,000.00 to be paid by the 14th Defendant from 23 March 2012 until full payment.

The Suit 192

[8] A brief narration of the history behind the instant action is apposite. This, in turn requires reference to two earlier suits. The first is Suit 192. As mentioned earlier, CFB declared the Assignment signed by its subsidiary, CFT and the Plaintiff to have been rescinded. In response, on 17 February 2006, the Plaintiff and one Kwan Chin Hing filed a claim against CFB and CFT for, inter alia, a declaration that the Assignment signed between the Plaintiff and CFT was valid.

[9] Subsequently, on 8 March 2006, the Plaintiff and Kwan Chin Hing filed an interlocutory injunction application. This resulted in the High Court granting an interim order dated 4 April 2006 that all sums accrued and payable to CFT as at 4 April 2006 from the debtors listed in the said order are to be placed in a stakeholder's account under the name of CFB and CFT's then solicitors, Messrs Joseph Yeo, the 13th Defendant herein, pending the disposal of the interlocutory injunction application ("the Stakeholder Order").

[10] The 14th Defendant was, on 5 October 2011, more than five years later, appointed to take over conduct of Suit 192 from the 13th Defendant, for and on behalf of CFB and CFT. Therefore, on 25 October 2011, CFB and CFT instructed the 14th Defendant to file an application to vary the Stakeholder Order to name the 14th Defendant's firm as the new stakeholder replacing the 13th Defendant and for a consequential order that the 13th Defendant forward the accrued sums in their possession to the 14th Defendant.

[11] This was allowed on 14 November 2011 and the 14th Defendant was then substituted to replace the 13th Defendant, resulting in the transfer by the latter of a sum of RM2,525,648.93 to the 14th Defendant as the new stakeholder.

[12] The Plaintiff and Kwan Chin Hing were ultimately victorious in Suit 192, given the dismissal of CFB and CFT's appeal at the Court of Appeal on 20 August 2014 of the High Court decision given on 31 July 2013 in favour of the Plaintiff and Kwan Chin Hing.

[13] Soon thereafter, the Plaintiff's solicitors, Messrs Ven & Associates on 9 September 2014 requested that the 14th Defendant release the stakeholder sum of RM2,523,648.93 to the Plaintiff's solicitors in light of the said Court of Appeal's decisions. There was, crucially, no request for interest, then.

[14] On even date however, the 14th Defendant also received a copy of a letter from CFB and CFT's new solicitors Messrs Christie Soosay Nathan & Associates addressed to the Plaintiff's solicitors notifying the Plaintiff's solicitors and the 14th Defendant that CFB and CFT were in the process of liquidation and as such the monies held in the stakeholders account in the firm of the 14th Defendant ought not to be released to the Plaintiff on the ground that it would infringe the liquidation provisions of the Companies Act 1965.

[15] This led to another important development which occurred on 24 September 2014, where the 14th Defendant filed an interpleader application to seek directions from the Court in respect of the release of the said stakeholder sum.

[16] The Court on 2 October 2014 ordered that the stakeholder sum of RM2,525,648.93 was to be released to the Plaintiff's solicitors within 7 days from the said order ("the Interpleader Order"). The Court made a further consequential order that a sum of RM15,000.00 ought to be paid to the 14th Defendant as stakeholder's fee and should be offset from the stakeholder sum.

[17] The 14th Defendant, in adherence to the terms of the Interpleader Order then on 7 October 2014 released the stakeholder sum, less stakeholder's fee RM15, 000.00 to Messrs Ven & Associates. The said sum was accepted without protest by Messrs Ven & Associates, on behalf of the Plaintiff. It is also noteworthy that there was no appeal and no further applications filed by the Plaintiff pursuant to the Interpleader Order.

The Suit 1560

[18] The other relevant proceeding involving some of the parties herein which should also be referred to is the Suit 1560. Just like Suit 192, the proceedings in Suit 1560 were initiated way back more than a decade ago. In 2006, CFB (as the 1st plaintiff therein), CFT (2nd plaintiff), Chin Foh Trading (Johor Bahru) Sdn Bhd (3rd Plaintiff), Okura Steel

Service Centre Sdn Bhd (4th plaintiff), Chunsoon Zinc Industrial Sdn Bhd (5th plaintiff) and CF Aluminium Sdn Bhd (6th plaintiff) (referred to as the said plaintiffs) collectively filed an action against K3 (Metal (Shah Alam High Court Sivil Suit No: MT4-22-1560-2006).

[19] The claim against K3 Metal was principally for the return of goods belonging to the said plaintiffs as well as for damages. On 11 July 2011, the 14th Defendant was appointed to take over conduct as solicitors for the said plaintiffs, replacing Messrs Kiru & Yong. On the first day of trial, the parties to the said Suit 1560 agreed to record a Consent Judgment, pursuant to which, K3 Metal's solicitors then sent to the 14th Defendant (as the solicitors for the plaintiffs in Suit 1560) two post-dated cheques dated 22 February 2012 and 22 March 2012 in the judgment sum amount of RM500, 000.00 each, payable to CFB.

[20] Significantly, on 29 February 2012, CFB instructed the 14th Defendant to deposit the judgment sum into CFB's bank account. Pursuant to these instructions and in accordance with the terms of the Consent Judgment, the 14th Defendant had duly transferred the said judgment sum of RM448,624.00 (less the 14th Defendant's legal professional fees) and RM500, 000.00 to CFB.

[21] In March 2017, the Plaintiff filed the writ action against the 14 Defendants, including the 14th Defendant in respect of whom the key allegations, as stated earlier, are that the 14th Defendant failed to deposit the RM1 million from K3 Metal into the stakeholder account in Suit 1560 and that the 14th Defendant failed to place the stakeholder sum received in Suit 192 in an interest-bearing account. The reliefs prayed for have been mentioned earlier. The latter now seeks to strike out the suit against it. Hence, the instant application before me.

Summary of Contention Of Parties

[22] In essence, the 14th Defendant is seeking to strike out the Plaintiff's claim on the principal grounds that firstly, it was not required to keep the stakeholder monies in an interest bearing account; secondly, the Plaintiff should be prevented from raising the issue of interest after close to 4 years upon receiving the principal sum and thirdly, the release of the RM1 million to CFB was made pursuant to a Consent Judgment and also following instructions from CFB. In addition, the 14th Defendant asserted that the claim against it is an afterthought and merely a fishing expedition and the Plaintiff has no right to claim the said RM1 million.

[23] The Plaintiff, on the other hand, submitted that it has sufficiently pleaded and disclosed reasonable cause of action against the 14th Defendant and that any dispute on facts and evidence should only be determined following a full trial. The Plaintiff emphasised that its action concerns serious issues of breach of trust and breach of stakeholders' duties that should be ventilated before this Court at full trial.

[24] Before I examine the issues I should first state, in summary fashion, the law on striking out of claims.

Law On Striking Out – A summary

[25] The starting point of reference must be Order 18 r 19(1) of the Rules of Court 2012 ("RC 2012") which reads as follows:-

> "19. Striking out pleadings and endorsements (O. 18 r. 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[26] The 14th Defendant in the instant case relies on limbs (a), (b) and (d). Thus it is argued that the claim commenced by the Plaintiff disclosed no reasonable cause of action, was frivolous, vexatious and otherwise tantamount to an abuse of Court process.

[27] The leading authority on Order 18 r 19 (1) is the Supreme Court decision in *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, and in particular, the following part of the judgment of Mohamed Dzaiddin SCJ (as he then was):-

> "The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney-General of Duchy of Lancaster v. L. & N.W. Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA.). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 Rules of the High Court) (*Hubbuck v. Wilkinson) (supra).* The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable".

[28] It is therefore well established that the power of the Court to strike out under the four grounds of Order 18 r 19 (1) is to be exercised when it can clearly be determined that a claim or answer is prime facie obviously unsustainable (see the Court of Appeal decision of *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520 referred to by the plaintiffs). It is also only to be invoked sparingly (see *Affin Bank Bhd v. Eye Bee Sdn Bhd* [2005] 7 MLJ 1).

[29] It is also well settled that as for limb (a), examination could only be made of the pleadings, not the affidavits evidence, but where the application is premised on more than one ground under Order 18 r 19 (1), like in the present case, the Court should ignore the affidavits affirmed in relation to the other grounds when dealing with limb (a) which should be considered first, before examining the affidavit evidence under the other limbs (see *See Thong & Anor v Saw Beng Chong* [2013] 3 AMR 385).

Evaluation & Findings of this Court

[30] There are, in my view, three principal issues for determination, which are exactly concerning the reliefs prayed for by the Plaintiff in his statement of claim vis-a-vis the 14th Defendant. First, whether the 14th Defendant must account for the monies it received in Suit 192; secondly, whether, in that same Suit 192, 14th Defendant

should account for the accrued interest; and thirdly, whether the 14th Defendant should return to the Plaintiff the RM1 million previously paid in Suit 1560 to CFB. I now consider these in turn.

Whether the 14th Defendant should account for receipt of payments

[31] The starting point must be the Stakeholder Order in question. As stated earlier, pursuant to an interlocutory injunction order dated 4 April 2006 in Suit 192 (between the Plaintiff herein (and one other) on the one hand and CFB and CFT on the other, the sum of RM2,525,648.93 ("the said sum") was deposited in a stakeholder account in the name of the 13th Defendant, who was then the solicitors for CFB and CFT in that action, in Suit 192

[32] In my view, it is quite unmistakable that the terms of the Stakeholder Order are in this respect clear in stating that "*Sebarang pengutipan ("recovery") wang yang terakru daripada penghutang yang disenaraikan di dalam perintah ini kepada Defendant ke 2 harus di bayar ke dalam akaun pemegang amanah di bawah nama peguamcara Defendan-Defendan, iaitu Tetuan Joseph Yeo sehingga pelupusan Lampiran 6..."*

[33] As referred to earlier, the 14th Defendant replaced the 13th Defendant as solicitors for CFB and CFT in Suit 192 on 5th October 2011, and pursuant to a variation order dated 14th November 2011, the said sum was transferred by the 13th Defendant to a stakeholder account in the name of the 14th Defendant.

[34] It is common ground that the said sum was forwarded to the 14th Defendant by the 13th Defendant without any account. Even more pertinently, the Plaintiff's previous solicitors (Messrs Bodipalar Ponnudurai De Silva) were aware of this as it transpired in 2011 and the Plaintiff's current solicitors (who took over conduct in Suit 192) were also similarly informed of the same in 2013.

[35] In addition, apart from the said sum, no other sums were received under the Stakeholder Order by the 14th Defendant and this seems to be supported by the Plaintiff who himself pleaded in paragraph 35.8 of his statement of claim that *"...only a sum of RM2,523,648.93 was deposited into the Stakeholders Account".*

[36] As such, it stands to reason that since the 14th Defendant did not receive any account for the said sum from the 13th Defendant and that only the said sum was deposited into the stakeholder account of the 14th Defendant, it would be wholly superfluous and unnecessary to require the 14th Defendant to provide an account for the said sum to the Plaintiff.

[37] And that is not all. For, in addition to claiming against the 14th Defendant, the Plaintiff had also sought for an account for the said sum from the 13th Defendant, who undeniably is better, if not best placed to render the account as the 13th Defendant was the party who as a matter of fact received the said sum at the material time. Accordingly, I do not think there is any valid basis for the Plaintiff to require the 14th Defendant to provide an account to the Plaintiff of receipt of the said sum.

Whether the 14th Defendant should account for accrued interest

[38] Similarly, one cannot but strictly refer to the terms of the Stakeholder Order in addressing this issue for the matter concerning the payment of the said sum into a stakeholder account arose purely from the terms of the Stakeholder Order. In my assessment, there is, as a matter of fact, no requirement stipulated in the Stakeholder Order for monies received to be placed in an interest bearing account for the benefit of the parties.

[39] This is unsurprising, for the duty of the stakeholder under the Stakeholder Order is merely to hold the monies deposited in a stakeholder account pending determination of Suit 192. After all, Rule 4 of the Solicitors' Account (Deposit Interest) Rules 1990 clearly stipulates that monies held by solicitors as trustees need not be placed in an interest bearing account. In this connection, Rule 4 of the Solicitors' Account (Deposit Interest) Rules 1990 provides as follows:

> Rule 4 Solicitors' Accounts (Deposit Interest) Rules 1990.
>
> Written arrangement or money subject to a trust not affected.
> Nothing in these Rules shall –
>
> (a) affect any arrangement in writing whenever made between a solicitor and his client as to the application of the client money or interest thereon; or
> (b) apply to money received by a solicitor, being money subject to a trust of which the solicitor is a trustee.

[40] The Plaintiff argued that being a firm of advocates and solicitors, the 14th Defendant is duty bound under the Solicitors' Accounts (Deposit Interest) Rules 1990 to place the sums in an interest bearing account. Rule 14.10 of the Rules and Rulings of the Bar Council state thus:-

> "(1) Where an Advocate and Solicitor holds money as a stakeholder (whether or not such money is paid by a client o the Advocate and Solicitor) the Advocate and Solicitor shall pay interest in accordance with the Solicitor's Accounts (Deposit Interest) Rules 1990, to the person to who the stake money is paid unless otherwise agreed.

[41] The Plaintiff referred to the case of *NME Services Sdn Bhd v Tetuan S P Chandra (disaman sebagai satu firma)* [22NCVC-158-04-2014] which held as follows:

> "The Defendant's final argument was that there is no term in the consent order for the accrued interest to be paid to the plaintiff. This issue therefore had to be tried. This allegation was denied by the plaintiff. The defendant's argument fails in limine in the light of Rule 14.10 of the the Rules and Rulings of the Bar Council which is binding on the defendant...
>
> In the instant matter there is no suggestion by the defendant that the parties had agreed that the interest earned on the monies was not to be paid to the plaintiff. Accordingly, it is unarguable that the plaintiff is entitled to the interest."

[42] Reference was also made by the Plaintiff to the case of *Magnakata Development Sdn Bhd v Osman Bin Bahtin (Suing as administrators for the estate of Pee Eenh @ Sephee Employee @ Shafee Employee bin Lebby Omar @ Sapiee, deceased) & Ors* [2017] MLJU 892 which stated:-

> "That notwithstanding, if the monies are held by a firm of advocates and solicitors, it would be subjected to the Solicitors' Accounts (Deposit Interest) Rules 1990 wherein Rule 2 provides as follows.." Since Messrs. Idris & Associates is a firm of advocates and solicitors registered with the Bar Council under the Legal Profession Act 1976, I hold that the applicable law is that as set out in the Solicitors' Accounts (Deposit Interest) Rules 1990".

The Plaintiff also contended that a similar conclusion was reached in the High Court case of *Vije & Co v Co-operative Central Bank Ltd* [1991] 3 MLJ 432.

[43] The Plaintiff thus asserted that similarly in our present case, there was no suggestion that the parties agreed that the interest earned on the monies was not to be paid to the Plaintiff. Instead, the Plaintiff argued that the previous conduct of the 13th Defendant channelling the collected sums into an interest bearing account fortifies the Plaintiff's contention that all monies were to be put in an interest bearing account.

[44] The Plaintiff maintained that at the very least, whether the stake-holding duties of the 14th Defendant compels the firm to place the said sum in an interest bearing account and to whom the interest is due are triable issues which would have to consider the evidence of other parties such as the 13th Defendant who should be called to give evidence during trial for this matter.

[45] In my view, there are however, authorities which firmly held that a stake holding duty is in the nature of a trustee. Thus, the act of the 13th Defendant who did place the sum into an interest bearing account is not material. The true issue is the status of the 13th Defendant and the 14th Defendant vis-à-vis the stake-holding duty under the law. In the case of *Sorrell v Finch* [1977] AC 728, as highlighted by the 14th Defendant, Lord Edmund-Davies in the House of Lords referred to the judgment of Lord Denning M.R in *Burt v Claude Cousins & Co Ltd* [1971] 1 Q.B 426 as follows:

> "If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit "as stakeholder", he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor nor as agent for the purchaser. He holds it a trustee for both to await the event."

[46] In the instant case, the event was the disposal of Suit 192, pending which the said sum is not held on behalf of any of the parties in dispute. As further highlighted by the 14th Defendant, in the case of *Toh Theam Hock v Kemajuan Perwira Management Corp Sdn Bhd* [1987] CLJ (Rep) 400 (which was later cited with approval by the Federal Court in *Selvaratnam a/l Vellupillai v. Dr Jayabalan Karrupiah* (Rayuan Civil No. 02-1-2006 (W)) the Supreme Court held thus:-

> "The view that the appellant cannot be held accountable for the interest would also seem to be consistent with the notes on r.2 of the Solicitor's Accounts Rules 1967 shown to us by Mr.Lim Kean Chye where the following appears:
>
> Stakeholders
>
> Although r. 2 of the Solicitors' Accounts Rules, 1967, lays down that for the purpose of those Rules money held by a solicitor as stakeholder is "client's money" and must be paid into a client account, in the Council's opinion (which is supported by the advice of Leading Counsel) when a solicitor holds money as a stakeholder the stake money does not belong to any specific client until the happening of the deciding event, and the solicitor can keep any interest earned thereon. Neither s. 8 of the Solicitors Act, 1965, nor the Solicitors' Accounts (Deposit Interest) Rules, 1965, apply to it."

[47] I cannot emphasise enough that in the instant case, there is additionally, a Stakeholder Order which governs the stake holding of the said sum, with absolutely no mention of interest. Indeed, even the Plaintiff himself in his own pleading in paragraph 42 of the statement of claim stated *"Kuan Shin contends that the Stakeholders are also trustees to Kuan Shin for all monies received from the said Debtors".*

[48] Further, it is worthy of emphasis that in any event, Rule 2 of the Solicitor's Account (Deposit Interest) Rules 1990 is arguably of no relevance because the 14th Defendant did not hold or receive the said sum "*for or on account of a client"*. It is imperative to note that it was held by the 14th Defendant as a stakeholder. Properly construed this should mean that upon receipt and until the decision of the Court of Appeal dismissing the case of CFB and CFT, the said sum did not really belong to anyone, in line with the ratio of the decision of the Supreme Court in *Toh Theam Hock v Kemajuan Perwira Management Corp Sdn Bhd*. In contradistinction, the consent order in the case of *NME Services* had a provision for monies to be kept in an interest bearing account. As had been emphasised earlier, there was a patent absence of any such term in either the Stakeholder Order or the Interpleader Order.

[49] Furthermore, the conduct of the Plaintiff during the long period prior to the institution of the underlying writ action cannot be ignored. First, at all times during the proceedings in Suit 192, the 14th Defendant had made full disclosure of the amount in the stakeholders account and the sum released to the Plaintiff. Thus, if the Plaintiff had any issue with this, he could surely have raised the matter in the Suit

192. Nor has the Plaintiff produced any documents, not to mention contemporaneous in nature, to substantiate his claim for accrued interest. The truth of the matter is the stakeholder sum had been accepted without any hint of protest or objection. I cannot therefore but agree with the 14th Defendant's assertion that since it was only about four years later that the Plaintiff raises this claim in a fresh suit, this round of litigation appears to be bordering on being tantamount to an abuse of process.

[50] Secondly, then, upon the completion of the Suit 192, whilst the Plaintiff had rightly demanded that the said sum be released to him, there was however no demand by the Plaintiff that it should be paid with interest. None whatsoever.

[51] Thirdly, following the dispute over the release of the said sum referred to earlier, in the ensuing Interpleader Order, it was ordered that the said sum (less RM15,000 being stakeholder's fees) be paid to the Plaintiff. Significantly, there was no direction, express or implicit that the said sum should be paid to the Plaintiff with interest.

[52] Fourthly, the Interpleader Order was heard and granted in the presence of the Plaintiff's own solicitors, Messrs Ven & Associates and those of CFB. Guided by the 14th Defendant's letter, the Plaintiff would have known as early as 5 September 2013 (when the Plaintiff asked for the release of the said sum, as mentioned earlier) of the specific stakeholder sum and thus surely had every right and opportunity to seek directions on this very issue during the interpleader proceedings. Yet, the Plaintiff did not do so. The Plaintiff also argued that he could not have raised the complain concerning interest in the application for interpleader relief by referring to the Federal Court decision in *Tetuan Teh Kim Teh, Salina & Co v Tan Kau Tiah & Anor* [2013] 5 CLJ 161. But in that decision the Federal Court ruled that under Order 17 of the former Rules of the High Court 1980 damages could not be awarded on a counterclaim raised in an affidavit filed to oppose an application for interpleader relief, and that any such claim ought to be initiated in a separate action. In the instant case, it was not about the Plaintiff making a separate claim for interest on the sum, for his contention had always been that the sum should have been put in an interest bearing stakeholder account. It was part and parcel to his entitlement to the payment of the sum. The point of importance is that the Plaintiff had never previously raised this demand to have the position concerning interest clarified in any of the proceedings, including in the interpleader

application which resulted in the Interpleader Order. *Tetuan Teh Kim Teh* would not prevent the raising of the same because it would not be an introduction of a substantive action. Here, the Plaintiff also did not even ever attempt to invoke the liberty to apply clause.

[53] In contrast, adhering to the terms of the Interpleader Order, the 14th Defendant released the requisite stakeholder sum to Messrs Ven & Associates (less the stakeholder's fee of RM15,000.00). It bears repetition that the said sum was accepted without condition, let alone protest by Messrs Ven & Associates. In fact, since then (October 2014) the Plaintiff has never raised any query on the alleged interest let alone claimed for the same until the filing of the instant suit in March 2017. The conduct of the Plaintiff now clearly reeks of a convenient afterthought. The Plaintiff cannot now take a different stand and claim interest.

[54] The Plaintiff should rightfully be prevented from now challenging the same. He should be estopped from taking this contrary position now (see the leading Federal Court decision in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Berhad* [1995] 4 CLJ 283). It would be inequitable to the 14th Defendant if it were otherwise.

[55] At the same time, the Plaintiff cannot blow hot and cold. He cannot approbate and reprobate. In the case of *Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* [2016] 10 CLJ 247, I stated thus:-

> "[43] The position taken by the plaintiffs currently may be characterised as one which violated the principle against 'approbating and reprobating'. In the Court of Appeal case of *Visage Continental Sdn Bhd v Smooth Track Sdn Bhd* [2007] 6 CLJ 570, Richard Malanjum JCA (as his Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to approbate and reprobate as it is a practice that is both plainly unconscionable and unfair".

[56] As such, I do not see how the Plaintiff can successfully challenge the position of the 14th Defendant on this point. For the Interpleader Order provides for the release of the said sum in accordance with the Stakeholder Order; which the 14th Defendant had dutifully fulfilled. Indeed, the action by the Plaintiff cannot succeed because the Stakeholder Order and the Interpleader Order remain valid and binding Orders of Court (at any rate at the material time) that afford a complete defence to the 14th Defendant against the instant claim for an

account for interest (and payment of interest) on the said sum released to the Plaintiff.

[57] The 14th Defendant acted in accordance with the clear terms of the Stakeholder Order and the Interpleader Order. The Plaintiff has not challenged or even attempted to impeach either of the Stakeholder Order or the Interpleader Order. He must certainly be bound by both Orders. It is after all trite law that Orders of Court must be treated with respect and require strict obedience, until and unless set aside (see the Supreme Court decision in *Wee Choo Keong v. MBf Holdings Bhd* [1993] 2 MLJ 217). At the same time unless the Stakeholder Order is impugned, the question as to whether the stakeholder in this case performed a trustee role in respect of the said sum is secondary, if not immaterial.

Whether the 14th Defendant should return to the Plaintiff the RM1 million paid in Suit 1560 to CFB

[58] The Plaintiff also sought for the 14th Defendant to return the sum of RM1, 000,000.00 paid in Suit 1560 to CFB with interest of 5% on the ground that this sum is caught by the Stakeholder Order and it ought to have been deposited by the 14th Defendant in the stakeholder account.

[59] As stated earlier, on the first day of trial of the Suit 1560 a Consent Judgment was entered (many years after the grant of the Stakeholder Order) inter-alia, stating: *"....Defendan (K3) hendaklah membayar kepada Plaintif Pertama (CFB) wang sebanyak RM1,000,000.00...".* Thus upon receiving the sum of RM1,000,000.00 from K3 Metal's solicitors on 21 February 2012, the sum of RM948,624.00 was released by the 14th Defendant to CFB (after deducting the legal fees on the instructions of CFB) in 2012. This payment was made post the Stakeholder Order of 2006 and prior to High Court's judgment in favour of the Plaintiff in Suit 192 on 31 July 2013, as later affirmed by the Court of Appeal.

[60] For completeness, the relevant terms of the Consent Judgment read as follows:

> "...MAKA ADALAH PADA HARI INI DIHAKIMI SECARA PERSETUJUAN berdasarkan kepada terma-terma seperti berikut:-

a) Bahawa Defendan (K3) hendaklah membayar kepada Plaintif Pertama (CFB) wang sebanyak RM1,000,000.00 (Ringgit Malaysia Satu Juta Sahaja) dengan 2 kali ansuran pembayaran sebagai penyelesaian yang penuh dan muktamad termasuk faedah;

b) Bahawa jumlah Penghakiman tersebut hendaklah dibayar secara 2 ansuran yang mana wang sebanyak RM500,000.00 hendaklah dibayar pada atau sebelum 22 February 2012 dan ansuran kedua wang sebanyak RM500,000.00 hendaklah dibayar pada atau sebelum 22 March 2012;

c) Bahawa tuntutan oleh Plaintif ke-2 hingga ke-6 adalah ditarik balik dengan tiada kebebasan untuk pemfailan semula terhadap Defendan.

d) Bahawa tiada Perintah mengenai kos bagi tuntutan ini..."

[61] And this means that, again, the case of the Plaintiff is difficult to sustain. For the Consent Judgment remains a valid and binding judgment of Court. The Plaintiff has neither challenged nor attempted to impeach it. The Plaintiff cannot be allowed to ignore its legal effect. Parties could have then negotiated for different terms but the plain fact is that there is no requirement that the RM1 million should be placed in the stakeholder account. On the other hand, what the 14th Defendant did was to adhere to the terms of the Consent Judgment. Although the Plaintiff submitted that he was not party to the Consent Judgment and that pursuant to the Court of Appeal decision in *Mewah-Oils Sdn Bhd v Lushing Traders Pte Ltd* [2017] 2 MLJ 592 only the owner can sue in a tort of conversion action, the undeniable fact is that the Consent Judgment, being the basis of the payment by the 14th Defendant of the RM1 million to CFB, remains valid and is never impugned.

[62] In this connection, in *Bukit Baru Villas Sdn Bhd v Malaysia Building Society Berhad* [2017] 1 MLRH 1, I stated:-

> [22] However, the law is so well settled that a consent judgment can only be set aside on specific grounds, as established by the Federal Court in the leading case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Berhad [1998] 2 CLJ 75* where Peh Swee Chin FCJ, in one of the judgments delivered by the Federal Court, stated instructively as follows:-
>
> > "The grounds referred to for setting aside a consent order of a judgement by consent are grounds which basically relate to *consensus ad idem* or the free consent of parties to a binding agreement or contract. It is elementary that if it is

> proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgement by consent is undoubtedly based on an agreement of both parties where consent to the agreement must or should have been free in the first place. If the agreement upon which a consent order or judgement by consent is based, is vitiated by any ground recognized in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration, (see *Huddesfield Banking Co. v. Henry Lister* [1895] 2 Ch. 273 and the cases cited therein), then such a perfected consent order or judgement by consent could be set aside in a fresh action filed for the purpose. Grounds which would vitiate such free consent should also include misrepresentation, coercion, and undue influence and other grounds in equity".
>
> [emphasis added]
>
> [23] It is of relevance to note that the plaintiff did not in its statement of claim or in any of its affidavits in reply make mention of, let alone specifically plead any of the aforesaid grounds established by *Badiaddin Mohd Mahidin* that could legitimately justify the plaintiff setting aside the Consent Judgment. There was no allegation of mistake or fraud or misrepresentation, and indeed it would have resolutely been disingenuous if the plaintiff had alleged coercion on the part of the defendant who accommodated the plaintiff's own request for extension of time".

[63] The Consent Judgment is also additionally independent of the Stakeholder Order in Suit 192. The Consent Judgement is not subject to the Stakeholder Order because the latter only deals with the recovery of the accrued monies due from the listed debtors to CFT as at 4 April 2006. However, Suit 1560 is not a debt recovery action but an action for recovery of goods (and general damages) that were converted by K3 Metal in 2005. Indeed, the Stakeholder Order specifically states that the debts to be recovered and deposited in the stakeholder account of the 14th Defendant would be that of CFT.

[64] In contrast, the RM1 million under the Consent Judgment was paid to CFB, and not CFT. The RM1 million is thus clearly not subject to the Stakeholder Order. The terms of the respective orders and judgment must be construed strictly. They had also I reiterate been entered into by agreement of parties and counsel who deliberately did not make one to be subject to the other, and vice versa.

Other Considerations

[65] Furthermore, in any event, the Plaintiff's reliance on the Stakeholder Order in its pursuit of the instant claim against the 14th Defendant is wholly misconceived. For the Stakeholder Order in Suit 192, being interlocutory in nature, lapsed when the final judgment was handed down on 31 July 2013. In other words, the final judgment displaces the Stakeholder Order and the Stakeholder Order, as a consequence becomes unenforceable.

[66] The Plaintiff's contention that the Stakeholder Order dated 4 April 2006 should be read together with the final order dated 31 July 2013 is thus untenable in law as any interlocutory order is plainly unenforceable once a final order is pronounced. In any event, the final order dated 31 July 2013 has no relevance to the claim against the 14th Defendant. The Plaintiff's recourse, if any, is against CFB and CFT under the final order in Suit 192. In this connection, the High Court in *Syed Kechik Holdings Sdn Bhd & Ors v. Syed Gamal Bin Syed Kechik* [2013] 8 MLJ 720 observed as follows:

> "[8] The interim injunction does not decide the rights of the parties. The purpose was to preserve the prevailing status quo prior to final decision. When the final order was made the interim order lapses and is superseded by the terms of the final order. The final order was never appealed and its terms are therefore conclusive and binding.."

[67] Further, the Plaintiff has also filed committal proceedings against CFB and CFT on the same subject matter and on similar issues vis-a-vis the underlying writ action. The committal proceedings are therefore still pending. This bolsters the 14th Defendant's submission that this action is nothing more than a fishing expedition. The Plaintiff moved for committal against CFB and CFT in Suit 192 on 23 January 2017. The instant (and separate) suit was filed on 22 March 2017 without the Plaintiff disclosing even to this Court of the concurrent committal proceedings.

[68] The said committal proceedings against the directors of CFB and CFT in fact pertain to the Stakeholder Order dated 4 April 2006 and the final order dated 31 July 2013 in relation to the stakeholder sum. The 14th Defendant is not even a party to the committal proceedings.

[69] The instant suit is therefore more likely than not a fishing expedition for it was instituted in aid of the committal proceedings re Suit 192 because in the main, as averred in the Plaintiff's affidavit contesting the striking out, the Plaintiff wishes to ascertain the identity of the individuals (presumably in either CFB or CFT) who instructed the 14th Defendant to enter into the Consent Judgment and for the agreed RM1 million sum to be paid to CFB. Therefore, apart from being a fishing expedition, the argument of the 14th Defendant that the Plaintiff's action unjustifiably seeks also to attack the solicitor-client privilege is not without merit.

[70] As such, even if the Plaintiff seeks to complain about the Stakeholder Order or the Interpleader Order in Suit 192 (which the Plaintiff cannot) without challenging to impeach the same, the appropriate forum to deal with issues relating to the Orders in Suit 192 must manifestly be the High Court hearing in Suit 192, currently dealing with the committal proceedings for alleged breaches of the Orders in the Suit 192.

[71] The Plaintiff has also helpfully identified, by making various averments as to what he contended as the key issues for trial, as follows:-

(a) Who gave instruction to the 14th Defendant to record the Consent Judgment in the Suit 1560?

(b) Whether the amount received from the K3 Metal should be placed in the stakeholder account?

(c) Whether the money kept in the stakeholder account should be placed in the interest bearing account?

[72] In my view, these purported issues again exposed the flaw in the action by the Plaintiff. First, fundamentally, the question as to who gave instructions to record the Consent Judgment is so clearly irrelevant as the Consent Judgment remains valid and enforceable, and no attempt has been made by the Plaintiff to set it aside. Secondly, the issues of whether the sum from K3 Metal should be placed in stakeholder account and whether the said sum kept in the stakeholder amount should be interest–bearing concern issues of law, determinable having regard to the proper construction of the terms of the relevant

Orders and the Consent Judgment. As discussed earlier, the terms are unmistakably plain. They do not require viva voce evidence at trial.

[73] Thirdly, the issue raised by the Plaintiff to identify the persons who gave instruction in respect of the Consent Judgment clearly shows that the instant suit is merely an elaborate expedition orchestrated to fish for evidence. Furthermore, the action is against the 14th Defendant, a firm of advocates and solicitors. Yet it is rudimentary that communication between a client and his solicitor is protected under Section 126 of the Evidence Act 1950, and is therefore privileged and cannot be disclosed.

Conclusions

[74] It is thus clear beyond peradventure that if examination of the pleadings is made to determine the basis of the striking out application under limb (a), and in addition of the affidavit evidence in respect of limbs (b) and (d) of Order 18 r 19 (1), as I have done earlier, it is an inevitable conclusion that the 14th Defendant has established its case to have the claim filed by the Plaintiff struck out summarily under all three limbs. The claim is plainly and obviously unsustainable and ought to be struck out by reasons primarily of the clear terms of the Orders of the Court which were valid and binding at the material time, and which have never been challenged, and because the claim also represents an afterthought. In other words, the claim does not disclose a reasonable cause of action under limb (a), is frivolous and vexatious under limb (b) and is otherwise an abuse of the process of the Court under limb (d) of Order 18 r 19 (1) of the RC 2012.

[75] In view of the foregoing reasons, it is my judgment that the 14th Defendant has more than clearly, on a balance of probabilities succeeded in establishing its case to have the statement of claim of the Plaintiff struck out under any one of the grounds stipulated under limb (a), (b) or (d) of Order 18 r 19 (1) of the RC 2012. As such, I allow enclosure 67, and strike out the claim of the Plaintiff, with costs.

Dated: 27 December 2017

(MOHD NAZLAN BIN MOHD GHAZALI)
Judge
High Court NCC1
Kuala Lumpur
Counsel:

Counsel for Plaintiff

Krishna Dallumah & Venka Arun
Messrs Ven & Associates
Kuala Lumpur

Counsel for the Defendant 14

Stephen Thiru, David Matthew, Sarita Ashok Khandhar & Shaik Abdullah
Messrs Alvin John & Partners
Kuala Lumpur