IN THE COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

(COMMERCIAL DIVISION)

ORIGINATING SUMMONS NO.: WA-24NCC-14-01/2020

In the matter of the Escrow Agreement dated 31.10.2018 and the sum of RM 10 million in the Claim Escrow Account;

And

In the matter of Order 7, Order 15 rule 16, Order 17, Order 28 and Order 92 rule 4 of the Rules of Court 2012;

And

In the matter of section 25(2) and paragraph 5 of the Schedule to the Court of Judicature Act 1964

BETWEEN

MALAYSIAN TRUSTEE BERHAD
(Company No.: 21666-V)) **… APPLICANT**

AND

1. **DATO' SNG CHONG KEONG**
   (NRIC No.: 580809-10-5661)

2. **HOW YEN TOW**
   (NRIC No.: 671014-10-6090)

3. **INISIATIF IKHLAS DN BHD**
   (Company No.: 480132-V)

4. KOPERASI PERMODALAN FELDA MALAYSIA BERHAD (Co-Operative Society Registration No.: Negara 39)

5. PC MANUFACTURING SOLUTIONS HOLDINGS SDN BHD (Company No1184234-A) … RESPONDENTS

GROUNDS OF JUDGMENT

[1] On or about 08.08.2016, the 5th Respondent ("**the Purchaser**") entered into a Share Sale Agreement ("**SSA**") with the 1st to 4th Respondents ("**Vendors**") to acquire the entire 100% equity interest in one Plastic Centre Sdn Bhd and its wholly owned subsidiary companies, Packaging Centre Services Sdn Bhd and CLC Pump (M) Sdn Bhd (collectively known as the "**PCSB Group**").

[2] Under the SSA, the agreed purchase price to be paid by the Purchaser to the Vendors was RM 110,000,000.00 ("**Original Purchase Price**").

[3] The Original Purchase Price was premised *inter alia,* on various warranties and condition precedents given by the Vendors to the Purchaser.

[4] Subsequent to the execution of the SSA, the Vendors failed to satisfy certain conditions precedent in the SSA. This led to the Purchaser and the Vendors entering into a supplemental agreement on 27.02.2018 ("**1st Supplemental Agreement**") and a

further supplemental agreement on 04.05.2018 ("**2nd Supplemental Agreement**") to vary the terms and conditions of the SSA including but not limited to the lowering of the Original Purchase Price.

[5] In particular:

(a) By way of the 1st Supplemental Agreement the purchase consideration was revised from the Original Purchase Price of RM 110,000,000.00 to RM 108,000,000.00 ("**1st Revised Price**"); and

(b) By way of the 2nd Supplemental Agreement, the purchase consideration was further revised from the 1st Revised Price to RM 86,000,000.00 ("**2nd Revised Price**").

[6] The Vendors' Warranties as set out under Schedule 4 of the SSA included *inter alia* that:-

(a) the financial statements of PCSB Group for the for year ended 31.12.2013, 31.12.2014 and 31.12.2015 ("**Accounts**") give a true and fair view of the assets, liabilities and state of affairs of the respective PCSB Group at each balance sheet date to which the Accounts relate and of the profits or losses for each accounting period to which the Accounts relate;

(b) all the accounts, books, registers, ledgers, financial and other records of whatsoever kind of the PCSB Group (including any which it may be obliged to produce under any contract now in force) are in its possession, properly and accurately kept, up-to-date, are true and complete in

accordance with the law and applicable standards, principles and practices generally accepted in Malaysia, and there are no material inaccuracies or discrepancies of any kind contained or reflected therein and fairly reflect their financial and trading position;

(c) other than the liabilities disclosed in the Accounts and the Management Accounts (for the period ended 31.12.2015) of PCSB Group, PCSB Group does not have any other off-balance sheet liabilities or contingent liabilities;

(d) the assets of the PCSB Group included in the Management Accounts or acquired since the Management Accounts Date (31.12.2015) and all assets used by PCSB Group other than those assets disposed of or realised in the ordinary course of business are legally and beneficially owned by PCSB Group free from any mortgage, charge, lien or other encumbrance; and

(e) all receivables obtained by PCSB Group prior to the Management Accounts Date shall inure to the Vendors' benefit and the Vendors shall have the right make such collection and/or compound with the debtor who had incurred any part of the receivables so due to the Vendors.

[7] Further, clauses 7.2.1, 7.2.2 and 7.2.3 of the SSA stipulate:

> '7.2.1 The Vendors shall not be liable in respect of any claims for breach of Vendors' Warranties ("Claim(s)") to the extent that the facts and circumstances giving rise to such Claims have been disclosed.

7.2.2. The Parties agree that:

(a) The aggregate amount of the liability of the Vendors in respect of Claims shall not exceed thirty five per cent (35%) of the Purchase Consideration; and

(b) No liability shall in any event arise in respect of any Claim unless:

(i) The amount of that Claim shall exceed Ringgit Malaysia Two Hundred Thousand (RM 200,000.00); and

(ii) That Claim (together with the aggregate amount of any previous Claims) shall exceed Ringgit Malaysia One Million Five Hundred Thousand (RM 1,500,000.00),

("Minimum Sum"), and in such event, the Vendors shall be liable for the entire amount claimed (and not only for such amount in excess of the Minimum Sum).

7.2.3 In addition, the Vendor shall not be liable for any Claim unless notice in writing containing reasonable details and a summary of the nature and scope of any such Claims has been given to the Vendors by the Purchaser within eighteen (18) months from the Closing Date, and no Claim shall be enforceable against the Vendors, and shall be deemed to have been withdrawn unless legal proceedings in respect of such Claim are commenced within one (1) year of service of notice of the relevant Claim on the Vendors.'

[8] The Vendors agreed that part of the purchase consideration amounting to RM 10 million ("**Escrow Fund**") shall be placed with

the Applicant as the escrow agent/stakeholder ("**Escrow Agent**") to provide security and speedy remedy to the Purchaser in the event of any breach of the Vendors' Warranties by the Vendors, especially in relation to the Vendors' non-disclosure obligations.

[9] The Escrow Fund was created because the Vendors and Purchaser were keen to expedite and complete the process of acquisition of PCSB Group and the parties had anticipated that there could potentially be non-compliance and/or non-fulfilment of the Vendors' Warranties.

[10] The Applicant's appointment as the Escrow Agent was subject to the terms and conditions of an agreement dated 31.10.2018 which contain express provisions on the circumstances for the release of the Escrow Fund ("**the Escrow Agreement**").

[11] After the Purchaser took over the management of the PCSB Group, the Purchaser alleged that it discovered *inter alia,* that there were numerous balance sheet as well as profit and loss items which have direct impact on the profitability of PCSB Group that were not duly and correctly reflected and/or recorded and/or disclosed by the Vendors.

[12] Following the above alleged discovery, the Purchaser then appointed an independent Investigative Accountant *i.e.* Ferrier Hodgson MH Sdn Bhd ("**FH**") to *inter alia* review the acquisition of PCSB Group with the objective of ascertaining if there was any breach of the Vendors' Warranties by the Vendors.

[13] Based on the findings of FH, the Purchaser determined that the Vendors had indeed breached the Vendors' Warranties by *inter alia* failing to ensure that the information with respect to the accounts and/or assets of the PCSB's Group as well as the contractual and/or statutory obligations owed by PCSB's Group to the third party(s) are accurately and correctly disclosed to the Purchaser.

[14] In view of the above, and in accordance with clause 5.2.3(b)(i) of the Escrow Agreement, the Purchaser issued a notice to the Vendors substantially in the form set out in Appendix 6 therein informing the Vendors that an event triggering the release of the Escrow Fund has occurred and that the Purchaser shall issue the Escrow Release Notice in the form prescribed by the Escrow Agreement for the sum of RM 10,000,000 being the maximum amount of the Escrow Fund with interest accrued to be paid out to the Purchaser ("**Claim Notice**");

[15] On the same day, the Purchaser also issued the Escrow Release Notice dated 15.11.2019 in substantially the form prescribed in Appendix 5 of the Escrow Agreement *vide* e-mail / fax to the Applicant instructing the Applicant to release the entire Escrow Fund to the Purchaser ("**the Escrow Release Notice**"). A hardcopy of the Escrow Release Notice was duly received by the Applicant on the 18.11.2019.

[16] However, the Applicant failed to release the Escrow Fund to the Purchaser within the stipulated time i.e. not later than the 3rd

Business Day after the receipt of the Escrow Release Notice as stated in Clause 6.2 of the Escrow Agreement.

[17] Instead, by way of an letter dated 21.11.2019 the Applicant informed the Purchaser that it would commence a civil action in court so as to allow the Court to determine the respective rights of the parties to the SSA to receive the Escrow Fund in view of the fact that the Vendors had issued a notice of dispute dated 20.11.2019 ("**Notice of Dispute**") to the Applicant pursuant to Clause 6.3(a) of the Escrow Agreement.

[18] The Purchaser recorded its objection towards the position taken by the Applicant *vide* a letter dated 27.11.2019.

[19] On 8.1.2020, the Applicant filed the present Originating Summons which is an Interpleader application seeking the following reliefs:

> i. The Respondents claiming RM 10,000,000.00 (or any part thereof) being the Claim Escrow Amount presently deposited with the Applicant pursuant to an Escrow Agreement dated 31.10.2018 ("the Disputed Sum"), do appear and state the nature and particulars of their respective claims to the Disputed Sum and maintain or relinquish the same and abide by such order as may be made hereon;
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> ii. This Honourable Court does make such order and/or issue such directions as may be appropriate in relation to any issue concerning the Disputed Sum as may be necessary and appropriate;

iii. That all costs and expenses of this application/ the proceedings herein or incidental thereto be first paid to the Applicant from the monies held by the Applicant in connection with the Disputed Sum and/or the Respondents (or any of them) as the Court may direct, prior to payment of such Disputed Sum or any part thereof to the successful Respondent(s) herein.

The Issues

[20] There are 2 legal issues for determination by this Court. They are:

i. Whether the Escrow Agent was entitled to file the interpleader application under the Escrow Agreement;

ii. Whether the Escrow Agent should release the Escrow Fund to the Vendors or to the Purchaser.

[21] The determination of the 2 legal issues depends on the interpretation of the terms of the Escrow Agreement.

[22] Insofar as the Applicant's action in filing this interpleader application is concern, Clause 6.3(a) of the Escrow Agreement provides:

> 'If the Escrow Agent has received a notice of dispute from either Vendors or the Purchaser (as the case may be) indicating that a dispute has arisen between the SSA Parties with respect to the Escrow Fund, the Escrow Agent may (but without obligation to do so) commence a civil action in a court of competent jurisdiction and deposit the Escrow Fund with the court for determination as to the respective rights of the SSA Parties to receive the Escrow Fund and the obligation of the Escrow

> Agent under this Agreement shall be suspended pending the decision of the court and the Escrow Agent shall act in accordance with the court's direction.'

[23] According to learned counsel for the Applicant, based on the aforesaid Clause 6.3(a), all that the Escrow Agent needed to show before commencing a civil action in this Court is that it has received a notice of dispute from either the Vendors or the Purchaser indicating that a dispute has arisen between the SSA Parties with respect to the Escrow Fund. Once this is established, the Applicant may exercise its discretion to file an interpleader action, more so when the Applicant is threatened with legal suit by the SSA Parties in the event the Applicant were to ignore the positions taken by the parties.

[24] Learned counsel for the Applicant also referred to Clause 6.3(c) which stipulates:

> 'Notwithstanding the provisions of Clauses 6.3(a) and (b), at any time and from time to time, the Escrow Agent shall be entitled to apply any to court of competent jurisdiction to determine the rights of the SSA Parties and, in the event of such application, may deposit the Escrow Funds with such Court'.

[25] It is not in dispute that the Purchaser has issued to the Escrow Agent the Escrow Release Notice under Clause 5.2.3(a) in the form that is substantially in compliance with Appendix 5 of the Escrow Agreement instructing the Escrow Agent to release the Escrow Fund to the Purchaser.

[26] It is not in dispute that the Escrow Agent has also received Notice of Dispute from the Vendors indicating their objection to the Purchaser's Escrow Release Notice which discloses that there is a dispute that has arisen between the SSA Parties with respect to the Escrow Fund.

[27] Accordingly, learned counsel for the Applicant submitted that the Escrow Agent has met the condition stated in Clause 6.3(a) to entitle them to file the present action to seek the Court's determination as to the respective rights of the SSA Parties to receive the Escrow Fund. The inconsistent positions taken by the Purchaser and the Vendors has given rise to a 'dispute'. In any event, the Applicant has a right under Clause 6.3(c) to file this application to the Court.

[28] Learned counsel for the Vendors did not challenge the Applicant's right to file the interpleader action.

[29] However, learned counsel for the Purchaser contended that there is no 'adverse claims' before the Escrow Agent to entitle them to file the present interpleader action. This is because only the Purchaser had made an express claim on the Escrow Fund. All that the Vendors had done was to issue its Notice of Dispute against the Purchaser's Escrow Release Claim. The Vendors did not claim that they are entitled to the Escrow Fund.

[30] With respect to learned counsel for the Purchaser, I disagree.

[31] I agree with learned counsel for the Applicant that the Notice of Dispute vide the letter dated 29.11.2019 by the Vendors pursuant to Clause 6.3(a) must necessarily mean that the Vendors are staking a claim to the Escrow Fund. The consequence of the Notice of Dispute is, if successful, would mean that the Escrow Fund would not be released to the Purchaser and instead be paid over to the Vendors. It constitutes a claim by the Vendors that they are entitled to the Escrow Fund and not the Purchaser. It is part of the purchase price for the shares. In any case, Clause 6.3(c) gives the Applicant the right to apply to Court at any time to determine the parties' rights.

[32] Learned counsel for the Purchaser next contended that Clause 6.3(a) vests the Applicant with a discretion to file a civil action. She contended that in the present circumstances, the Applicant did not exercise its discretion properly as the Applicant has not demonstrated any difficulty at all in discharging its duties and responsibilities under the Escrow Agreement to warrant incurring the legal costs and expense of filing the present action. Merely because there is a dispute between the SSA Parties and the fact that the Applicant had been threatened with legal action could not be an adequate justification for commencing the civil action.

[33] After all, the Applicant is paid a handsome fee of RM 45,000.00 as the Escrow Agent and is further protected under clauses 8.2 and 8.3 of the Escrow Agreement which stipulate thus:

> '8.2 Unless the Escrow Agent fails or refuses to observe and perform its obligations contained in this Agreement, the Escrow Agent will not be liable for any action taken or omitted by it, or

any action suffered by it to be taken or omitted, in good faith and in the exercise of its own best judgment, and may rely conclusively on, and will be protected in acting upon, any order, notice, demand, certificate, or opinion or advice of counsel (including counsel chosen by the Escrow Agent), statement, instrument, report or other paper or document (not only as to its due execution and the validity and effectiveness of its provisions, but also as to the truth and acceptability of any information contained in the aforesaid documents) which is reasonably believed by the Escrow Agent to be genuine and to be signed or presented by the proper Person or Persons. Except as provided in Clause 8.3, the Escrow Agent shall not incur any liability for following the instructions contained or expressly provided for in this Agreement, or written instructions given by the Parties in accordance with the provisions of this Agreement.

8.3 The Escrow Agent (including its partners, employees and staff) will be indemnified and held harmless jointly and severally by the SSA Parties from and against nay expenses, including reasonable counsel fees and disbursements, damages or losses suffered by the Escrow Agent in connection with any claim or demand which in any way, directly or indirectly, arises out of or relates to this Agreement or the services of the Escrow Agent under this Agreement; except in the case where the Escrow Agent is guilty of fraud or gross negligence under this Agreement. For the purposes of this Clause, the terms “expense” or “loss” will include all amount paid or payable to satisfy any such claim or demand, or in settlement of any such claim, demand, action, suit or proceeding settled with the express written consent of the Parties, and all costs and expenses, including, but not limited to, reasonable counsel fees and disbursements, paid or incurred in investigating or defending against any such claim,

demand, action, suit or proceeding. The indemnity provided in this Agreement shall survive the termination of this Agreement and any other agreement made by the Parties.'

[34] Accordingly, learned counsel for the Purchaser contended that the Applicant ought not to be permitted to claim the costs for this action having failed to discharge its duties and responsibilities under the Escrow Agreement and instead seeking to 'play safe' by placing the determination in the hands of the Court.

[35] In support of the Applicant, learned counsel for the Vendors contended that the Applicant did properly exercise its discretion to commence this present action as the dispute between the SSA Parties involves the construction of the Clause 5.2.3(a) which is a legal issue. The Applicant is not competent to decide on legal issues, especially construction of a contract and for this reason, the Applicant was right to place this before the Court.

[36] What are the duties and responsibilities of the Escrow Agent under the Escrow Agreement? Clause 5.3 therein expressly provides:

'5.3 The Escrow Agent has been engaged to represent the SSA Parties in respect of this Agreement and that notwithstanding such engagement, for the purposes of its appointment as Escrow Agent pursuant to this Agreement, the Escrow agent is not required to be concerned in any way of any disagreement that may arise or that has arisen between the SSA Parties whether or not it results in adverse claims or demands being made in connection with any sum or sums of the Escrow Funds'

[37] It is significant that Clause 6.3 expressly provides the Escrow Agent with a discretion when a 'dispute' arises between the SSA Parties to decide whether or not to commence a civil action in court for the determination of the dispute. In my mind, the existence of this discretion suggests that the Escrow Agent ought not to commence a civil action the very moment there is a hint of a 'dispute' however trivial or frivolous it may be. Similarly, merely because a party to the agreement has threatened to sue the Escrow Agent cannot *per se* be a good reason to incur the legal costs and expenses of a civil suit which would ultimately be borne by the SSA Parties.

[38] Further, merely because the 'dispute' may involve the construction of the terms of the Escrow Agreement again does not automatically justifies the decision to file a civil suit under Clause 6.3 thereto. The Escrow Agent is empowered to appoint and get advice of legal counsel on legal issues including the construction of the terms of the agreement. Clause 8.2 expressly provides that the Escrow Agent 'will not be liable for any action taken … in good faith and in the exercise of its own best judgment and may rely conclusively on and will be protected in acting upon … opinion or advice of legal counsel…'. So, clearly the SSA Parties had envisaged the need for the Escrow Agent to seek legal advice in the discharge of its duties and responsibilities.

[39] In the instant case, the Applicant has not demonstrated satisfactorily to this Court that, firstly, it had sought legal advice on the 'dispute' and secondly, that the 'dispute' involves such complexity that it necessitated commencing a civil action to the

Court for a determination by the Court. In this connection, learned counsel for the Purchaser suggested that the Escrow Agent should resort to civil action under Clause 6.3(a) only in cases where there are issues of fraud, I do not think that it should be so narrowly construed. There could be instances where the Escrow Agent is faced with legal issues including even the construction of the terms of the agreement which are complex and or which present to the Escrow Agent seemingly difficult and intractable choices or 2 inconsistent legal positions where an application to the Court is desirable.

[40] In the Vendors' Notice of Dispute, the relevant paragraphs outlining the Vendors' dispute to the Purchaser's Escrow Release Notice are as follow:

> '3. As stated in the Said Email, pursuant to Clause 5.2.3(a) of the Escrow Agreement, the Purchaser is only entitled to issue the Escrow Release Notice (in Appendix 5 of the Escrow Agreement) to release the Claim Escrow Amount upon the occurrence of a Claims Default Event. Further, "Claims Default Event" means the events arising from breach of the Vendors' Warranties (as defined in the SSA).
>
> 4. Further, and as stated in the Said Email, we have instructions from the Vendors to inform and put the Escrow Agent on notice that the Vendors have not received a formal notice of claim for breach of Vendors' Warranties from the Purchaser as required under Clause 7.2.3 of the SSA, and accordingly it has not been established that the Vendors are in breach of any of the Vendors' Warranties. Accordingly, the Escrow Release

Notice issued by the Purchaser has not been issued in accordance with Clause 5.2.3(a) of the Escrow Agreement.

5. In addition, please note that although the Purchaser has issued the written notice (in Appendix 6 of the Escrow Agreement) dated 15 November 2019 under Clause 5.2.3(b)(i) of the Escrow Agreement to the Vendors, the Vendors have only receipt the same on 19 November 2019.

6. In the light of the above, we have been instructed by the Vendors to notify you that a dispute has arisen between the SSA Parties with respect to the Claim Escrow Amount, and to treat this letter as the notice of dispute issued to the Escrow Agent under Clause 6.3(a) of the Escrow Agreement.

7. In the premises, we are further instructed by the Vendors to require the Escrow Agent to hold on to the release of the Claim Escrow Amount pending resolution of the said dispute between the SSA Parties, failing which, the Vendors will take necessary legal actions, including legal actions against the Escrow Agent, to preserve and protect the Vendors' interests.'

[41] In order to determine if the 'disputes' raised by the Vendors in their Notice of Dispute necessitated the Applicant filing the present application, we will have to now deal with the second issue which is to determine the merits of the Vendors' objections and to see if the Applicant ought to release the Escrow Fund to the Purchaser pursuant to its Escrow Release Notice.

[42] Here, we are dealing primarily with the construction of Clauses 5.2.3(a) and 5.2.3(b) which provides:

> ‘(a) The Purchaser shall issue to the Escrow Agent the Escrow Release Notice to that effect substantially in the form set out in Appendix 5 instructing the Escrow Agent to release the Purchaser:
>
> (i) The Claim Escrow Amount or any part thereof;
> (ii) …
>
> pursuant to the occurrence of each of the following events under the SSA:
>
> (i) *the events arising from the breach of the Vendors’ Warranties* (as defined by the SSA) (‘Claim Default Event’)’ [Emphasis added]
>
> ‘(b) For the purpose of Clause 5.2.3(a), upon the occurrence of the Claims Default Event … :
>
> (i) the Purchaser shall issue and deliver a written notice to that effect in substantially the form set out in Appendix 6 to the Vendors;
>
> (ii) the Purchaser shall issue and deliver to the Escrow Agent the Escrow Release Notice in substantially the form set out in Appendix 5 instructing the Escrow Agent to release the (i) Claim Escrow Amount or any part thereof …to the Purchaser.

[43] The Vendors are not disputing that the Purchaser had duly complied with Clause 5.2.3(a) and (b)(i) and (ii) above. Under Clause 6.1(a), the Escrow Agent is obliged to release the Escrow

Fund to the Purchaser pursuant to the Purchaser's Escrow Release Notice. The Clause stipulates:

> '6.1 Subject to the terms and conditions of this Agreement, the Escrow Agent will continue to hold the Escrow Funds until:
>
> (a) It has received an Escrow Release Notice from … the Purchaser, as the case may be, in which case it shall release the Escrow Funds in accordance with such instructions;
>
> (b) …
>
> 6.2 For the purposes of Clause 6.1(a) or (b) or (c), as the case may be, the Escrow Agent shall release the Escrow Funds not later than the 3rd Business Day after receipt of the relevant Escrow Release Notice from the SSA Parties.'

[44] How should the Escrow Agent deal with the Notice of Dispute issued by the Vendors to the Purchaser's Escrow Release Notice? Reference was made to Clause 5.3 above.

[45] Relying on Clause 5.3, learned counsel for the Purchaser contended that the Escrow Agent is obliged to release the Escrow Fund to the Purchaser once the Purchaser issued the Notice under Appendix 6 stating that an event triggering the release has occurred pursuant to Clause 5.2.3((b)(i) and the Purchaser has issued and delivered to the Escrow Agent the Escrow Release Notice pursuant to Clause 5.2.3(b)(ii).

[46] Based on Clause 5.3, it is not for the Escrow Agent to inquire if there was indeed 'any disagreement that may arise or that has

arisen between the SSA Parties whether or not it results in adverse claims or demands being made in connection with any sums or sums of the Escrow Funds.'

[47] Thus, notwithstanding the Notice of Dispute issued by the Vendors questioning the Purchasers' assertion that there is a breach of the Vendors' Warranties, the Escrow Agent ought not to concern themselves with the disagreement under the SSA.

[48] According to learned counsel for the Purchasers, the Escrow Agreement is akin to an unconditional and on-demand guarantee or performance bond. Upon the Purchaser issuing the Escrow Release Notice substantially in compliance with Appendix 5, the Escrow Agent is obliged to release the Escrow Fund as claimed notwithstanding the Notice of Dispute by the Vendors.

[49] On the other hand, learned counsel for the Vendors submitted that the Claim Default Event under Clause 5.2.3(a)(i) refers to 'events arising from the breach of the Vendors' Warranties' and not merely the 'identification of the breach of the Vendors' Warranties'. As I understand it, what learned counsel for the Vendors is saying is that the *mere* breaches of the Vendors' Warranties is not enough to constitute a Claim Default Event. What the Purchaser is required to show under Clause 5.2.3(a) (i) is that such breaches must result in certain 'events' the consequences of which justify the speedy solution to the Purchaser provided for under Clause 5.2.3 for the Escrow Fund to be released on the basis of the Escrow Release Notice without more.

[50] To further bolster his submission, learned counsel for the Vendors contended that an examination of the '*events*' arising from the breach of the Vendors' Warranties is necessary in order to establish the quantum that ought to be claimed by the Purchaser under its Escrow Release Notice. Learned counsel for the Vendors pointed out that under Clause 5.2.3(a)(i) of the Escrow Agreement, the Purchaser is required to state the amount claimed in its Escrow Release Notice as the provision refers 'the Claim Escrow Amount or *any part* thereof;'. Not every breach of the Vendors' Warranties will result in a loss permitting the Purchaser to make a claim for the entire Escrow Fund of RM 10,000,000.00. The construction placed on Clause 5.2.3(a)(i) requiring an examination of the 'events' arising from the breach of the Vendors' Warranties is consistent with the need for the Purchaser to quantify its claim. Corollary to this contention, learned counsel for the Vendors submitted that the Purchaser's Escrow Release Notice failed to provide any particulars of breach of the Vendors' Warranty and identifying the 'events' giving rise to the Claims Default Event.

[51] I must confess that I have some difficulty appreciating the submission by learned counsel for the Vendors. Surely, almost all if not every breach of the Vendors' Warranties will inevitably result in some 'events' arising therefrom. How is one to know which 'events' constitute a Claim Default Event?

[52] In answer to this question, learned counsel for the Vendors gave an instance of such event, namely, where during the 18 months from the Closing Date, there is a breach of the Vendors' Warranties involving an omission to disclose a judgment debt. If

this has resulted in a section 456 notice under the Companies Act 2016 to be issued to wind up the company by the judgment creditor, then, in such a case, a Claim Default Event would occur and the sum that the Purchaser could claim under its Escrow Release Notice would be the judgment debt which the Vendor had failed to disclose. The mere omission to disclose the judgment debt which is a breach of the Vendors' Warranties is not a Claim Default Event but the issuance of the section 456 statutory demand for the judgment debt would be such an event constituting a Claim Default Event.

[53] In further support, learned counsel for the Vendors referred to Clause 7.2.3 of the SSA which I alluded above. This section requires the Purchaser to give a notice to the Vendors containing reasonable details and a summary of the nature and scope of any claims that the Purchaser wishes to make against the Vendors.

[54] Relying on the aforesaid Clause 7.2.3 of the SSA, learned counsel for the Vendors contended that the Purchaser's rights in the event of any breach of the Vendors' Warranties would be to file a claim for appropriate reliefs under the said Clause. Unless there is an 'event' from the breach which qualifies as 'Claim Default Event', the Purchaser is not entitled to invoke Clause 5.2.3 of the Escrow Agreement to issue the Escrow Release Notice.

[55] Learned counsel for the Vendors sought to deal with Clause 5.3 of the Escrow Agreement in this way. Since Clause 5.3 prohibits the Escrow Agent from concerning itself in any way with any disagreement that may arise between the SSA Parties, learned

counsel for the Vendors contended that the Escrow Agent quite rightly relied on Clause 6.3(a) and (c) of the Escrow Agreement to refer the dispute to the Court for the determination of the SSA Parties' respective rights thereunder after receiving the Notice of Dispute by the Vendors.

[56] In other words, because the Escrow Agreement prohibits the Escrow Agent from looking at the SSA Parties' disagreement that may arise or has arisen under the SSA, the Escrow Agent will be obliged to bring such dispute before the Court under Clause 6.3(a) and (c) for determination.

[57] With respect to learned counsel for the Vendors, I find the contention untenable and wholly inconsistent with the language of the Escrow Agreement.

[58] The principles governing the interpretation and construction of contracts are trite and they are succinctly summarised by our Federal Court in the case of **SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor** [2016] 1 CLJ 177 *inter alia* as follows:-

(a) Interpretation is the ascertainment of the meaning which the contract would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract;

(b) The background knowledge would include anything which would have affected the way in which the language of the contract would have been understood by a reasonable man;

(c) Words in the contract should be given their natural and ordinary meaning; and

(d) The Court must approach the contract holistically and no term is to be taken or interpreted in insolation.

[59] Similar principles were recently adopted by the High Court in the case of **Bank Islam Malaysia Berhad v TMF Trustees Malaysia Berhad & Ors** [2019] 1 LNS 520 where the Court in an escrow/trust account related dispute took into consideration, amongst others, the following factors in interpreting the contracts in question:-

(a) The documents are to be construed in the manner a reasonable commercial person would construe them as to give commercial sense. Words should be given their natural and ordinary meaning;

(b) The factual matrix which forms the background to the execution of the contract; and

(c) The imputed intention of the parties and not what the parties thought they intend it to be.

[60] Following the above trite principles, I find that the terms of the Escrow Agreement in their natural and ordinary meaning must be taken to mean that:-

(a) Any breach of the Vendors' Warranties stipulated under the SSA is an 'event' constituting a Claim Default Event under Clause 5.2.3(a)(i) the Escrow Agreement which entitled the

Purchaser to issue the written notice to the Vendors in substantially the form set out in Appendix 6 under Clause 5.2.3(b) (i) and to issue the Escrow Release Notice to the Applicant instructing the Applicant to release the Escrow Fund or any part thereof to the Purchaser under Clause 5.2.3(b)(ii) thereto. There is no qualification prescribed in Clause 5.2.3(a) to the word 'events' and none should be imposed;

(b) After receipt of the Escrow Release Notice from the Purchaser, the Applicant is obligated to release the Escrow Fund within 3 business days;

(c) The Escrow Release Notice is to comply substantially the form set out in Appendix 5 and is only subjected to the maximum amount of Escrow Fund. There is no requirement to state the particulars or the nature of the breach of the Vendors' Warranties. This is because Clause 5.3 expressly stipulates that the Applicant is not required to be concerned in any way with any disagreement that may arise between the Purchaser and the Vendors under the SSA;

(d) Even as regards the written to the Vendors under Clause 5.2.3(b)(i) of the Escrow Agreement, the Purchaser is only required to deliver a written notice to that effect in substantially the form set out in Appendix 6 of the Escrow Agreement and need not provide any further details to the Applicant with respect to the Claims Default Event. Clause 7.2.3 of the SSA serves a different purpose from Clause 5.2.3(b)(i) of the Escrow Agreement. The requirement to

state the particulars or nature of the breaches by the Vendors required in the former cannot and ought not to be imported into the latter.

[61] To accept the interpretation proffered by learned counsel for the Vendors would require reading into Clause 5.2.3(a)(i) words that are simply not there. There is nothing in the said Clause to indicate that '*the events* arising from the breach of the Vendors' Warranties'are intended to confine only to 'events' of certain consequence or quality. Indeed, apart from merely citing an illustration of such 'event', learned counsel for the Vendors was unable to provide a definition of such 'events' that constitutes 'Claims Default Event'.

[62] Further, to accept the construction of learned counsel for the Vendors would mean that the Escrow Agent would have to concern itself to the terms of the SSA which expressly contradicts what the SSA Parties had provided for in Clause 5.3. The contention that this only means that the Escrow Agent is to bring such determination to Court is also not supported by any provisions in the Escrow Agreement. In fact it is inconsistent with Clauses 6.3(a) of the Escrow Agreement as this would mean that the Escrow Agent would have no discretion but is compelled to commence a civil action to the Court each time such a dispute arises.

[63] Learned counsel for the Vendors' interpretation is also against the undisputed purpose of the Escrow Fund, which was to provide a speedy remedy to the Purchaser in the event of a breach of the

Vendors' Warranties giving rise to a Claim Default Event. The requirement that the Escrow Agent will need to commence a civil action in Court for determination whether the 'event' arising from the breach of the Vendors' Warranties constitutes a Claim Default Event will defeat the very object of a speedy remedy to the Purchaser under the Escrow Agreement.

[64] I agree with the submission by learned counsel for the Purchaser that under Clause 5.2.3(a)(i) of the Escrow Agreement, it is entirely for the Purchaser to determine how much of the Escrow Fund that the Purchaser wishes to seek from the Escrow Agent up to the maximum amount of the Escrow Fund. All that the Purchaser is required to do is to ensure that the Escrow Release Notice complies substantially with Appendix 5 and that its notice to the Vendors complies substantially with Appendix 6 as stipulated in Clause 5.2.3(b) (i) and (ii). There is also no necessity for the 2 notices to be issued simultaneously.

[65] I disagree with learned counsel for the Vendors that the Vendors are completely without any remedy in the event that the Vendors dispute the Purchaser's right to issue the Escrow Release Notice.

[66] In the first place, Clause 7.2.2(a) of the SSA limits the Purchaser's Claims to a sum not exceeding 35% of the Purchase Consideration. More significantly, Clause 7.2.3 obliges the Purchaser to give notice in writing containing reasonable details and a summary of the nature and scope of any such Claims to the Vendors within 18 months from the Closing Date. It further stipulates that no Claim shall be enforceable against the Vendors

and shall be deemed to have been withdrawn unless legal proceedings in respect of such Claim are commenced within one (1) year of service of notice of the relevant Claim on the Vendors.

[67] In my mind, this means that notwithstanding that the Escrow Agent has released the Escrow Fund to the Purchaser under the Escrow Agreement, the Purchaser is still obliged to serve the Vendors with the written notice under Clause 7.2.3 of the SSA and to commence legal proceedings against the Vendors within 1 year of service of the notice in respect of the alleged breach of the Vendors' Warranties and is successful in that proceedings, failing which the Purchaser would have to repay the Escrow Fund to the Vendors.

[68] The Escrow Agreement is not intended by the SSA Parties to deal with their respective legal rights under the SSA at all. It is merely a means for the Purchaser to obtain a speedy release of the Escrow Fund upon the happening of a prescribed condition. This is clear from Clause 2.4 of the Escrow Agreement which provides:

> 'If there is any disagreement or dispute in respect of the SSA, the SSA Parties agree that:
>
> (a) their rights, obligations and responsibilities hereunder; and
>
> (b) their rights, obligations and responsibilities of the Escrow Agent hereunder, shall not be affected by the existence and conduct of any such disagreement or dispute, nor by their involvement (or the involvement of the Escrow Agent) in any such disagreement or dispute, in whatever capacity, and the Escrow Agent shall be under no obligation to investigate or exercise any discretion as to whether or not

any action is required to be taken in respect of the Escrow Funds pursuant to the SSA.'

[69] Learned counsel for the Vendors referred to Clause 9.1(a) of the SSA and contended that the Purchaser was obliged to require the Vendors to remedy the default or breach of the Vendors' Warranties within 30 days of the receipt of such notice and only upon the Vendors' default in remedying the breach would the Purchaser be entitled to make the claim for the Escrow Fund. I disagree.

[70] Clause 9 of the SSA deals with events entitling the Purchaser to *terminate* the SSA Agreement. It has nothing to do with the SSA Parties' rights under the Escrow Agreement at all.

[71] I agree with learned counsel for the Purchaser that the Escrow Agreement is akin to an unconditional and on-demand guarantee or performance bond.

[72] It is trite that only in exceptional cases will the courts interfere with the machinery of irrevocable obligations assumed by banks, such as that assumed by the bank under an unconditional guarantee. This strict approach is explained by Kerr J in **Harbottle v National Westminster Bank** [1978] QB 146 at pages 155 to 156.

[73] The principle in ***Harbottle*** was followed and applied by the Malaysian Supreme Court in **Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd** [1995] 1 MLJ 149 at page 156 where the Supreme Court held amongst others, as follows:

"… **this performance bond was, on a true construction, a pure on-demand guarantee, and all that was required to trigger it was a demand in writing. It would not be dependent or conditional on the production of a document, eg a certificate from some nominated independent person like an architect as in some building contract, etc. Neither was it worded to make it conditional for Bank Bumiputra, the issuer of the performance bond, to inquire into the existence or otherwise of any breach of any contractual obligation between the beneficiary of the bond, ie the buyer in this case, and the seller; at the behest of the latter itself, the performance bond was issued…… It was thus not open to his Lordship in the court below to impart into this on demand guarantees, by implication, a requirement to have regard to, or to inquire into any breach of any obligation of such underlying contract, and this seemed to have been done**.

One, therefore, looked at the letter dated 11 October 1993 as set out above which was supposed to trigger the operation of the instant performance bonds. There was nothing there that could suggest that the demand was not proper and, complying with the simple words there of making a claim by 'a demand in writing', **the said letter was sufficiently compliant even though it was verbose**.

On the type of such pure on demand performance bonds, the issuer should unquestionably pay on demand except in the case of fraud. Any argument of immediate disadvantage to the party who caused such a document to be in use is of no avail to the party who must face the risks of such unquestioned payment except where there is fraud; there was even no allegation of it, let alone any evidence of it.

> A performance bond, like a pure on demand guarantee in the instant appeal, has always occupied an important place in the national or international world of commerce. It will be remembered that Lord Diplock in American Cynamid had alluded to special factors to be taken into consideration in the particular circumstances of individual cases. **We, therefore, in the end, found the balance of convenience tipped heavily against the seller, and we unanimously agreed that the interlocutory injunction granted ex parte and continued inter partes by the learned judge in favour of the seller, should be discharged, hence the appeal was allowed.**"

[Emphasis added]

[74] With regard to escrow agreements, the case of **McCarthy Tetrault** v **L.C. Holdings Ltd.** [1992] O.J. No. 1268 is instructive. In that case, Conan J held *inter alia* that an escrow agreement is akin to a performance bond or letter of credit. The Court adopted the following legal principles governing performance bond to escrow agreement:-

(a) An escrow agent must release the escrow sum holding by it if the required documents are in order and the terms of the escrow agreement are met.

(b) Any dispute between parties must be resolved settled between themselves;

(c) The exception to the general principles stated above would be if there is established or obvious fraud; and

(d) There is a high standard of conduct placed upon the escrow agent to discharge its obligation pursuant to the escrow agreement.

[75] Notably, Conan J also held that the escrow agreement shares the same unique commercial value as performance bond which is that the beneficiary can be completely satisfied that whatever dispute that may thereafter arise between him and the counter party in relation to the performance of the underlying contract, the escrow agent has personally undertaken to pay him provided that the specific conditions are met.

[76] Accordingly, following the principles held in the aforesaid case, I hold that:

(a) Firstly, the Applicant as the Escrow Agent herein ought to adhere to the clear and unambiguous terms of the Escrow Agreement;

(b) The Escrow Agreement clearly provides that the Escrow Agent is obliged to release the Escrow Fund to the Purchaser in the event the Purchaser issues the Escrow Release Notice in accordance with the specific terms stipulated under the Escrow Agreement;

(c) The Escrow Agreement herein is akin to an unconditional and on-demand performance guarantee – in other words, upon issuance of the Escrow Release Notice in terms provided under Appendix 5 of the Escrow Agreement, the

Applicant is obliged to release the Claim Escrow Amount to the Purchaser without proof or condition;

(d) It is undisputed that the Escrow Release Notice issued by the Purchaser had complied with the form set out under Appendix 5 of the Escrow Agreement;

(e) The Vendors have not raised any issue of fraud in its Notice of Dispute;

(f) In the absence of any allegation of fraud on the part of the Purchaser, the Applicant ought to have released the Claim Escrow Amount to the Purchaser to give effect to the true purport and intention of the Escrow Agreement;

(g) The interpretation of Clause 5.2.3(a)(i) contended by the Vendors is without merits;

(h) There is no obligations for the Purchaser to comply with Clause 7.2.3 of the SSA before issuing the Escrow Release Notice;

(i) There is no requirement that the Purchaser's notice to the Vendors under Clause 5.2.3(b)(i) must be sent simultaneously with the Escrow Release Notice issued under Clause 5.2.3(b)(ii).

Conclusion

[77] Accordingly, this Court holds that the Escrow Release Notice was properly and validly issued by the Purchaser pursuant to the Escrow Agreement and accordingly, the Applicant is obligated to

release the Escrow Fund of RM 10 million to the Purchaser within 3 business days thereof.

[78] On the question of costs, I am of the opinion that the claims raised by the Vendors' Notice of Dispute are not beyond the competence of the Applicant as Escrow Agent to determine and or are something which the Applicant cannot determine after obtaining legal advice from counsel. There is nothing at all to show that the Applicant had addressed his mind to the SSA Parties' respective claims before deciding that an action in court is required to discharge its duties under the Escrow Agreement.

[79] For the aforesaid reason, I order that there be no order as to costs for this action.

Dated: 5 June 2020

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(**ONG CHEE KWAN**)
Judicial Commissioner
High Court of Malaya, Kuala Lumpur,
Commercial Division, NCC2.

COUNSEL:

1. Mr. Samuel Tan with Ms. Heng Chia Leng for Applicant.
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2. Dato V. Manokaran with Mr. Chung Phon Yew for 1st to 4th Respondents.
(Messrs. Kamaruzaman Arif, Amran & Chong (Shah Alam))

3. Ms. Farah Shuhada with Mr. Wong Yan Wei for 5th Respondent.
(Messrs. Zul Rafique & Partners (Kuala Lumpur))

CASE REFERENCE:

1. *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 CLJ 177.
2. *Bank Islam Malaysia Berhad v TMF Trustees Malaysia Berhad & Ors* [2019] 1 LNS 520.
3. *Harbottle v National Westminster Bank* [1978] QB 146.
4. *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149.
5. *McCarthy Tetrault v L.C. Holdings Ltd*. [1992] O.J. No. 1268.