IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
AT THE FEDERAL TERRITORY O KUALA LUMPUR, MALAYSIA
SUIT NO. WA-22C-32-05/2023

BETWEEN

GRAND DYNAMIC BUILDERS SDN BHD
(Company No.: 200501035889 (718036-T)) **…PLAINTIFF**

AND

KSK LAND SDN BHD
(Syarikat No.: 201201043800 (1028277-H)) **…DEFENDANT**

GROUNDS OF JUDGMENT

(Enclosure 9 & 44)

[1] Enclosure 9 is an application by Grand Dynamic Builders Sdn Bhd ("**Plaintiff**"), the Plaintiff in this matter, for an order for summary judgment be given against the Defendant, KSK Land Sdn Bhd ("**Defendant**") pursuant to Order 14 rule 1 of the Rules of Court 2012 (Enclosure 9) for inter alia the following sums: -

i. Total outstanding sums which were certified under Interim Certificates No. 17(R1) (part payment being made) to No. 24 amounting to RM93,393,742.77;

ii. Total late payment interests in respect of Interim Certificates No. 2 to part of the payment made under Interim Certificates No. 17(R1) amounting to RM4,968,425.09;

iii. Total late payment interest in respect of Interim Certificates No. 17(R1) (part remains outstanding) to No. 24 amounting to R3,714,004.07 calculated as of 24.4.2023; and

iv. Total late payment interest s in respect of Interim Certificates No. 17(R1) (part remains outstanding) to No. 24 which were still accruing from 2.4.2023 until the full payment of the total outstanding sum under Interim Certificates No. 17(R1) (part remains outstanding to No. 24.

[2] The Plaintiff has also filed enclosure 44 (Enclosure 44) which is an application for judgment to be entered against the Defendant in accordance with Order 1A, Order 27 rule 3 and Order 92 rule 4 of the Rules of Court 2012, based on the admission of the Defendant to the sum of RM102,076,172.00 which derives from the Corporate Guarantee executed by the Defendant ("**Corporate Guarantee**").

Background Facts

[3] The Defendant is the holding company of its subsidiary company, Damai City Sdn Bhd ("**DCSB**") who is the developer of a project known as "Cadangan pembangunan Perdagangan Bercampur yang Mengandungi 3 lok Menara iaitu: Fasa 1 : 5 Tingkat Besmen dan 10 Tingkat Podium Fasa 1: Menara A – 61 Tingkat Pangsapuri Servis Fasa 3: Menara B – 56 Tingkat Pangsapuri Servis Fasa 4: Menara C – 72 Tingkat Hotel (Fasa 4A) dan Hotel Suite Strata (Fasa 4B) di atas Lot 20000 (Lot Lama 111 & 112) Seksyen 63, Banda Kuala Lumpur,

Jalan Conlay, Wilayah Persekutuan Kuala Lumpur untuk Tetuan Damai City Sdn Bhd" or better known as the 8 Conlay Project ("**8 Conlay Project**").

[4] By way of a Letter of Award dated 09.11.2020 ("LOA"), the Plaintiff was appointed by DCSB as the main contractor to carry out the Main Building Works with a Contract Sum of RM1,249,000,000.00 in relation to the 8 Conlay Project where the Main Building Works for the 8 Conlay Project had commenced on 23.11.2020. The Plaintiff and DCSB had thereafter incorporated other documents which defined in Clause 1 of the LOA to form the construction contract between the Plaintiff and DCSB ('**the Main Contract**').

[5] Subsequently, the Plaintiff and DCSB have via letters of amendments dated 15.12.2020 and 22.03.2022 ("**the letters of amendments**") agreed to amend the terms and conditions of the Main Contract, and further entered into a Supplementary Agreement dated 20.05.2022 ("**the Supplementary Agreement**") which was to be read together with the Main Contract. (the Main Contract, the letters of amendments and the Supplementary Agreement are collectively referred to as 'the Contracts').

[6] However, as at 26.07.2022, DCSB had allegedly failed to fulfil its obligations to make full payment for the certified sums under the Contract that led to the signing of an agreement dated 05.08.2022 between the Plaintiff and DCSB which read together with the Contracts setting out the terms for the arrangement of repayment of

the outstanding sum of RM87,207,853.55 ('the August 2022 Agreement').

[7] Pursuant to Clause 3 of the August 2022 Agreement, the Defendant had in the capacity of DCSB's holding company, executed a corporate guarantee dated 05.08.2022 ("**Corporate Guarantee**") in favor of the Plaintiff in consideration of the Plaintiff having agreed with the Defendant to enter into the August 2022 Agreement with the DCSSB. Based on Clause 3.9 of the Corporate Guarantee, it was stated that the Corporate Guarantee shall continue to bind the parties notwithstanding any subsequent agreements entered between the Plaintiff and DCSB.

[8] The Plaintiff and DCSB had thereafter entered into several agreements for the repayment of the certified sums under the Contract.

[9] Subsequently, the Plaintiff determined its own employment under the Contracts with DCSB on 19.4.2023 due to the alleged breach committed by DCSB under the Contract and the other agreements entered between the Plaintiff and DCSB.

[10] As of the date of determination, the total sums allegedly certified under Interim Certificates No. 17(R1) (part payment) to No. 24 (including late payment interests) as well as the late payment interest for late payment in respect of certified sums under Interim Certificates

No 2 to No. 1(1) (part payment) for a total sum of RM102,076,171.93 remains outstanding.

[11] The Plaintiff's solicitors thereafter issued, on behalf of the Plaintiff, a Notice of Demand dated 3.5.2023 to the Defendant, in the capacity of the Corporate Guarantor, to demand for the payment of the total outstanding sum of RM102,076,171.93 within seven (7) days from the date of the said Notice of demand.

[12] However, the Defendant has allegedly failed, refused and/or neglected to pay the total outstanding sum of RM102,076,171.93 within the period specified.

[13] The Plaintiff then file a court action against the Defendant and the Summary Judgment application herein to recover the outstanding sum of RM102,076,171.93 from the Defendant in the capacity of the Corporate Guarantor.

[14] The Plaintiff has since received a court order dated 27.9.2023 from the Defendant vide suit No. **WA-24NCC-513-09/09/2023** where the Defendant has filed an ex-parte Originating summons dated 19.9.2023 and applied for, amongst others, the following ("scheme of arrangement proceedings").

(a) An order to summon meeting of its creditors ("**Scheme Creditors**") pursuant to section 366(1) of the Companies Act

2016 for the purpose of considering the Defendant's proposal for a compromise or arrangement with these creditors ("Order to summon Creditors' Meeting"); and

(b) An order to restrain further proceedings in any action or proceedings against the Plaintiff pursuant to section 368(1) of the Companies Act 2016 ("Restraining Order").

[15] The Plaintiff is one of the Scheme Creditors mentioned in the Defendant's Affidavit in support and classified under the 'List of Scheme Creditors' by the Defendant as the sole independent creditor making up 77.4% of the total debt due and owing by the Defendant to its creditors.

[16] Pursuant to the Restraining Order and in compliance of the same, the suit herein was stayed in abeyance.

Findings of Court

Issue of Admission

[17] Order 27 rule 3 of the Rules of Court 2012 provides:

(1) Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without waiting for

the determination of any other question between the parties, and the court may give such judgment, or make such order, on the application as it thinks just.

[18] The above order was explained in *Vithal Kumar A/L Jayaraman v Azman Bin Md Nor* [2010] 2 MLJ 67; [2009] MLJU 785; [2010] 3 CLJ 332 where the Court of Appeal in a judgement delivered by Ramly Ali JCA (as he then was) held:

> "*The object of the above rule is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed in his claim (see Ellis v Allen [1914] 1 Ch 904 at p 909 and Low Yoke Lan v Ng Ooi Kiat [2001] 4 AMR 4781).*
>
> *This rule relates to admissions of fact, whether in the pleadings or otherwise. The admission must be a clear admission, and not simple evidence of some facts upon which the plaintiff would have to rely to establish his cause of action (see Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd & Ors [1988] 3 MLJ 271 at p 272).*
>
> *The words 'or otherwise' in the said rule are of general application and justify the making of an order or judgment where an admission is made by letter or other relevant documents or agreements which clearly show that the defendant has no defence to the plaintiff's claim. They are not confined to admissions contained in the pleadings alone (see Pembinaan KSY Sdn Bhd v Syarikat Federal Furniture Construction and Engineering Works [1991] 1 MLJ 347 (SC)).*"

[19] Following the above, I have read the Corporate Guarantee which can be seen in enclosure 45 at exhibit LSH-1 p 36-41, and I find that the same was issued pursuant to an undated agreement between one Damai City Sdn Bhd ("**DCSB**") and the Plaintiff for the Project where there was agreed a repayment schedule for the outstanding amount of RM87,207,863.55 which was to guarantee the performance of DCSB obligations under what was defined as the terms "Contracts" which consisted of the Letter of Award ("**LOA**"), the Main Contract which included and was to be read together with the Terms and conditions in the PAM Contract 2006 (With Quantities) various drawings, bills and other documentation, Letters of Amendments and Supplementary Agreement.

[20] A further reading of the Corporate Guarantee shows that the same was worded as an irrevocable & unconditional Guarantee for amongst others: -

(a) the complete and punctual performance and observance by DCSB of its obligations under the Agreement and Contracts "*but not limited to the due payment by DCSB of the indebtedness (as* defined therein*) and all moneys that may become due and payable by DCSB to the Plaintiff...'*; and

(b) that on demand in writing made by the Plaintiff, the Defendant as guarantor '...*shall immediately and unconditionally pay to...'* the Plaintiff the sum specified in the demand

[21] The Plaintiff submits that the Corporate Guarantee is thus akin to a Performance Bond and that an admission was made by the Defendant in a sworn affidavit before a court of law which led to the granting of 2 orders i.e. the Order to Summon a Creditors Meeting and a Restraining Order.

[22] From the facts before me, as per exhibit LSH 2, LSH 3 and LSH 4 respectively in enclosure 45 a Court Order was made to Summon a Creditors Meeting and a Restraining Order was issued thereto on 27.9.2023 in an Originating Summons (Ex Parte) No. WA-24NCC-513-09/2023 (OS 513). I have noted that the Plaintiff herein is also one of the Scheme Creditors mentioned in the said OS 513 making up 77.4% of the total debt due and owing by the Defendant to its creditors and that in the Affidavit in Support ("**AIS**") of OS 513 affirmed on 19.9.2023, the Defendant had also averred by way of a sworn statement in the said AIS that '*The total outstanding debts to the Scheme Creditors…'* include the Corporate Guarantee issued to the Plaintiff in the sum of RM102,076,172.

[23] I have, for the record, also looked at the entire Plaintiff' Statement of Claim in this matter and observed that the Plaintiff's entire claim against the Defendant is based on the said Corporate Guarantee and the sums allegedly due and owing thereunder.

[24] The Plaintiff therefore submits that in the above AIS there is a clear admission in the AIS with regards the debt owing to the Plaintiff which is a statement sworn by the Defendant themselves. To this the

Defendant has contended that the Proposed Scheme contained a disclaimer notice ("**Disclaimer Notice**") as to amongst others the accuracy, correctness or completeness of the facts set out therein and that the report referred to by the deponent of the AIS has expressly stated at para 3.3. of the Report entitled "Preliminary Proposed Debt Settlement Framework' dated 18.9.2023 ("**Report**") under the heading "Verification of Scheme Creditors" that the proposed scheme "...*shall not be construed as amount to an admission of the debt.* ...".

[25] I am also aware that the Report contained a note in the "Unsecured Creditors" section that the ERV amount of the 'Purported Sum' was the "…*amount arose from the legal suit initiated by the Plaintiff against (*the Defendant*) ...being the Corporate Guarantee ... for the sum of RM102,076,172, being the sum DCSB has allegedly owed ..."* the Plaintiff. I agree with counsel for the Defendant that the 'Purported Sum' therein is only an estimated realisable value and which thus amounts to only an estimation and not definitive as was also decided in the case of *BGMC Holdings Bhd (formerly known as BGMC Holdings Sdn Bhd) v Fulloop Sdn Bhd & Ors* [2023] 9 MLJ 465.

[26] In response to the Disclaimer Notice, the Plaintiff submits that there can be no disclaimer possible and refers to the case of *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417 where the Court of Appeal had in essence held the restructuring scheme therein had acknowledged the appellant as a scheme creditor and even invited the appellant to produce certain confirmations of the debt and listed

the appellant as one of 24 scheme creditors to be involved in the restructure exercise and that in the light of the repeated acknowledgements of the appellant as a scheme creditor, the learned judge ought to have applied the doctrine of estoppel against the respondent. The respondent had, by their words and conduct, allowed and even to a certain extent, encouraged the appellant to proceed on the basis and understanding that the respondent had accepted the appellant as a scheme creditor. The respondent had, therefore, led the appellant to harbour a legitimate expectation that it was a scheme creditor, and it would be unconscionable and unjust for the respondent to assert otherwise. The Court of Appeal then held that the respondent ought not to be allowed to approbate and reprobate.

[27] It is then alleged by the Defendant that the Report annexed to the AIS was prepared by Baker Tilly Insolvency PLT who are the Defendant's scheme advisor who is a separate legal entity from the Defendant and that a third party cannot make an admission on behalf of the Defendant.

[28] In support of the Defendant's contention with regards the Disclaimer Notice and the issue that the report was done by a third party and not the Defendant, they had referred to *Metroplex Holdings Bhd v Commerce International Merchant Banker Bhd* [2013] 4 MLJ 520; [2013] MLJU 285; [2013] 3 AMR 782 where the Court of Appeal therein through Abdul Malik Ishak JCA (as he then was) delivered the judgment of the Court and held:

"[60] *The document dated 31 March 2003 entitled, 'Proposed Debt Restructuring of the Metroplex Berhad Group' as seen at pp 482–510 of the appeal record at Jil 3(2), and the document dated 12 October 2004 entitled, 'Composite Explanatory Statement To Scheme Creditors' and embossed with the words, 'Draft For Discussion Only' as seen at pp 512–659 of the appeal record at Jil 3(3), as well as the document dated 28 December 2008 entitled, 'Scheme Paper In Relation To The Restructuring Exercise of Metroplex Berhad' as seen at pp 661–697 of the appeal record at Jil 3(3) and marked 'Strictly Private & Confidential' were documents pertaining to the exercises undertaken to structure the company as a whole and had nothing to do with the validity of the charge. These exercises which were related to the appellant were made pursuant to the provisions of the Companies Act 1965 and cannot be construed ipso facto as an admission*

…

[*62]* *Again, Her Ladyship also failed to consider or appreciate the fact that the 'Scheme Paper in Relation to The Restructuring Exercise of Metroplex Berhad' dated 28 December 2008 was prepared by the scheme arrangers with the qualification that the document shall not be construed as an admission, in any way, of liability or recognition of the rights of any party. At p 661 of the appeal record at Jil 3(3), the following passages reflected the cautious stand of the scheme arrangers:*

This scheme paper is based on information and financial data provided by Metroplex Berhad, who has taken due care to ensure that the facts presented herein are true, fair and reasonable,

accurate and valid and that no material information/facts have been intentionally omitted or misrepresented. All information contained herein is strictly confidential and may not be reproduced or used in whole or in part for any other purpose nor furnished to any person other than those authorised by FHMH Corporate Advisory Sdn Bhd. For avoidance of doubt, nothing as set out in this Scheme Paper shall be construed as admission of any debt or its validity or any rights, if any, of the Metroplex Group against its lenders. While the Proposed Restructuring Scheme with the Scheme Creditors has been conservatively evaluated for feasibility on a preliminary basis, detailed discussion with the relevant parties, particularly Scheme Creditors, have not commenced as at the date of preparation of this document. Changes to the Proposed Scheme may be required at a later date to accommodate the interest of all affected parties after further discussion and negotiations with the Scheme Creditors.

[63] *Evidence wise, there is no direct or unequivocal admission between Metroplex Bhd and the respondent which would constitute an admission or an acknowledgment of a debt as envisaged under s 26 of the Limitation Act 1953.*

...

[65] *To compound the matter further, the scheme arrangers are not agents to the company and the scheme papers prepared by the scheme arrangers and vigorously relied upon by the respondent cannot, in our judgment, bind the appellant or Metroplex Bhd and the scheme papers cannot be construed as an acknowledgment saving limitation."*

[29] Upon reading the aforesaid reported Court of Appeal cases, I am, with respect, inclined to follow *Metroplex Holdings Bhd (supra)* where interestingly I note that *PB Securities Sdn Bhd (Supra)* was not referred to.

[30] After carefully examining the said AIS and the facts before me, I have found that the Plaintiff has failed to satisfy me that the alleged admission in the said AIS as afore mentioned is an admission as I do hold: -

(i) that such statement and the Report referred to in the AIS was in relation to an exercise which related to the Defendant's application made pursuant to the provisions of section 366 of the Companies Act 2016 and cannot be construed ipso facto as an admission;

(ii) the Report was done by a third party who are not agents to the Defendant and that the said report was not prepared by the Defendant;

(iii) the 'no admission of debt' and the Disclaimer Notice qualification in the Report must be given effect; and

(iv) the alleged admission was not and did not amount to a clear, direct, unambiguous and unequivocal admission.

[31] Accordingly, I hold that the said alleged admission does not bind the Defendant herein.

Alleged Triable Issues

[32] The Defendant has raised a number of salient issues as its opposition and defence to Enclosure 9 which they assert are triable issues where they ought to be given an opportunity to call witnesses to justify the fact that the sums due under the Corporate Guarantee are not payable and they are in essence as follows: -

i. the terms of the Corporate Guarantee at clause 2.1 (a) read with (b) uses the word 'and', also refers to word 'Contracts' which includes the PAM Contract and that the interim certificates cannot be looked at in isolation as it must be seen in light of the right of set off by DCSB. They further submit that the obligation of the Defendant can only be triggered if there are sums owed by DCSB to the Plaintiff. As such this is a triable issue which is subject to arbitration as liability has not been established by the Plaintiff against DCSB and how much is to be paid to DCSB;

ii. there is also the RM122 million cross claims by the Plaintiff against DCSB in arbitration which is a live issue there and of which any order by this Court for Summary Judgement against the defendant herein will presume liability against DCSB;

iii. the Court must also consider the interpretation of clause 25.4 (d) PAM where upon termination of the Plaintiff's employment,

DCSB is not bound by the Contract to make payments to contractor. Thus, the issue here is the veracity of the Plaintiff's claim herein against the Defendant; and

iv. the issue of whether the Corporate Guarantee was executed under economic duress.

[33] The Defendant further contends that the Notice of Demand by the Plaintiff issued after termination of its employment by DCSB has triggered clause 25.4(d) of the PAM Contract which the Plaintiff submits is void under CIPAA, and of which the Defendant submits is only void under the regime in CIPAA.

[34] Clause 25.4(d) [Encl. 10, page 167] states that when Damai City terminates the Plaintiff's employment under the Contract, among others, "*until after the completion of the Works under Clause 25.4(a)*", Damai City "*shall not be bound by any provision in the Contract to make any further payment to*" the Plaintiff, "*including payments which have been certified but not yet paid*" when the employment of the Plaintiff was determined.

a. For completeness, "*the Works under Clause 25.4(a)*" mentioned in Clause 25.4(d) means those works to be carried out and completed by such other person to be employed by the Respondent i.e., the replacement contractor.

Clause 25.4(d) [Encl. 10, page 167] also provides that "*upon the completion of the Works, an account taking into consideration of the value of the Works carried out by [the Plaintiff] and all cost incurred by [Damai City] to complete the Works including loss and/or expense suffered by [Damai City] shall be incorporated in a final account prepared in accordance with Clause 25.6*".

[35] Thus, after considering the Defendant's submissions and reading the documents referred to by them in particular clause 25.4(d) of the PAM Contract, I find that there exist triable issues in the matter, inter alia in particular:

a) whether there is an obligation of the part of the Defendant which can only be triggered if there are sums owed by DCSB to the Plaintiff; and

b) the interpretation of clause 25.4 (d) PAM where upon termination of the Plaintiff's employment, whether DCSB is not bound by the Contract to make payments to contractor.

[36] Following from the above I find that there are triable issues to the Plaintiff's claim herein which can only be determined by viva voce evidence adduced at the trial of this matter.

Decision

[37] In the circumstances I am dismissing both Enclosure 9 and 44 with costs.

Dated: 29th day of July 2024

sgd.

NADZARIN WOK NORDIN

HIGH COURT JUDGE

CONSTRUCTION COURT 1

COUNSEL FOR THE PLAINTIFF:

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Naveen Sri kantha, Leong Chee Weng and Cassandra Woo Ka Yan

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