**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR**

**IN THE FEDERAL TERRITORY, MALAYSIA**

**(COMMERCIAL DIVISION)**

**SUIT NO.: WA-22NCC-810-11/2023**

**BETWEEN**

**MALAYAN BANKING BERHAD**
**[Company No.: 196001000142 / (3813-K)] … PLAINTIFF**

**AND**

1. **Q DEVELOPMENT SDN BHD**
   **[Company No.: 201801009616 / (1271630-U)]**
2. **LOW MOI ING**
   **[Identity Card No.: 610127055358]**
3. **PHOA BOON TING**
   **[Identity Card No.: 590305016197]**
4. **CHAN JUI HIN**
   **[Identity Card No.: 660725135249] …DEFENDANTS**

# JUDGMENT

## Introduction

**[1]** This Court granted summary judgment to the Plaintiff in respect of outstanding sums under various banking facilities extended to the

1st Defendant which were guaranteed by the 2nd to the 4th Defendants.

**[2]** The Defendants' main contention is that by reason of challenges made by third parties against certain first party charges that the Defendants had created as securities in favour of the Plaintiff for the banking facilities, the banking facilities are void and or inoperative. I found this to be wholly without any merits. I found no *bona fide* issues to be tried to warrant the Plaintiff's claims going for trial.

**Background Facts**

**[3]** By a letter of offer dated 3.8.2018 ("**Letter of Offer**") which was duly accepted by the 1st Defendant, the Plaintiff approved the 1st Defendant's application for 4 term loans with the total limit of RM77,000,000.00 ("**Banking Facilities**") as follows:

| Facility(ies) Type | Amount/ Limit (RM) |
|---|---|
| TL 1 | 11,800,000.00 |
| TL 2 | 31,900,000.00 |
| TL 3 | 19,300,000.00 |
| TL 4 | 14,000,000.00 |
| **Total** | **77,000,000.00** |

**[4]** The Banking Facilities were later renewed and or revised *via*, amongst others the Supplementary Letter of Offer dated 7.9.2018 ("**Supplementary Letter of Offer**"), which was duly accepted by the 1st Defendant. The Banking Facilities were revised as follows:

| Facilities Types | Amount/Limit (RM) |
|---|---|
| TL 1 | 11,800,000.00 |
| TL 2 | 18,300,000.00 |
| TL 3 | 19,300,000.00 |
| TL 4 | 14,000,000.00 |
| TL 5 | 13,600,000.00 |
| **Total** | **77,000,000.00** |

**Facility Agreement**

**[5]** In respect of the Banking Facilities, the 1st Defendant entered into a Facility Agreement dated 28.2.2018 with the Plaintiff ("**Facility Agreement**").

**[6]** At all material times, for the purpose of, amongst others, the reimbursement for the purchase of lands or to partly finance the purchase of lands located at Taman Saujana in Mukim Plentong, Daerah Johor Bahru, the 1st Defendant and its solicitors had represented to the Plaintiff that the full purchase price or the relevant differential sums had been made for the purchase of the lands concerned.

**[7]** Acting on the faith and truth of the said representations, the Plaintiff granted the 1st Defendant the Banking Facilities and accepted land charges over the aforesaid lands as security for the Banking Facilities.

**[8]** Thus, as additional securities for the Banking Facilities, the 1st Defendant had executed the following securities in favour of the Plaintiff:

a) various first-party charges over residential lands located in Mukim Plentong, Daerah Johor Bahru ("**Land Charges**");
b) subordination of shareholder's advances dated 26.9.2018;
c) irrevocable letter of undertaking dated 26.9.2018;
d) letter of undertaking dated 18.10.2018; and
e) letter of undertaking dated 31.1.2019.

(collectively referred as "**the Security Documents**").

**[9]** The Banking Facilities were renewed and or revised by way of *inter alia* subsequent Supplementary Letters of Offer, Letters of Notification, and Letters of Renewal ("**Facility Documents**").

**[10]** More specifically, pursuant to a Supplemental Letter of Offer dated 14.6.2022 ("**the SLO-2**"), the Plaintiff offered, *inter alia*:

(a) to defer the monthly instalment payment for TL1 to TL5 for another 3 months from 1.5.2022 to 31.7.2022; or
(b) for the 1st Defendant to make full settlement of the outstanding loan amount for any titles under disputes within 6 months from the date such writ is served on the Plaintiff, failing which it will be an event of default;
(c) for the 1st Defendant to make full settlement of the outstanding loan amount for the 16 land titles involved in dispute ("**Disputed Titles**") within 6 months from 17.5.2022 or prior to

release of TL6/Bridging Loan, whichever is earlier, failing which it would be an event of default.

More will be said on the Disputed Titles below.

**[11]** By a Letter of Notification dated 22.7.2022, the Plaintiff informed the 1st Defendant to sign and return the original SLO-2 within 5 days from the date of the letter, failing which, the 1st Defendant was deemed to accept the terms and conditions in the SLO-2.

**[12]** It is not in dispute that the 1st Defendant did not respond to the Plaintiff's Letter of Notification.

**[13]** By a Letter of Notification dated 27.7.2022, the Plaintiff reminded the 1st Defendant to sign and return the original SLO-2 within 14 days from the date of the letter, failing which, the 1st Defendant was deemed to accept the terms and conditions in the SLO-2.

**[14]** Again, it is not in dispute the 1st Defendant did not respond to the Plaintiff's aforesaid Letter of Notification.

**Letters of Guarantee granted by the 2nd to 4th Defendants**

**[15]** In consideration of the Plaintiff granting and continue to grant the Banking Facilities to the 1st Defendant, the 2nd, 3rd and 4th Defendants executed the following guarantees whereby they unconditionally agreed to jointly and severally guarantee to the Plaintiff, payment of the amounts owing by the 1st Defendant under the Banking Facilities:

a) letter of guarantee dated 26.9.2018 by the 2nd, 3rd and 4th Defendant for TL1;
b) letter of guarantee dated 26.9.2018 by the 2nd, 3rd and 4th Defendant for TL2;
c) letter of guarantee dated 26.9.2018 by the 2nd, 3rd and 4th Defendant for TL3;
d) letter of guarantee dated 26.9.2018 by the 2nd, 3rd and 4th Defendant for TL4; and
e) letter of guarantee dated 26.9.2018 by the 2nd, 3rd and 4th Defendant for TL5.

(hereinafter, collectively referred to as "**Guarantees**").

**Disputed Titles**

**[16]** As regards the Land Charges, subsequent to the disbursement of the term loans, since 2019, multiple legal suits have been brought against the Plaintiff and the 1st Defendant by various third parties to nullify the Land Charges ("**Suits to Nullify the Land Charges**").

**[17]** The Suits to Nullify the Land Charges have resulted in the securities created in favour of the Plaintiff to be in jeopardy. This was what led to the Plaintiff to issue the SLO-2 to make full settlement of the outstanding sums in respect of the Disputed Titles.

**1st Defendant's Defaults**

**[18]** The 1st Defendant has defaulted in its obligations to make payments under the terms of the Banking Facilities and the Facility Agreement. Further, the Suits to Nullify the Land Charges also

constitute an event of default under the Security Documents.

**[19]** By a letter dated 20.9.2022 from the Plaintiff to the 1st Defendant, the Plaintiff informed the 1st Defendant that its TL accounts are in arrears and demanded the 1st Defendant among others, to settle all the arrears together with penalty interest charges and miscellaneous charges by 30.9.2022. The Plaintiff also demanded the 1st Defendant to settle the outstanding loan amount for the Disputed Titles by 16.11.2022. However, the 1st Defendant failed, refused and or neglected to comply with the said demand.

**Notices of Demand**

**[20]** By a notice of demand dated 25.10.2022 from the Plaintiff's solicitors, Messrs Skrine to the 1st Defendant, the Plaintiff demanded for the amount in arrears due and owing under the Banking Facilities in the sum of RM1,119,000.00 as at 1.10.2022 together with penalty interest charges in the sum of RM998.18 and miscellaneous charges in the sum of RM219,969.02 as at 30.9.2022 together with interests thereon to be paid within seven (7) days from the date thereof, failing which, the Plaintiff shall proceed to recall and terminate the Banking Facilities. However, the 1st Defendant failed, refused and/or neglected to comply with the said demand.

**[21]** By notice of demand dated 25.10.2022 from the Plaintiff's solicitors to the 2nd, 3rd and 4th Defendants, the Plaintiff demanded for the amount in arrears due and owing under the Banking Facilities in the sum of RM1,119,000.00 as at 1.10.2022 together with penalty

interest charges in the sum of RM998.18 and miscellaneous charges in the sum of RM219,969.02 as at 30.9.2022 together with interests thereon to be paid within seven (7) days from the date thereof, failing which, the Plaintiff shall proceed to recall and terminate the Banking Facilities. However, the 2nd, 3rd and 4th Defendants failed, refused and/or neglected to comply with the said demand.

**[22]** Subsequent to the notices of demand dated 25.10.2022, the 1st Defendant made some partial payments which were accepted by the Plaintiff without prejudice to its right to institute legal action in respect of the balance outstanding owing.

**[23]** By a letter dated 23.11.2022 from the Plaintiff's solicitors to the 1st Defendant which was copied to the 2nd, 3rd and 4th Defendants, the Plaintiff informed the 1st Defendant that the partial payments were utilised to settle the amount in arrears, penalty interest and miscellaneous charges for TL1, TL2, TL3 and TL5. The Plaintiff further demanded for the outstanding loan amount for the Disputed Titles and the amount in arrears due and owing under the Banking Facilities in the sum of RM970,700.00 as at 1.11.2022 together with penalty interest charges in the sum of RM1,641.62 and miscellaneous charges in the sum of RM190,983.13 as at 31.10.2022 together with interests thereon to be paid on or before 29.11.2022, failing which, the Plaintiff shall proceed to recall and terminate the Banking Facilities. However, the 1st Defendant failed, refused and or neglected to comply with the said demand.

**[24]** By a Notice of Recall and Termination dated 16.1.2023 from the

Plaintiff's solicitors to the 1st Defendant, the Plaintiff terminated and recalled the Banking Facilities and demanded full settlement of the entire outstanding amount under the Banking Facilities in the sum of RM61,877,507.36 as at 31.12.2022 and the outstanding loan amount for the Disputed Titles within seven (7) days from the date thereof. However, the 1st Defendant failed, refused and or neglected to comply with the said demand.

**[25]** By a Notice of Recall and Termination dated 16.1.2023 from the Plaintiff's solicitors to the 2nd, 3rd and 4th Defendants, the Plaintiff terminated and recalled the Banking Facilities and demanded full settlement of the entire outstanding amount under the Banking Facilities in the sum of RM61,877,507.36 as at 31.12.2022 and the outstanding loan amount for the Disputed Titles within seven (7) days from the date thereof. However, the 2nd, 3rd and 4th Defendants failed, refused and or neglected to comply with the said demand

**[26]** By a Notice of Demand dated 16.10.2023 from the Plaintiff's solicitors to the 1st Defendant, the Plaintiff demanded the full settlement of the entire outstanding amount under the Banking Facilities in the sum of RM66,312,236.05 as at 30.9.2023 within seven (7) days from the date thereof. However, the 1st Defendant failed, refused and/or neglected to comply with the said demand.

**[27]** By a Notice of Demand dated 16.10.2023 from the Plaintiff's solicitors to the 2nd, 3rd and 4th Defendants, the Plaintiff demanded the full settlement of the entire outstanding amount under the Banking Facilities in the sum of RM66,312,236.05 as at 30.9.2023 within seven (7) days from the date thereof. However, the 2nd, 3rd

and 4th Defendants failed, refused and/or neglected to comply with the said demand.

**Triable Issues**

**[28]** The Defendants contended that the Facility Agreement was subject to the Condition Precedent that Land Charges would be registered or perfected before the Plaintiff would disburse the loans.

**[29]** The Defendants contended that in breach of the said Condition Precedent, several of the Land Charges made in favour of the Plaintiff although registered or perfected, were being challenged. In particular, there are at least 16 on-going actions filed against the Plaintiff and the 1st Defendant in the High Court at Johor Bahru challenging the validity of the charges in favour of the Plaintiff under the Suits to Nullify the Land Charges.

**[30]** By reason of the aforesaid, the Defendants contended that in respect of these Disputed Titles, the charges that are intended to be security for the Facility Agreement are impaired or potentially impaired to the detriment of the Defendants, particularly, the 2nd to the 4th Defendants who are sued in their capacity as guarantors for the 1st Defendant's obligations as Borrower under the Facility Agreement.

**[31]** The Defendants contended that on a proper construction of Schedule 2 of the Facility Agreement, the proper and effective registration of charges was *inter alia* a Condition Precedent that must be fulfilled prior to the Plaintiff rendering the facility available

to the 1st Defendant. This, according to the Defendants, rendered the Facility Agreement void and or inoperative. The Plaintiff, as an established financial institution ought not to have released any funds without the security documents properly registered or perfected especially where the Facility Agreement mandated the perfection of the security as a Condition Precedent.

**[32]** The Defendants further contended that the Plaintiff had breached its duty to conduct due diligence on the lands proffered by the Defendants to be charged as security and that had the Plaintiff conducted land searches, the Plaintiff would have discovered the existence of private caveats lodged against these lands. More specifically, the Defendants contended that the Plaintiff is in *pari delicto* when the Plaintiff failed or neglected in its responsibilities and or statutory obligations to conduct proper due diligence before entering the Facility Agreement with the 1st Defendant.

**[33]** According to the Defendants, the Plaintiff's failure or omission to conduct due diligence exercises is a contravention of the Financial Services Act 2013 ("**FSA**"), in particular paragraphs (1) and (2)(b) of Schedule 7 of FSA which provide for the List of Prohibited Business Conduct for financial institutions as follows:

> "1. Engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive in relation to the nature, features, terms or price of any financial service or product.
>
> 2. Inducing or attempting to induce a financial consumer to do an act or omit to do an act in relation to any financial service or product by—

…

(b) dishonestly concealing, omitting or providing material facts in a manner which is ambiguous; or …"

**[34]** Learned counsel for the Defendant contended that it is "utterly unreasonable, irresponsible and unacceptable" for the Plaintiff to have relied on the representations of the 1st Defendant and or the 1st Defendant's solicitors prior to entering the Facility Agreement that the full purchase price or the relevant differential sums had in fact been paid in respect of the lands proffered as security for the Facility Agreement.

**[35]** In fact, the Defendants contended that the Plaintiff did have actual knowledge that private caveats were lodged against some of the lands and that residential houses were erected on some of these lands. This ought to have alerted the Plaintiff to the possibility that there were or would be issues with the Land Charges on these lands.

**[36]** Based on the aforesaid, the Defendants contended that the Plaintiff had chosen to proceed to enter the Facility Agreement with the 1st Defendant which the Defendants submitted meant that the Plaintiff had engaged in conduct amounting to "inducing or attempting to induce the 1st Defendant, as a financial consumer, to accept the facility granted by the Plaintiff" and or "dishonestly concealing material facts" which directly violated Schedule 7 of FSA.

**[37]** Based on the same failure to exercise due diligence, the Defendants also contended that the Plaintiff had also breached its undertaking

as provided in Clause 21.2(e) of the Facility Agreement which stipulates:

> (e) Licences and Conduct of Business
>
> It will obtain all necessary licences and approvals and comply with all regulations relating to the carrying on of its business and will carry on its business with due diligence and efficiency and in accordance with sound financial and business standards and practices and will furnish to the Lender all information which the Lender may reasonably request in connection with such business;

**[38]** Other than the issues relating to the Disputed Titles, the Defendants contended that the Supplementary Letter of Offer dated 14.6.2022, i.e. the SLO-2, that changed the original terms and conditions of the Facility Agreement has never been agreed and or signed by the Defendants. By this, the Defendants contended that the 1st Defendant had not categorically accepted the variation of the terms and conditions therein, in particular, the change to the interest rates stated.

## Court's Considerations

**[39]** At the outset, it must be highlighted that the Defendants have never disputed that they had enjoyed the loans extended to the 1st Defendant under the Facility Agreement and had in fact admitted to their indebtedness and liabilities towards the Plaintiff. This is evidenced by the fact that the 1st Defendant has made part-payments to the Plaintiff, which were accepted by the Plaintiff without prejudice.

**[40]** In fact, learned counsel for the Defendants candidly conceded that the Defendants are not disputing that the outstanding sums are due but claimed that by reasons of the issues relating to the Disputed Titles arising from the Suits to Nullify the Land Charges, they have raised triable issues that merit the matter going for trial.

**[41]** With respect, I completely disagree.

**[42]** To begin, it is not in dispute that the provision of the Land Charges was indeed a Condition Precedent to the Facility Agreement. However, it is also expressly stipulated in the Facility Agreement that the Condition Precedent are inserted for the sole benefit of the Plaintiff and that the Plaintiff may waive in whole or in part the Condition Precedent. Further, the effect of any non-fulfilment of the Condition Precedent only means that the Plaintiff may choose to terminate or suspend the Facility. This is clear from Clause 3 of the Facility Agreement which is reproduced below:

> **3. AVAILABILITY**
>
> **3.1 Conditions Precedent**
>
> The Facility shall become available to the Borrower on the date the Lender has received the documents and evidence listed in **Schedule 2** in each case in form and content satisfactory to the Lender and upon fulfilment of the conditions set out in **Clause 4.1** and the Letter of Offer.
>
> **3.2 Non-fulfilment of Conditions Precedent**
>
> Pending fulfilment in the manner satisfactory to the Lender of the conditions precedent referred to in **Clause 3.1**, the Lender may at its absolute discretion, terminate the Facility or suspend the utilisation of the Facility

**3.3 Waiver of Conditions Precedent**

The terms and conditions set out in **Schedule 2** hereof are inserted for the sole benefit of the Lender and may be waived by the Lender in whole or in part with or without terms or conditions without prejudicing the right of the Lender to assert such terms and conditions in whole or in part in respect of subsequent utilisation of the Facility.

**[43]** More importantly, by Enclosure 11 which is the Plaintiff's affidavit in reply, the Plaintiff has exhibited documents evidencing that all the Land Charges had been duly and validly created and registered in favour of the Plaintiff before the release of any loan sum to the 1st Defendant. The fact that *subsequent* to the Legal Charges, legal actions have been initiated by third parties challenging the same does not negate the fact that the Condition Precedent had been satisfied prior to the disbursement of the loan sums under the Facility Agreement.

**[44]** Thus, the premise of the Defendants' contention that the Condition Precedent had not been satisfied simply does not pass muster.

**[45]** In any case, with respect to learned counsel for the Defendants, I find that the contentions of the Defendants that it is "utterly unreasonable, irresponsible and unacceptable" for the Plaintiff to have relied on the representations of the 1st Defendant and or the 1st Defendant's solicitors that the full purchase price or the relevant differential sums had been paid in respect of the lands proffered as security for the Facility Agreement prior to entering the Facility Agreement with the 1st Defendant to be incredulous.

**[46]** To be sure, the fact that the Plaintiff had relied on the representations of the 1st Defendant and or the 1st Defendant's solicitors, does not mean that the Plaintiff did not conduct its own due diligence exercise. This aside, it seems to me incredulous that counsel for the Defendants is contending that the 1st Defendant and or the 1st Defendant's solicitors could *not* be relied upon as regards the representations that they made to the Plaintiff regarding the Land Charges. More incredible is the fact that the Defendants are seeking to rely on their misrepresentations as a ground to refuse paying the Plaintiff the outstanding sums under the Facility Agreement.

**[47]** The 1st Defendant had expressly represented that it is the lawful owner or purchaser of the Charged Lands and had paid the relevant purchase prices or differential sums for the purchase of the lands concerned. The Defendants' representations that the Land Charges can be validly created can be found in Clause 5 of the Charge Annexures which can be seen in Exhibit "**A-5**" of the Plaintiff's Additional Affidavit (Encl.11 to 17).

> **5. REPRESENTATIONS AND WARRANTIES**
>
> **5.1 Representations and Warranties**
>
> The Chargor acknowledges that the Lender has entered into the Facility Agreement and agreed to accept this Charge as security on the basis of and in full reliance on representations by the Chargor in the following terms and the Chargor now represents and warrants to the Lender that:-

(a) where applicable, the Chargor is a company duly incorporated with limited liability under the laws of Malaysia;

(b) where applicable, the Constitution of the Chargor include provisions which give power, and all necessary corporate authority has been obtained and action taken, for the Chargor to own the Land, its assets, carry on its business and operations as they are now being conducted, and execute and deliver, and perform its obligations under this Charge and this Charge constitutes valid and binding obligations of the Chargor enforceable in accordance with its terms;

(c) where applicable, the execution and delivery of this Charge, the exercise of any of its rights or the performance of any of its obligations under this Charge does not or will not contravene or constitute a default under, or cause to be exceeded any limitation on the Chargor or the powers of its directors imposed by or contained in (i) any law judgment, order, licence, permit or consent by which the Chargor or the Land or any of its assets is bound or affected; (ii) its Constitution, or (iii) any agreement to which it is a party or by which the Land or any of its assets is bound:

(d) where applicable, no authorisation, approval, consent, licence, exemption, registration, recording, filing or notarisation and no payment of any duty or tax and no other action whatsoever which has not been duly and unconditionally obtained, made or taken is necessary or desirable to ensure the validity, enforceability or priority of

the liabilities and obligations of the Chargor and the rights of Lender under this Charge;

(e) the Chargor is the registered and beneficial owner of, and has good title to, the Land;

(f) no event has occurred which constitutes, or which with the giving of notice and/or the lapse of time would constitute, a contravention of, or default under, any agreement or instrument by which the Chargor or the Land or any of its assets is bound or affected, being a contravention or default which might either have an adverse effect on the Land, its business, assets or condition or which will adversely affect its ability to observe or perform its obligations under this Charge.

(g) no litigation, arbitration or administrative proceeding or claim which might by itself or together with any other such proceedings or claims either have an adverse effect on the Land, the Chargor's business, assets or condition or which will materially and adversely affect its ability to observe or perform its obligations under this Charge, is presently in progress or pending or, to the best of the knowledge, information and belief of the Chargor, threatened against the Chargor, the Land or any of its assets;

(h) the Land is not affected by any Security Interest, and the Chargor is not a party to, nor is the Land bound by, any order; agreement or instrument under which the Chargor is or in certain events may be, required to create, assume of permit to arse any Security Interest;

(i) all necessary returns have been delivered by or on behalf of the Chargor to the relevant taxation authorities and the Chargor is not in default in the

payment of any taxes and no claim is being asserted with respect to taxes which as not disclosed in the Chargor's financial statements;

(j) no bankruptcy or winding-up or insolvency proceedings have been commenced against the Chargor, and

**[48]** At all material times, the Plaintiff had no reasons to suspect that the 1st Defendant's titles to the Charged Lands would be subject to challenge. In fact, the 1st Defendant's own position in the Suits to Nullify the Land Charges has consistently been that the Plaintiff is in law a *bona fide* subsequent purchaser. The 1st Defendant also contended that no legal action should be taken against the Plaintiff as the lawful chargee of the lands concerned. This can be seen in the defences filed by the 1st Defendant in those suits.

**[49]** In truth, the actions taken by third parties in the High Court at Johor Bahru to challenge the Land Charges, as rightly pointed out by learned counsel for the Plaintiff, are irrelevant to the Plaintiff's claims in this action. The Defendants have benefitted from the Banking Facilities extended by the Plaintiff but have since defaulted in making the necessary repayment. This default constitutes a clear breach of the terms governing the Banking Facilities,

**[50]** The fact that the Land Charges are now being contested in the High Court at Johor Bahru to nullify the Land Charges, if at all, suggests that it was the 1st Defendant who had concealed or omitted material facts to the Plaintiff when presenting the said lands for the creation of the Land Charges in favour of the Plaintiff.

**[51]** The Defendants cannot be permitted to claim that the Plaintiff is in *pari delicto* when in truth it is the Defendants who had concealed or omitted material facts to the Plaintiff in respect of the Land Charges.

**[52]** I also did not find any merits to the Defendants' contention that by reason of the challenge to the Land Charges, their security has been impaired, thereby prejudicing their rights as guarantors. This is because, if indeed the security is found to be impaired, the reasons are caused by the Defendants themselves in failing to provide the Plaintiff with a valid and unencumbered security.

**[53]** As regards the contention relating to the breach of undertaking on the Plaintiff's part, Clause 21.1(e) of the Facility Agreement in fact referred to the the Borrowers' undertaking (in this case, the Defendants) and not the Plaintiff's undertaking. This is an example of the frivolity of the Defendants' contention.

**[54]** As regards the Defendants' contention that the 1st Defendant never signed the SLO-2 and as such the terms and conditions of the SLO-2 do not bind the 1st Defendant, this is also clearly devoid of any merits. Clause 30.14 of the Facility Agreement provides that the Plaintiff is entitled to review and vary the terms of the Banking Facilities and that the consent of the 1st Defendant is unnecessary. Clause 30.14 of the Facility Agreement is produced below:

> **30.14 Variation of Terms**
>
> It is hereby expressly agreed and declared by the parties hereto that notwithstanding any of the provisions of this Agreement to the contrary, the provisions and terms of this Agreement may at any time and from time to time be varied

> or amended by means of letters or such other means as the parties may agree from time to time and thereupon such amendments and variations shall be deemed to have been amended or varied accordingly and shall be read and construed as if such amendments and variations have been incorporated into and had formed part of this Agreement at the time of execution hereof.

**[55]** Accordingly, it is clear that the Banking Facilities granted by the Plaintiff to the 1st Defendant remain valid even though the 1st Defendant did not sign the SLO-2, which contained the review and variation of terms of the Banking Facilities.

**[56]** In fact, it is undisputed that the Plaintiff had issued two Letters of Notification dated 22.7.2022 and 27.7.2022, notifying the 1st Defendant that the Plaintiff would deem the 1st Defendant to have accepted the terms and conditions stated in the SLO-2 if the Plaintiff did not receive the 1st Defendant's reply within the stipulated timeline. The 1st Defendant had not replied objecting to the terms at all.

**[57]** On the variation to the rate of interest charged, the mutually agreed terms in the Letter of Offer and Facility Agreement which were duly accepted and signed by the 1st Defendant expressly stipulated that the Plaintiff has an absolute discretion to review the Banking Facilities including the variation of interest rate and repayment period. The said review or variation can be done by the Plaintiff by way of the agreed method of communications which includes the issuance of the Supplementary Letter of Offer and Letter of Notification.

**[58]** On this point, the Court of Appeal in *OCBC Bank (M) Bhd v Prolink Marketing Sdn Bhd and another appeal* [2023] 2 MLJ 851 has held thus:

> "[48] Given this context, we do not think that the appellant's conduct in performing a review of the facilities granted to the respondent borrower was in any manner irregular or unwarranted. **In any event, and again as is standard, the relevant facilities agreement and security documentation would invariably give the right to review on the lender. There is no exception here. This position is so well-embedded in banking practice that we need only mention that this right to review is spelt out among others in the letter of offer dated 30 July 2015 and the facilities agreement dated 28 January 2014**.
>
> [49] For example, cl 3(3) of the facilities agreement reads as follows:
>
> > (3) No obligation to advance
> > … **the Borrower agrees that the Facilities may be reviewed from time to time and at any time by the Bank** irrespective whether or not an Event of Default has occurred. Upon such review, the Bank may impose such terms and conditions as it deems fit including without limitation, reducing the principal limits of the credit facilities, or require settlement of the Indebtedness. The Bank is under no obligation either at law or in equity to make or to continue to make available the Facilities or any part thereof to the Borrower.

[50] Similarly in cl(m) of the RP4 letter of offer dated 8 April 2015 it is stated thus:

> Review and Termination
> Notwithstanding anything herein stated, **the Facility may be recalled at the Bank's discretion at any time and payable on demand (without assigning any reason therefor) irrespective of whether or not any Repurchased Event has occurred and shall be reviewed annually or at such times as may be decided by the bank at its sole and absolute discretion. Upon review the Bank may impose any further conditions at the Bank's sole discretion**.

[51] **It goes without saying that these are contractual terms which are plainly binding on the parties given that it is so well-established that upon execution of an agreement, parties are bound by the entire document, in the absence of fraud or misrepresentation, and even regardless of whether a party has read the document or not (see Serangoon Garden Estate Ltd v Marian Chye [1959] 1 MLJ 113**)."

## Certificate of Indebtedness

**[59]** In the present case, Clause 30.1 of the Facility Agreement and Clause 11 of the Letters of Guarantee provide that such a certificate of indebtedness is conclusive evidence for the amount due and owing by the Defendants, including for legal proceedings.

**[60]** The Plaintiff has issued such Certificate of Indebtedness and the same is binding on the Defendants and has conclusively proven the amounts due and owing by the Defendants to the Plaintiff.

**Conclusions**

**[61]** Accordingly, it is my judgment that the Defendants have not demonstrated to this Court that there are *bona fide* triable issues in this present case to merit the Plaintiff's claims to be determined at a trial.

**[62]** For the reasons given above, I allowed the Plaintiff's claims for summary judgment under Enclosure 8 with costs fixed at RM 10,000.00 subject to allocator.

Dated the 4th day of July 2024

**ONG CHEE KWAN**
Judge of the High Court of Malaya
High Court of Kuala Lumpur, NCC2 & Admiralty

**Counsel:**

1. Ms. Aufa Radzi together with Anson Liow and Ms. Natasha Neena Yau Hwee Lynn (PDK) for Plaintiff
   *Messrs. Skrine (Kuala Lumpur)*
2. Mr. S. K. Liow together with Jennifer Lai and Sim Qi Wei (PDK) for Defendants
   *Messrs. Liow & Co (Petaling Jaya)*

**Case Reference:**

1. *OCBC Bank (M) Bhd v Prolink Marketing Sdn Bhd and another appeal* [2023] 2 MLJ 851

**Legislation Reference:**

1. Paragraphs (1) and (2)(b) of Schedule 7 of Financial Services Act 2013