



4. The Chief Executive Officer (“CEO”) and the Chief Operating Officer (“COO”) of BILL were responsible for the management and operation of BILL.
5. Mohamad Najib Bin Shaharuddin, the 1<sup>st</sup> defendant, was the COO from 1 January 2000 and the CEO from 1 January 2003. Subsequently, the 1<sup>st</sup> defendant was appointed as the director of BILL at the 54<sup>th</sup> Board of Directors’ meeting on 25 June 2003.
6. Raja Zainal Alam Shah Bin Raja Abdullah Omar, the 2<sup>nd</sup> defendant, was the CEO of BILL from 1 May 1997 i.e. prior to the 1<sup>st</sup> defendant’s tenure of office as the CEO from 1 January 2003.
7. Between July 2000 and August 2004, the 2<sup>nd</sup> defendant served as a member of the Board of Directors of BILL.
8. At all material times, Abdul Aziz Bin Ismail, the 3<sup>rd</sup> defendant, was an employee of BILL and served as the Head of the Operations Department of BILL from 1 October 2000.
9. Ishak Bin Yahya, the 4<sup>th</sup> defendant, joined the plaintiff as a bank officer on March 1984. In April 2001, he was transferred to BILL.
10. At all material times, the 4<sup>th</sup> defendant, was an employee of BILL and served as the Head of the I.T. and Finance Department of BILL from April 2001 until 2005.
11. At all material times, there was a Management Committee (“MC”) in BILL. The role of the MC was, *inter alia*, to consider and to recommend credit facilities to the Board of Directors for the latter’s approval.
12. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants were appointed as members of the MC. Subsequently, the 1<sup>st</sup> and 2<sup>nd</sup> defendants also held the post of the Chairman of the MC at different times.

13. The 3<sup>rd</sup> defendant, as a member of the MC, was also involved in the performance and discharge of the functions and role of the MC i.e. the recommendation of loans and their disbursal for the approval of the Board of Directors.

5 14. On 10 December 2004, the High Court ordered all the undertakings and the assets of BILL to be vested in the plaintiff.

15. According to the plaintiff, at all material times, the defendants' in their capacity as the employees of BILL owe to BILL statutory duties under section 92 of the Offshore Companies Act 1990, a common  
10 law duty of care and skill and express and/or implied contractual duties.

### **Plaintiff's suit**

16. In this suit, the plaintiff is claiming for damages against the  
15 defendants for losses suffered as a result of their breaches of duties in respect of four credit facilities.

### **The four credit facilities**

17. The four credit facilities are as follows:

- 20
- (1) the Farris facility;
  - (2) the Commerce Trading facility;
  - (3) the Crest Group facility; and
  - (4) the Crestek facility;

### **25 The Farris facility**

18. The briefs facts of this facility are as follows:

- (1) This facility was granted by BILL to Farris.

- (2) It is an Al-Bithaman Ajil facility for USD\$ 485,000.00. One of the securities required under the facility comprised a 3<sup>rd</sup> party Cash Deposit. It provided 100% security and the Cash Deposit was made by one Dato' Afifudin bin Haji Omar.
- 5 (3) The facility was recommended by the MC to BILL's Board of Directors and the facility was disbursed to Farris.
- (4) Prior to the execution of the security documents, the 1<sup>st</sup> defendant signed a letter which was addressed to Tabung Haji. The letter instructed Tabung Haji to release the plaintiff's charge over Dato' Afifuddin's account with Lembaga Tabung Haji.
- 10 (5) However, the charge over the security i.e. the Cash Deposit, was never perfected. Hence, the Farris facility was unsecured since 19 January 2004
- 15 (6) Subsequently, Farris defaulted on the repayment of the facility.
- (7) The plaintiff's claim is against the 1<sup>st</sup> defendant.

### **The Commerce Trading facility**

- 20 19. The brief facts of this facility are as follows:
- (1) The facility was recommended by the MC and approved by the Board of Directors of BILL to Commerce Trading and disbursement was made to Commerce Trading.
- (2) While they were in the MC, all the defendants recommended to BILL's Board of Directors for the latter's approval, a USD\$ 4,800,000.00 Al-Ijarah Al-Muntahiah Bit Tamlik facility in favour of Commerce Trading.
- 25

- 5
- (3) The defendants proposed to BILL's Board of Directors that the facility be secured by joint and several guarantees to be given by one Kamaruddin Awang and one Datuk Hiew (the "2 guarantors") even though Datuk Hiew was not an appropriate guarantor for the facility.
- (4) Subsequently, Commerce Trading defaulted on the repayment of the facility.
- (5) The plaintiff also failed to recover the amounts owed by Commerce Trading to BILL from the two guarantors.
- 10 (6) The plaintiff's claim is against all the defendants.

### **The Crest Group facility**

20. The brief facts of this facility are as follows:

- 15
- (1) This is a Master Al Bai Bithaman Ajil facility which was granted by BILL to the Crest Group.
- (2) The facility was to be secured by two debentures i.e. one on the fixed and floating assets of Martin Walter Ultrashlltechnik AG and another on the fixed and floating assets of Rinco Ultrasonics AG (the "2<sup>nd</sup> securities").
- 20 (3) A change of security arrangement was later recommended and approved whereby the 2 securities were cancelled and replaced by a negative pledge.
- (4) Nevertheless, notwithstanding that the negative pledge was not obtained, the 1<sup>st</sup> and 2<sup>nd</sup> defendants approved the
- 25 disbursal of the facility to the Crest Group.
- (5) Subsequently, the Crest Group defaulted on the repayment of the facility to BILL.
- (6) The plaintiff's claim is against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

## **The Crestek facility**

21. The brief facts of this facility are as follows:

- (1) This is a facility which was granted by BILL to Crestek.
- (2) Contrary to the practice of BILL, the 3<sup>rd</sup> defendant prepared the Memorandum of Financing Approval to Crestek which approved the disbursement of the facility.
- (3) Subsequently, Crestek defaulted on the repayment of the facility.
- (4) The plaintiff's claim is against the 3<sup>rd</sup> defendant.

## **Documents filed by the parties for use in the full trial**

22. The parties have filed the following documents for use in the full trial pursuant to the directions given by the Court during case management proceedings:

- (1) Bundle of Pleadings (enclosure (39A));
- (2) Bundle of Documents in 4 volumes;
- (3) Summary of case (plaintiff) (enclosure (39B));
- (4) Summary of case (4<sup>th</sup> defendant) (enclosure (40A));
- (5) Summary of case (1<sup>st</sup> and 2<sup>nd</sup> defendants) (enclosure (42)).
- (6) Agreed Facts (enclosure (45));
- (7) Issues to be tried (enclosure (46));
- (8) Plaintiff's Opening Statement (enclosure (44));
- (9) List of 4 (four) Witnesses (plaintiff) (enclosure (47));
- (10) List of 2 (two) Witnesses (1<sup>st</sup> and 2<sup>nd</sup> defendants) (enclosure (43));
- (11) List of 1 (one) Witness (4<sup>th</sup> defendant) (enclosure (48));
- (12) 4 Witness Statements (plaintiff) (enclosures (58), (59), (60) and (61));

- (13) 1 Witness Statement (4<sup>th</sup> defendant) (enclosure (56)); and  
(14) 2 Witness Statements (1<sup>st</sup> and 2<sup>nd</sup> defendants) (enclosures (65) and (66)).

5 **Issues for the determination of the Court**

23. The parties have framed the following 3 (three) issues for the determination of the Court:

- (1) Whether all the defendants at the material times, owe duties (statutory, common law and/or contractual) to the plaintiff?  
10 (2) Whether all the defendants had, at all material times, acted in breach of their duties owed to the plaintiff? and  
(3) Whether the plaintiff has suffered loss and/or damage by reason of the defendants' breaches of their statutory, common law and/or contractual duties and, if so, what is the quantum  
15 of such loss and/or damage?

**Additional issues for the determination of the Court**

24. The Court has framed the following 3 (three) additional issues for the determination of the Court, which have arisen as a result of the submissions of the parties on the 3 (three) issues as set out above:  
20

- (1) Whether the Court ought to apportion liability between the 4 (four) defendants and the Board of Directors of BILL and/or the plaintiff?  
(2) Whether the non-calling of the members of the Board of Directors of BILL and/or the plaintiff as witnesses is fatal to the plaintiff's suit and claims against the 4 (four) defendants?  
25  
(3) Who bears the burden of proof on mitigation of losses that are claimed by the plaintiff?

## **The full trial**

25. The parties called 7 (seven) witnesses altogether.

26. The plaintiff called 4 (four) witnesses. They are as follows:

5 (1) Mdm. Maria binti Mat Said, the Company Secretary and Head of Legal and Secretarial of the plaintiff, who had joined the plaintiff on 1 August 2005 and whose evidence is based on documents and records maintained by the plaintiff to which she has access, as PW1;

10 (2) Mr. Suffian bin Ariffin, who, at the material time, was assigned to the Capital Market and Syndication Unit under the Corporate Banking Department of BILL, as PW2;

(3) Mr. Mohamed bin Jusoh, the Investigating Officer from the Special Investigations Unit of the plaintiff since 2007, as PW3; and

15 (4) Mr. Nurulzahar bin Ghazali, the present Assistant General Manager of the Business Support Division of the plaintiff, who had joined the plaintiff on 6 June 2005, whose evidence is based on his personal knowledge and also the documents of the plaintiff to which he has full access, as PW4.

20 27. The defendants called 3 (three) witnesses. They are as follows:

25 (1) Mr. Mohamad Najib bin Shaharuddin, the 1<sup>st</sup> defendant himself, who had commenced his employment with the plaintiff in 1986 and who was transferred to BILL in 1997, as DW1;

(2) Mr. Raja Zainal Alam Shah bin Raja Abdullah Omar, the 2<sup>nd</sup> defendant himself, who had commenced his employment with the plaintiff on 16 December 1996 as a bank officer, and who



was tasked with the setting up of BILL and who was transferred to BILL in June 1997, after BILL was set up and had commenced operations, as DW2; and

- 5 (3) Mr. Ishak bin Yahaya, the 4<sup>th</sup> defendant himself, who had commenced his employment with the plaintiff on 15 March 1984 as a bank officer and in April 2001, he reported for duty in BILL and about 3 to 4 months later he was appointed as one of the members of the Management Committee of BILL, as DW3.

10 **1<sup>st</sup> and 2<sup>nd</sup> defendants' submissions**

28. Encik Azhar Arman Ali, the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, submitted that the plaintiff's claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants ought to be dismissed based on the following reasons:

- 15 (1) He relied on clause 1 of the Supplementary Agreement, which was drafted by the legal advisors of BILL, (at Bundle E, p. 304) which states as follows:

20 "In consideration of the Customer procuring the said Third Party Memorandum of Charge Over Shares in favour of the Bank, the Bank hereby agrees to release the Memorandum Of Deposit with effect from the date hereof."

- 25 (2) Based on the wordings of clause 1 as set out above, it seems that BILL's own legal adviser, i.e. Messrs. Mohamed Ismail & Co, had found it safe to allow BILL to immediately release the Tabung Haji deposit "with effect from the date hereof", when Messrs. Mohamed Ismail & Co themselves had known fully

well that the Memorandum of Charge Over Shares i.e. of Digi.com Bhd, was yet to be perfected. This is because Bambang Sugeng had not executed the Memorandum of Charge Over Shares. This knowledge is clear from recital D of the Supplementary Agreement, which states that the Memorandum of Charge Over Shares was “to be executed by Bambang Sugeng in favour of the Bank”;

(3) It is worth noting that Messrs. Mohamed Ismail & Co. was not a legal firm which was called in at the last minute to draft the Supplementary Agreement without knowledge of the background facts. Messrs. Mohamed Ismail & Co. was duly engaged by BILL as its legal counsel at the inception of the Faaris Facility in the year 2000. BILL’s own papers dated 14 July 2000 (see Bundle E, p. 297) states clearly that Messrs. Mohamed Ismail & Co was the ‘Financier’s Legal Counsel’ for this loan transaction. It is safe to assume that Messrs. Mohamed Ismail & Co’s had full knowledge of the Faaris Facility and its securities;

(4) If BILL’s own legal advisor (i.e. Messrs. Mohamed Ismail & Co.) had deemed it all right to release the Tabung Haji deposit even though Bambang Sugeng had not executed the Memorandum of Charge over the Digi.com Bhd’s shares, why would the blame be placed on the 1<sup>st</sup> defendant for authorizing the release of the Tabung Haji deposit?;

(5) By virtue of executing the Supplementary Agreement (on 26 January 2004), an agreement which was prepared and advised upon by Messrs. Mohamed Ismail & Co., the 1<sup>st</sup> defendant had no choice but to authorize the release of the

Tabung Haji deposit. The words in clause 1 of the Supplementary Agreement are crystal clear. These are i.e. "... the bank hereby agrees to release the Memorandum of Deposit with effect from the date hereof";

5 (6) Since the undated Supplementary Agreement was actually executed on 26 January 2004 (a fact which PW4 himself had agreed), and in the absence of any documentary evidence to show the actual date Tabung Haji received the release letter, we have to assume that the release of the deposit was made  
10 on or after 26 January 2004;

(7) In the light of the Supplementary Agreement drafted by BILL's own legal counsel, authorizing an early release, i.e. prior to the execution of the Memorandum of Charge over the Digi.com Bhd's shares, the 1<sup>st</sup> defendant had done nothing  
15 wrong in the circumstances;

(8) The plaintiff's only witness who testified on this issue was PW3. PW3 claimed that he was an internal investigator appointed to investigate the alleged irregularities in approving the Commerce Trading Facility;

20 (9) His evidence is highly suspect. First and foremost, there was no document whatsoever to corroborate his appointment to investigate. His authority to investigate, functions and scope of investigation, remains a mystery;

25 (10) It is inconceivable for the plaintiff (as a licensed bank) to authorize an investigation of an alleged irregularity without any documentation (since none was tendered in evidence). There was also no report of the so-called investigation, made or produced in Court;

- 5 (11) PW3 also gave conflicting testimonies in Court. In his evidence-in-chief (i.e. in his witness statement, P30) he said he investigated the Commerce Trading Facility. In cross-examination, PW3 agreed to the suggestion that he investigated the defendants but did not make any conclusion because he found that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were not at fault. However, in re-examination, PW3 said that he did not investigate the 1<sup>st</sup> and 2<sup>nd</sup> defendants at all;
- 10 (12) It would be wrong in law and in fact to find liability on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants based on the suspicious evidence of PW3. This is bearing in mind that PW3 is the only witness for the plaintiff in respect of the Commerce Trading Facility;
- 15 (13) The presumption in section 114 (g) of the Evidence Act 1950 ought to apply against the plaintiff in respect of PW3 in that, the investigation documents (if any), such as any letter of appointment or notes of investigations, if produced, will adversely affect the plaintiff's case against the 1<sup>st</sup> and 2<sup>nd</sup> defendants;
- 20 (14) Much like the Faaris Facility, the plaintiff also failed to prove, on the balance of probabilities, that the plaintiff had taken the necessary steps to enforce the various securities under the Commerce Trading Facility when the facility was in default. There was no evidence that the plaintiff attempted to enforce
- 25 any security under the Commerce Trading facility when the same was in default;
- (15) The plaintiff also failed to prove that the loan default and the amount outstanding under the Commerce Trading Facility was

a consequence of the failure to determine Datuk Hiew's financial status. Hence, the plaintiff's loss is not caused by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the damage is remote;

5 (16) The ad hoc facility for USD 200,000.00 was also governed by various collaterals. It would be grossly unjust to blame the 1<sup>st</sup> and 2<sup>nd</sup> defendants (solely on the issue of Datuk Hiew's status) when the plaintiff had the benefit of all the other collaterals. The failure of Commerce Trading to repay its loan and the failure of the plaintiff to enforce the available securities diligently were the probable causes that the loan remained outstanding and it has nothing to do with Datuk Hiew's financial status;

10 (17) In respect of the Crest Group Facility, the plaintiff's case rests solely on the failure to secure a certain 'negative pledge' but it is important to note the evidence of PW4 when he said (in cross-examination) that a 'negative pledge' is in fact a reduction in security (compared to a debenture). In essence, the conversion of the originally intended security i.e. from a debenture to a 'negative pledge', is effectively reducing the net value of the security. Therefore, taking into consideration all the other securities and collaterals under this facility, and on the balance of probabilities, the 'negative pledge' should not be regarded as a 'deal breaker';

20 (18) Since none of the members of the Board of Directors (past and present) was called to give evidence for the plaintiff it would be wrong to assume that the action taken by the Board of Directors of BILL would be any different if the 'negative pledge' was not obtained;

(19) Further, Messrs. Mohamed Ismail & Co. was engaged to carry out its duties to secure the 'negative pledge' and there was no evidence of any follow-up action on the matter;

5 (20) Similar with the other facilities discussed above (like the Commerce Trading Facility, for example) there were other ample securities to cover the plaintiff's risk in the event of default;

10 (21) In this case, the plaintiff had adduced evidence of a loan settlement between the plaintiff and the borrower (i.e. Crest Group) for a sum of RM RM 8,049,980.00. In such a situation, it would be wrong to impose any finding of liability on the defendants, especially, when there is no longer any amount outstanding under the Crest Group Facility because the settlement is a full settlement and the total outstanding balance is recorded as nil in the the statement of account as at 7 October 2013 (see Bundle D, page 2);

15 (22) There is no evidence adduced at trial of any written contract of employment for both the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Hence, it would be wrong in law and in fact to speculate the exact contractual obligations of these defendants, in the circumstances of the above loan facilities. There was also no evidence of the industry practice in the given circumstances. Therefore, the case for a breach of contract against the 1<sup>st</sup> and 2<sup>nd</sup> defendants is not made out;

20 (23) Hence, the plaintiff has failed to prove that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were, in fact and in law, negligent or that they have breached their, respective, employment contracts or that

they have breached the provisions of section 92 of the Offshore Companies Act 1990;

5 (24) On the contrary, the failures of the, respective, borrowers, (namely, Faaris and Commerce Trading, bearing in mind that Crest Group had made payment and there is no amount outstanding), to repay their loans were not caused by the alleged failures of the 1<sup>st</sup> and 2<sup>nd</sup> defendant. This is because the failure to repay is a distinct issue quite separate from the issue concerning the alleged failures of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to perform and fulfil their duties to BILL. The failure to repay coupled with the fact that there is no evidence of recovery or the enforcement of available securities were the likely causes why the loans were outstanding. In other words, there was no causal connection between the alleged negligence of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the alleged damage suffered by the plaintiff;

10 (25) The evidence of the plaintiff's key witnesses (PW3 and PW4) left a lot to be desired and none of the members of the Board of Directors of BILL or the plaintiff was called to give evidence; and

20 (26) Therefore, on the balance of probabilities, there was no negligence, breach of contract and/or breach of statute on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

#### 25 **4<sup>th</sup> defendant's submissions**

29. Encik Mohd Mohyiddin bin Mohd. Mesbah, the learned counsel for the 4<sup>th</sup> defendant, submitted that the plaintiff's suit and claims

against the 4<sup>th</sup> defendant ought to be dismissed with cost based on the following reasons:

- (1) With regard to the Faaris Facility, the 4<sup>th</sup> defendant was not involved at all and the plaintiff's witnesses has not adduced any evidence to implicate the 4<sup>th</sup> defendant for this facility;
- (2) With regard to the Commerce Facility, the 4<sup>th</sup> defendant ought not to be held liable because he had relied solely on the paper that was presented by the 1<sup>st</sup> defendant to BILL's Board of Directors for the granting of the facility to the borrower;
- (3) With regard to the ad hoc facility for the USD 200,000.00 and USD 150,000.00 for Commerce Trading, the 4<sup>th</sup> defendant ought not to be held liable because he was not responsible for the recommendation to the Board of Directors of BILL for the granting of this facility to the borrower;
- (4) Furthermore, even though the 4<sup>th</sup> defendant had released the loan of USD 350,000.00 to the borrower, the release was made subject to conditions (see P29) and it was the responsibility of the Corporate Banking Department of BILL to ensure that the conditions were complied with before the moneys were released to the borrower;
- (5) The above is also applicable to the reduction of the security from a sum of USD 146,000.00 to a sum of USD 74,763.00;
- (6) With regard to the Crestek Facility, the plaintiff has not implicated the 4<sup>th</sup> defendant in its statement of claim; and
- (7) With regard to the Crest Group Facility, the 4<sup>th</sup> defendant is also not implicated by the plaintiff in its statement of claim.



## **Decision of the Court after the full trial**

30. On 16 June 2015, upon the conclusion of the full trial, the Court was satisfied that the plaintiff had proved on a balance of probabilities as follows:

- 5                   “1. All four (4) defendants at all material times owed statutory, common law and/or contractual duties to Bank Islam (L) Ltd (“BILL”);
2. All four (4) defendants had acted in breach of their duties owed to BILL; and
- 10                  3. BILL had suffered the following losses and damages by reason of the said breaches:
- (a) In respect of the Faaris facility, damages in the sum of USD 501,379.17 against the 1<sup>st</sup> defendant;
- (b) In respect of the Commerce facility, damages in the sum of USD 5,510,287.60 against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly;
- 15                  (c) In respect of the Crest Group facility, damages in the sum of USD 1,397,964.84 against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly; and
- 20                  (d) In respect of the Crestek facility, damages in the sum of USD 24,384,068.56 against the 3<sup>rd</sup> defendant.”

31. Therefore, the Court granted judgment in favour of the plaintiff as follows:

- 25                   “(1) for damages in the sum of USD 501,379.17 against the 1<sup>st</sup> defendant as claimed by the plaintiff in respect of the Faaris facility;
- (2) for damages in the sum of USD 5,510,287.60 against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly being as claimed by the plaintiff in respect of the Commerce facility;
- 30

- (3) damages in the sum of USD 1,397,964.84 against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly as claimed by the plaintiff in respect of the Crest Group facility; and
- (4) damages in the sum of USD 24,384,068.56 against the 3<sup>rd</sup> defendant as claimed by the plaintiff in respect of the Crestek facility.”

32. The Court further ordered the respective defendants to pay to the plaintiff interest on the respective judgment sums as specified above at 5% per annum from the date of judgment until the date of full realization and the costs of this action.

33. The Court then invited the parties to propose the amount of costs to be awarded to the plaintiff by the defendants.

34. The learned plaintiff’s counsel proposed a sum of RM 30,000.00 as cost against the 1<sup>st</sup> defendant, a sum of RM 30,000.00 as cost against the 2<sup>nd</sup> defendant, a sum of RM 10,000.00 as cost against the 3<sup>rd</sup> defendant and a sum of RM 20,000.00 as cost against the 4<sup>th</sup> defendant.

35. The learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants left the amount of cost to be awarded to the plaintiff to the discretion of the Court.

36. The learned counsel for the 4<sup>th</sup> defendant also left the amount of cost to be awarded to the plaintiff to the discretion of the Court.

37. The Court then ordered the 1<sup>st</sup> defendant to pay to the plaintiff a sum of RM 30,000.00 as the cost of the plaintiff’s action, the 2<sup>nd</sup> defendant to pay to the plaintiff a sum of RM 30,000.00 as the cost of the plaintiff’s action, the 3<sup>rd</sup> defendant to pay to the plaintiff a sum of RM 10,000.00 as the cost of the plaintiff’s action and the 4<sup>th</sup> defendant to pay to the plaintiff a sum of RM 20,000.00 as the cost of the plaintiff’s action.

## **Reasons for the decision of the Court**

38. The reasons why the Court decided in that manner are as follows:

39. The plaintiff's claim against the defendants is on the basis that the defendants owed statutory, common law and/or contractual duties to BILL and that the defendants had breached those duties.

### **Issue (1): Whether all the defendants at the material times, owe duties (statutory, common law and/or contractual) to the plaintiff?**

40. The Court was of the considered view that based on the facts and the law that is applicable, issue (1) ought to be answered in the affirmative in favour of the plaintiff.

## **The law**

41. Under section 92 of the Offshore Companies Act 1990, officers and employees of an offshore company such as BILL, at all material times, owe statutory duties, a common law duty of care and skill and express and/or implied contractual duties to their employer, who is BILL in the instant case.

42. Section 92 of the Offshore Companies Act 1990 provides as follows:

#### **"Section 92. Duty and liability of officers.**

(1) Every officer of an offshore company shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

(2) An officer of an offshore company shall not make improper use of any information acquired by reason of his office to gain, whether directly or indirectly, an advantage for himself or any other person or to cause detriment to the company.

(3) An officer of an offshore company who contravenes this section shall be -

- (a) liable to the company for any profit made by him and for any damage suffered by the company as a result of such breach; and
- (b) guilty of an offence against this Act.

5

- (4) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.”

10 43. In **Malayan Banking Bhd v Basarudin bin Ahmad Khan** [2007] 1 MLJ 613, the Federal Court allowed the appeal of the Bank-employer against a former employee of the Bank in a claim for damages for breach of contract of employment. The Federal Court held at page 623 that the “employee of the appellant owes a  
15 contractual duty of care to the appellant and breach of that duty would render him liable to the appellant in damages for breach of contract. This is the common law right of the appellant as the employer”.

20 44. In **The State of South Australia & Anor v Timothy Marcus Clark** [1996] SASC 5499, the Supreme Court of South Australia found the Managing Director and CEO of the State Bank of South Australia liable for negligence and in breach of fiduciary duties in connection with a transaction. On the duty of care owed by the defendant, the Court held at paragraph 157 as follows:

25 “[a]s the chief executive officer and managing director of a large bank, he was obliged to bring to bear an appropriate level of skill having regard to the responsibilities which that office entailed. No doubt, as is the case with all large corporations, it was necessary for him to delegate responsibility for the operation of different  
30 functions of the bank, in circumstances where no further oversight

could be expected. But he must unquestionably be regarded as responsible for the overall control of the operations of the bank ...” and at paragraph 160 that “[t]here is no question but that the requirements of his office imposed upon Mr. Marcus Clark a duty to act in accordance with the highest standards of competence and integrity applicable to the banking industry.”

45. In **Malaysia Building Society Berhad v Dato’ Yusuf Sudin** [2013]

1 LNS 1284, the Court of Appeal allowed the appeal by the Appellant/employer’s claim for breach of fiduciary duties owed by the respondent/employee which resulted in losses to the appellant.

46. Reverting back to the instant case, the Court was satisfied that the plaintiff has discharged its burden of proving on a balance of probabilities that there were indeed breaches of duties by the respective defendants in respect of the four (4) facilities. The plaintiff has relied on the oral evidence of its witnesses and also the evidence as contained in the documents filed and produced before the Court to prove that the breaches had indeed occurred.

47. In **Malaysia Airline System Bhd v Wan Sa’adi @ Syed Sa’adi bin Wan Mustafa** [2015] 1 MLJ 757, the Federal Court held at page 771D as follows:

“We also find no merit in the complaint of the respondent that the failure by the appellant to call the witnesses who testified during the domestic inquiry had deprived him of the opportunity to cross-examine them. **There was nothing to prevent the respondent from calling those witnesses even though the appellant did not call them. Obviously the appellant was satisfied with the evidence it had adduced without having to call those witnesses. ...**”

(Emphasis added).

## **The Faaris Facility**

48. The Court shall now deal with the Faaris Facility.

49. The Faaris Facility dated 27 July 2000 was entered into by BILL and Investment Holding Plc (“Faaris”) for USD 485,000.00 in favour of Faaris (see Bundle C, p. 216-276). The sale price for the Faaris Facility is USD 506,098.00 (see Bundle C, p. 216-276, at p. 262).

50. Among the principal terms and conditions of the Faaris Facility were that the facility was to be secured by, *inter alia*, a 3<sup>rd</sup> Party Cash Deposit providing 110% security at any one (1) time in the plaintiff or Lembaga Tabung Haji and held on lien to BILL (“the Memorandum of Deposit/Charge”).

51. A Cash Deposit was made by one Dato’ Affifudin bin Haji Omar (“Dato’ Affifudin”) in his Lembaga Tabung Haji account and was charged to BILL (“the Charge over Cash Deposit”).

## **Whether the 1<sup>st</sup> defendant has breached his duties in respect of the Faaris Facility?**

52. Prior to the execution of the security documents to give effect to a change in the security arrangement from the Charge over Cash Deposit to 2,000,000 units of Digi.com Berhad shares belonging to one Kamarudin Jaffar, the 1<sup>st</sup> defendant signed a letter dated 19 January 2004 addressed to Lembaga Tabung Haji releasing BILL’s charge over Dato’ Affifudin’s account (“the Release of Security”) (see Bundle E, p. 302).

## **What are the losses suffered by the plaintiff?**

53. Prior to the Release of Security, the Faaris Facility was secured by the Ringgit Malaysia equivalent of USD 673,115 in Tabung Haji

deposit charged to BILL (see Bundle E, p. 338). As at 1 July 2002, there remained RM 2,557,837.79 in Dato' Affifudin's Tabung Haji account (see Bundle E, p. 346-347).

54. The security of the Digi.com Berhad shares to be obtained as the replacement security had a market value of USD 1,789,474 (see Bundle E, p. 348-349). Accordingly, had this Digi.com Berhad shares been obtained as security, the plaintiff would have been fully secured for the outstanding amount under the Faaris Facility.

55. The Court found that based on the evidence adduced by the plaintiff, the plaintiff has suffered losses of USD 501,379.17 in respect of the Faaris Facility, which comprise the outstanding Selling Price as at 30 July 2004 of USD 499,647.00 and legal fees incurred of USD 1,732.17 (see Bundle D, p. 1).

56. The Court found that the plaintiff has proven on a balance of probabilities that the person who has caused this loss to the plaintiff is the 1<sup>st</sup> defendant.

### **Whether the plaintiff took steps to mitigate its loss?**

57. The Court was satisfied that the plaintiff had undertaken the following steps to mitigate its losses in relation to the Faaris Facility:

- (1) Upon default in making instalment payments by Faaris, BILL's solicitors had sent a letter of demand dated 16 December 2004 to Faaris (see Bundle C, p. 87-88);
- (2) Numerous telephone calls were made to Faaris to request for the transfer of the Digi.com Berhad shares (see Bundle C, p. 211-212, at p. 211);
- (3) BILL's solicitors issued a Notice of Recall of the Faaris Facility dated 9 March 2005 (see Bundle C, p. 213-214); and

- (4) BILL's solicitors had sent a letter of demand dated 21 March 2005 for the execution and delivery of the Third Party Memorandum of Charge Over Shares in favour of BILL to replace the Charge over Cash Deposit (see Bundle C, p. 85-86).

**Whether the plaintiff has discharged its burden of proof against the 1<sup>st</sup> defendant?**

58. Based on the evidence before the Court, the Court was satisfied that the plaintiff has discharged its burden of proof against the 1<sup>st</sup> defendant with regard to the 1<sup>st</sup> defendant's liability towards the plaintiff for the Faaris Facility.

**The First Commerce Facility**

59. The Court shall now deal with the First Commerce Facility.

60. By a Memorandum of Approval dated 5 February 2002, the Management Committee consisting of all defendants recommended for approval to the Board of Directors a USD 4,800,000.00 Al-Ijarah Al-Muntahiah Bit Tamlik facility in favour of Commerce Trading ("First Commerce Facility") to be secured by *inter alia*, a joint and several guarantee by Kamaruddin Awang ("Kamaruddin") and Datuk Hiew Min Yong ("Datuk Hiew") (see Bundle B, p. 17-29).

61. The recommendation for the First Commerce Facility was tabled at the 9<sup>th</sup> Credit Meeting of BILL but based on the results of a CTOS search carried out and presented, was then deferred for the Management Committee to obtain clarification on legal proceedings against Kamaruddin and Datuk Hiew and to consider additional securities for the facility (see Bundle B, p. 30).



62. In a letter dated 5 September 2001, Messrs. Zul Rafique & Partners, BILL's solicitors, had advised BILL in relation to a related facility, Commerce Resources Inc which was also secured *inter alia* by a joint and several guarantee by Datuk Hiew that there was every danger that Datuk Hiew may be made a bankrupt at any time in view of the fact that a receiving order had already been made against him (see Bundle F, p. 902-904).

**Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have breached their duties in respect of the First Commerce Facility?**

63. The Management Committee consisting of all defendants, nonetheless, submitted a further recommendation for approval of the First Commerce Facility dated 11 March 2002 (see Bundle B, p. 31-45) based on a letter dated 28 February 2002 from one C. Robertson, the legal counsel of Datuk Hiew, clarifying the legal proceedings against Datuk Hiew (see Bundle F, p. 905-906).

64. At its 38<sup>th</sup> Board meeting held on 28 March 2002 attended by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the Board of Directors of BILL approved the First Commerce Facility based on the recommendation by the Management Committee with several additional conditions (see Bundle B, p. 46).

65. By an internal memorandum dated 4 April 2002 addressed to the 2<sup>nd</sup> defendant and copied to the 1<sup>st</sup> defendant, BILL's officers recommended to the Management that the signing of the First Commerce Facility agreement be deferred to protect BILL's interests (see Bundle F, p. 909-911).

66. By another internal memorandum dated 5 April 2002 addressed to the 2<sup>nd</sup> defendant and copied to the 1<sup>st</sup> defendant, BILL's officer

expressed concerns regarding, *inter alia*, the strength of the security in the form of a personal guarantee from Datuk Hiew in view of the fact that a receiving order had been made against him (see Bundle F, p. 912-914).

- 5 67. Despite the concerns raised by BILL's officers, no action was taken by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and/or the Management Committee to address these issues.
68. The disbursement of the First Commerce Facility was approved by the Management Committee which included the 1<sup>st</sup> defendant on 30
- 10 April 2002 (see Bundle B, p. 49-60).

**Whether the plaintiff has discharged its burden of proof against all the 4 (four) defendants in respect of the First Commerce Facility?**

69. Based on the evidence before the Court, the Court was satisfied
- 15 that the plaintiff has discharged its burden of proof against all the 4 (four) defendants in respect of the First Commerce Facility.

**The Second Commerce Facility**

70. The Court shall now deal with the Second Commerce Facility.
- 20 71. By a memorandum dated 11 November 2002 signed by the 2<sup>nd</sup> defendant, a proposal was made to the Finance Exco of BILL for the provision of an ad-hoc Murabahah Working Capital Financing ("MWCF") facility of USD 200,000.00 to Commerce Trading. The security proposed was, a joint and several guarantee by
- 25 Kamaruddin and Datuk Hiew, and the placement of USD 146,000.00 in a Mudharabah Investment Account (see Bundle B, p. 61-70).

**Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have breached their duties in respect of the Second Commerce Facility?**

72. No further checks or clarification were obtained as to the financial status of Datuk Hiew notwithstanding that a receiving order had been made against Datuk Hiew. This issue was not highlighted to the Finance Exco. The proposal for the ad-hoc facility was recommended by the Management Committee comprising all defendants without further questions or reverting back to the Corporate Banking Department for further credit evaluation.

73. On 20 November 2002, the facility was approved by the Finance Exco of BILL which included the 2<sup>nd</sup> defendant based on this recommendation (see Bundle B, p. 70).

74. By a letter dated 2 January 2003, Commerce Trading requested for an additional amount of USD 150,000.00 over and above the approved amount of USD 200,000.00. This additional facility was again recommended by the 4<sup>th</sup> defendant upon the same terms and conditions as the USD 200,000.00 MWCF facility without enquiry (see Bundle B, p. 71-75).

75. On 28 January 2003, the additional amount of USD 150,000.00 was approved by the Finance Exco, which included the 1<sup>st</sup> and 2<sup>nd</sup> defendants, based on this recommendation (see Bundle B, p. 75 and p. 76-81).

76. Subsequently, on 11 January 2003, the 4<sup>th</sup> defendant approved a request for disbursal of the full amount of USD 350,000.00 and the same was accordingly disbursed (see Bundle F, p. 915-917).

77. *Vide* a memorandum from the Corporate Banking Department dated 6 February 2003, it was requested that the Management Committee approve the reduction of the security deposit from USD 146,000.00

to USD 74,736.00, as a sum of USD 72,000.00 from the security deposit had already been used by Commerce Trading to finance the quarterly instalments for the First Commerce Facility (“Reduction of Security”) (see Bundle F, p. 907-908).

5 78. The request for Reduction of Security was approved by the Management Committee which included the 4<sup>th</sup> defendant but it was a condition and in accordance with practice and procedure that the Reduction of Security be ratified by the Finance Exco and/or the Board of Directors as approving authority. The ratification was not  
10 obtained.

79. Contrary to the terms and conditions upon which the Second Commerce Facility had been approved, the amount in the Mudharabah Investment Account at the time of disbursement was only USD 73,736.00.

15 **What are the losses suffered by the plaintiff?**

80. The Court found that based on the evidence adduced by the plaintiff, the plaintiff has suffered losses of USD 5,510,287.60 which consists of the judgment sum for the First Commerce Facility of  
20 USD 5,150,800.00, the judgment sum of USD 352,240.00 for the Second Commerce Facility, the amounts advanced by BILL on behalf of Commerce Trading in the sum of USD 1,026.34 and costs on a full indemnity basis of USD 6,221.28 (see Bundle D, p. 4).

81. The Court also found that the persons who had caused these losses  
25 to the plaintiff are the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

**Whether the plaintiff had taken steps to mitigate its loss?**

82. Based on the evidence, the Court found that the plaintiff had undertaken the following steps to mitigate its losses in relation to the Commerce Trading Facility:

- (1) BILL's solicitors had sent letters of demand dated 15 June 2004 (see Bundle F, p. 918-920) and 20 October 2004 to Commerce Trading and the guarantors of the Commerce Trading Facility (see Bundle C, p. 281-283);
- (2) BILL obtained a judgment in relation to the First Commerce Facility on 25 May 2005 in the sum of USD 5,150,800; and
- (3) BILL obtained a judgment in relation to the Second Commerce Facility on 25 May 2005 in the sum of USD 352,240.00.

**Whether the plaintiff has discharged its burden of proof against all the 4 (four) defendants in respect of the Second Commence Facility?**

83. Based on the evidence before the Court, the Court found that the plaintiff has discharged its burden of proof against all the 4 (four) defendants in respect of the Second Commence Facility.

**The Crest Group Facility**

84. The Court shall now deal with the Crest Group Facility.

85. The Crest Group Facility for USD 11,000,000.00 was granted by BILL on 9 December 2000 to Crest Group Inc. ("the Crest Group"). The Crest Group Facility was to be secured by, *inter alia*, debentures by subsidiaries of the Crest Ultrasonics Group which was part of the Crest Group (see Bundle E, p. 472-528).

86. By a Memorandum for Approval dated 28 January 2001, a recommendation was submitted by the Management Committee,

which included the 1<sup>st</sup> and 2<sup>nd</sup> defendants for, *inter alia*, a change of the security arrangement by cancelling the security of a debenture on the fixed and floating assets of two (2) subsidiaries and requiring a 'negative pledge' instead due to tax reasons (see Bundle E, p. 316-319).

87. On 8 March 2001, the proposal for ratification by the Board of Directors of BILL was recommended by the Management Committee which included the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The change of security arrangement was, subsequently, ratified by the Board of Directors of BILL at the 33<sup>rd</sup> Board of Directors' meeting held on 23 March 2001 (see Bundle E, p. 320-321A).

88. By a letter dated 16 March 2001, BILL's solicitors, Messrs. Mohamed Ismail & Co. advised that the Crest Group Facility could be disbursed subject to resolution of several outstanding conditions precedent (see Bundle E, p. 322-328).

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants have breached their duties in respect of the Crest Group Facility?**

89. Notwithstanding the outstanding conditions precedent, disbursement of the Crest Group Facility was approved by the Management Committee comprising the 1<sup>st</sup> and 2<sup>nd</sup> defendants, and the Crest Group Facility was, subsequently, disbursed (see Bundle E, p. 325).

90. To date, the negative pledges have not been executed nor perfected nor have the outstanding conditions precedent been fulfilled. Crest Group, subsequently, defaulted on the repayment of the Crest Group Facility.

91. Hence, the Court was satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have breached their duties in respect of the Crest Group Facility

### **What are the losses suffered by the plaintiff?**

92. Pursuant to a Settlement Agreement entered into with Crest Group, the outstanding sum of USD 1,397,964.84 was waived (see Bundle D, p. 2).
- 5 93. Based on the evidence, the Court found that this loss was caused to the plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

### **Whether the plaintiff had taken steps to mitigate its loss?**

94. The Court found that the plaintiff had taken steps to mitigate its loss. BILL's solicitors had sent numerous reminders, among others, by letters dated 19 June 2002 (stated as "12<sup>th</sup> Reminder") (see Bundle C, p. 93-97) and dated 11-7-2002 (stated as "13<sup>th</sup> Reminder") (see Bundle C, p. 98) to Crest Group to request for the outstanding conditions precedent.

15

### **Whether the plaintiff has discharged its burden of proof against the 1<sup>st</sup> and 2<sup>nd</sup> defendants in respect of the Crest Group Facility?**

95. Based on the evidence, the Court found that the plaintiff has discharged its burden of proof against the 1<sup>st</sup> and 2<sup>nd</sup> defendants in respect of the Crest Group Facility.
- 20

### **The Crestek Facility**

96. The Court shall now deal with the Crestek Facility.
97. On 26 November 1999, the Board of Directors of BILL had approved an Al-Bai Bithaman Ajil facility of USD 20,000,000.00 to Crestek Inc and USD 10,000,000.00 to Crest Group Inc. for the period of three (3) years and the repayment of the principal was a "bullet repayment" at the end of maturity of the facility. The said
- 25

facilities were to mature on 12 October 2002 and 23 November 2002, respectively (see Bundle E, p. 32 and p. 332-336).

98. A Memorandum for Financing Approval for a USD 30,000,000.00 Al-Bai Bithaman Ajil facility in favour of Crestek ("Crestek Facility") as an extension of the earlier facilities to Crestek Inc and Crest Group respectively was recommended by the Management Committee which consisted of the 1<sup>st</sup> and 4<sup>th</sup> defendants (see Bundle C, p. 124-210).

99. Crestek and BILL entered into a facility agreement dated 19 June 2003 (see Bundle E, p. 529-590). It was a condition precedent that all security documentation must be executed and perfected prior to disbursement of the facility.

**Whether the 3<sup>rd</sup> defendant has breached his duties to the plaintiff in respect of the Crestek Facility?**

100. Based on the evidence, the Court found that the 3<sup>rd</sup> defendant has breached his duties to the plaintiff in respect of the Crestek Facility. This is because a pre-disbursement checklist dated 19 June 2003 was also forwarded to the Management Committee for their review and their approval disclosing several outstanding condition precedents (see Bundle C, p. 114-123).

101. However, the Memorandum for Approval of Disbursement was approved singly by the 3<sup>rd</sup> defendant, instead of by two (2) members of the Management Committee (see Bundle C, p. 113).

**What are the losses suffered by the plaintiff?**

102. Based on evidence, it is undisputed that Crestek, subsequently, defaulted on the repayment of the facility. Pursuant to a Settlement



Agreement entered into with Crestek, the outstanding sum of USD 24,384,068.56 was waived (see Bundle D, p.3).

103. Hence, the plaintiff has claimed for this amount against the 3<sup>rd</sup> defendant.

5

**Whether the plaintiff has discharged its burden of proof against the 3<sup>rd</sup> defendant in respect of the Crestek Facility?**

104. Based on the evidence, the Court found that the plaintiff has discharged its burden of proof against the 3<sup>rd</sup> defendant in respect of the Crestek Facility.

10

**Additional issue (1): Whether the Court ought to apportion liability between the 4 (four) defendants and the Board of Directors of BILL and/or the plaintiff?**

105. Since none of the defendants has pleaded contributory negligence, the Court cannot grant any apportionment of liability. Hence, the Court found for the plaintiff in respect of the plaintiff's claims for the whole amount of the losses suffered against the respective defendants (see **Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor** [1995] 2 MLJ 276 where the Court held at 283F as follows:

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“... apportionment of liability cannot be granted when contributory negligence was not pleaded by the appellants - see the case of *Hamizan bin Abd Haid v Wong Kok Keong & Anor* [1994] 3 MLJ 630.”

25

106. In **Hamizan bin Abd Hamid v Wong Kok Keong** [1994] 3 MLJ 630, the Court held at page 634E as follows:-

“Though the common law position is somewhat altered, the principle of contributory negligence as a defence does not seem to have changed. It is still required to be pleaded by the defendant and, failure to do is fatal to the defence even though contributory negligence on the part of the plaintiff is found to exist. The decision of *Fookes v Slayton* [1979] 1 All ER 137; [1978] 1 WLR 1293 supports this principle.

In this case, the English Court of Appeal held that the trial judge had erred in awarding damages based on contributory negligence of the claimant when the defendant did not even file his defence or appeared in court. The award was reversed by the Court of Appeal and altered to a 100% liability against the Defendant.

*Fookes v Slayton* has been accepted in our courts for some time and, in fact it was reiterated by KC Vohrah J in the case of *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313.”

and further at 635C,

“From the aforesaid authorities, one element is certain and that is, the issue of contributory negligence must be brought to the court’s consideration before it can be deliberated. If it is not, then apportionment of liability based on contributory negligence of the claimant cannot succeed. In a vast majority of cases where the cause of action is based on negligence, the defence normally pleads contributory negligence in their statement of defence. Once this is pleaded, it becomes an issue before the court which requires the court’s consideration. As it has become an issue, there is no necessity for the plaintiff to plead the same. **However, if the defendant does not plead contributory negligence in his defence, it does not become an issue before the court. In such an event, if the plaintiff is able to prove any degree of negligence against the defendant, he will succeed in his case**

despite the fact that he may have contributed towards it. He will be entitled to damages based on a 100% liability. The cases of *Fookes v Slayton* and *Anuar bin Mat Amin v Abdullah bin Mohd Zain* support this principle. ...”

5 (Emphasis added).

107. Based on the above authorities that were cited by Mr. Oommen Koshy, the plaintiff’s learned counsel, the Court agreed with and accepted the plaintiff’s submissions that since the Court is satisfied  
10 that the plaintiff has succeeded in proving liability on the part of the defendants, the plaintiff is entitled to damages based on a 100% liability against the, respective, defendants.

108. Further, since the defendants are attempting to shift the blame to the members of the Board of Directors of BILL, it was incumbent  
15 upon the defendants to ensure that the relevant members of the Board of Directors were added as third parties or co-defendants in this suit. Here, only the 4<sup>th</sup> defendant has issued indemnity proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. For the rest of the defendants, it is too late to raise this issue now.

20 109. In **Dr Aishah Tul Radziah bt L Hussin v Dr Suresh a/l Kumarasamy & Ors** [2014] 11 MLJ 702, the Court held at page 726D as follows:-

25 “As a matter of fairness, fairplay and justice, since Dr Aishah had shifted the blame to HPP and its doctors in the first suit, she should have joined HPP and its doctors either as third parties or co-defendants in the first suit and thereafter made all necessary interlocutory applications by way of further and better particulars or discovery or interrogatories. In the result, I am impelled to the view that everything that is

being articulated against HPP and its doctors in the present suit could have been done in the first suit.

In my view, in the circumstances of the situation which prevailed in the first suit and in particular having regard to Dr Aishah's trial strategy of shifting the blame to HPP and its doctors, it was incumbent upon Dr Aishah to ensure that HPP and its doctors were added as third parties or co-defendants in the first suit. ..."  
(Emphasis added).

### **Additional issue (2): Who bears the burden of proof on mitigation of losses that are claimed by the plaintiff?**

110. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have raised the issue of "follow-up" during cross-examination of the plaintiff's witnesses and as an alternative defence in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' submissions (see the 1<sup>st</sup> and 2<sup>nd</sup> defendants' Written Submissions, pages 16-18, paragraphs 32-36) in alleging that the losses suffered by the plaintiff could have been averted had "follow-up" actions been taken by BILL.

111. Nevertheless, the Court agreed with and accepted the plaintiff's submissions that it is trite law that the burden of proving grounds for mitigation rests on the defendants and the defendants have failed to discharge this burden as the defendants did not lead any evidence of fact in mitigation of damages.

112. In **Leong Yoong v Lee Sem Yoong** [1968] 2 MLJ 72, the Federal Court held at page 761 (right) as follows:-

"The damages suffered by the respondent in this case are by no means remote. The respondent said in his oral evidence that he had told the appellant that he wanted to sell the land. There has been no denial of that allegation. **If there were grounds for**

**mitigation it was for the appellant to have alleged and proved them:-**

5           ‘The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each case, the burden of proof being upon the defendant’ (see Halsbury, vol. 11, (3rd Ed.), para. 476, age 290).

10           **In the present action the appellant has not pleaded or proved any fact in mitigation of damages. ...**

**The appeal is dismissed with costs ...”**  
(Emphasis added).

15   113. In any event, the Court found that the plaintiff was only vested with the assets and undertakings of BILL pursuant to the Vesting Order in 2006. Prior to that, the day-to-day management of BILL was under the purview of the defendants themselves, either as members of the Management Committee or as the CEO of BILL. Therefore,  
20   the Court agreed and accepted the plaintiff’s submission that this is not an issue which should prevent the plaintiff from succeeding in a claim for damages against the defendants.

25   **Additional issue (3): Whether the non-calling of the members of the Board of Directors of BILL and/or the plaintiff as witnesses is fatal to the plaintiff’s claim?**

114. In **Malaysia Building Society Berhad v Dato’ Yusuf Sudin** [2013] 1 LNS 1284, it can be seen from the Grounds of Judgment that one of the members of the Appellant’s Board of Directors testified as a  
30   witness on behalf of the Appellant. However, the calling of the member of the Board of Directors concerned may have been

necessary in that case as the sole complaint of the Appellant was that the Respondent caused the Appellant to enter into loan agreements despite not getting the approval from the Board of Directors. This is not the situation in the present case.

5 115. In any event, the Court was of the considered view that the non-calling of the members of the Board of Directors of BILL as witnesses is not fatal to the plaintiff's claim. This is because the issue that none of the members of the Board of Directors of BILL was called as the plaintiff's witnesses was never raised by any of  
10 the defendants during the trial. Even then, it was open to any of the defendants to call them as witnesses, but none did.

## **Conclusion**

116. In the premises, based on the reasons as set out above, the Court  
15 found follows:

- (1) That all four (4) defendants at all material times owed statutory, common law and/or contractual duties to BILL;
- (2) That all four (4) defendants had acted in breach of their duties owed to BILL; and
- 20 (3) That BILL had suffered losses and damages by reason of the said breach:
  - (a) In respect of the Faaris Facility, damages in the sum of USD 501,379.17 against the 1<sup>st</sup> defendant;
  - (b) In respect of the Commerce Facility, damages in the  
25 sum of USD 5,510,287,60 against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly;

(c) In respect of the Crest Group Facility, damages in the sum of USD 1,397,964.84 against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly; and

(d) In respect of the Crestek Facility, damages in the sum of USD 24,384,068.56 against the 3<sup>rd</sup> defendant.

117. Therefore, the decision and orders of the Court in favour of the plaintiff and against the defendants are in order.

Dated: 6 April 2016

**(DATUK SU GEOK YIAM)**

Judge

High Court Civil NCvC 11

Kuala Lumpur

### **COUNSELS**

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**CASE REFERENCE:**

1. Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor [1995] 2 MLJ 276.  
2. Hamizan bin Abd Hamid v Wong Kok Keong [1994] 3 MLJ 630.  
3. Dr Aishah Tul Radziah bt L Hussin v Dr Suresh a/l Kumarasamy & Ors [2014] 11 MLJ 702.  
4. Malayan Banking Bhd v Basarudin bin Ahmad Khan [2007] 1 MLJ 613.  
5. The State of South Australia & Anor v Timothy Marcus Clark [1996] SASC 5499.  
6. Malaysia Building Society Berhad v Dato' Yusuf Sudin [2013] 1 LNS 1284.  
7. Malaysia Airline System Bhd v Wan Sa'adi @ Syed Sa'adi bin Wan Mustafa [2015] 1 MLJ 757.  
8. Leong Yoong v Lee Sem Yoong [1968] 2 MLJ 72.

**LEGISLATION REFERENCE:**

1. S 92 of the Offshore Companies Act 1990.  
2. S 114 (g) of the Evidence Act 1950.