MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK

AT KOTA KINABALU

SUIT NO.: BKI-22NCvC-16/2-2020

BETWEEN

HANZAC BINTANG SDN BHD

(COMPANY NO. 666958-W) **… 1ST PLAINTIFF**

KEVIN CHAN MING HAAN

(NRIC NO. 850520-12-5239) **… 2ND PLAINTIFF**

AND

MA PING

(REPUBLIC OF CHINA

PASSPORT NO. G50012301) **… 1ST DEFENDANT**

LI XUE FEI

(REPUBLIC OF CHINA

PASSPORT NO. G24576181) **… 2ND DEFENDANT**

(by Original Action)

BETWEEN

MA PING

(REPUBLIC OF CHINA

PASSPORT NO. G50012301) **… 1ST PLAINTIFF**

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PASSPORT NO. G24576181) **… 2ND PLAINTIFF**

AND

HANZAC BINTANG SDN BHD

(COMPANY NO. 666958-W) **…1ST DEFENDANT**

KEVIN CHAN MING HAAN

(NRIC NO. 850520-12-5239) **… 2ND DEFENDANT**

FREDERICK CHAN MEANG CZAC

(NRIC NO. 810811-12-5865) **… 3RD DEFENDANT**

(Action by way of Counterclaim)

BEFORE THE HONOURABLE

HIGH COURT JUDGE

JUSTICE LEONARD DAVID SHIM

GROUNDS OF DECISION

Introduction

[1] This is an action by the Plaintiffs in the counterclaim (the Plaintiffs) for fraud and/or misrepresentation and/or breach of the oral partnership agreement and/or Joint Venture Agreement by the Defendants in the counterclaim (the Defendants) in inducing the Plaintiffs into investing in the Care Centre project and transferring RM3 million into the Defendants' account.

[2] The Defendant's defences are that the Plaintiffs' claim is caught by the principle of res judicata. Further, the purported oral partnership agreement is a recent invention of the Plaintiffs and should not be allowed as it goes against the parol evidence rule pursuant to ss.91 and 92 of the Evidence Act 1950. The Defendants also contend that the Plaintiffs' claim is time barred pursuant to Item 94 of the Sabah Limitation Ordinance.

[3] The following were the witnesses called by the Plaintiffs and the Defendants during the trial of this case.

Plaintiffs

(a) The 2nd Plaintiff, Li Xue Fei (PW1) – Witness statement marked as PWSWS. See the notes of proceedings from pages 4 to 46.

Defendants

(b) The 3rd Defendant, Frederick Chan Meang Czac (DW1) - Witness statement marked as DW1-WS. See the notes of proceedings from pages 47 to 239.

(c) Goh Say Keong (DW2) (subpoenaed witness) - civil and structural engineer from Wang Harun & Goh - see the notes of proceedings from pages 248 to 259.

(d) Chong Choung Henn @ Samuel (DW3) - Witness statement marked as DW3-WS. See the notes of proceedings from 261 to 276.

Factual Background

[4] The factual background of this case as narrated by the Plaintiffs is contained in PW1-WS. Sometime on or around 24.06.2011, Ma Ping

and PW1 flew to Kota Kinabalu, Sabah, Malaysia to meet up with Chan Choon Huat and his two sons. Upon their arrival at KK, they were met at the airport by Chan and his two sons, Kevin and Frederick. In the same evening, Chan and his two sons invited the Plaintiffs for a dinner. During this dinner, they informed the Plaintiffs that they were carrying out property development businesses through their family controlled company, namely the 1st Defendant (by Counterclaim) (hereafter, "Hanzac"). They informed Ma Ping and PW1 that Hanzac was planning to develop a commercial project consisting of shop lots in Inanam called "Chinatown". They also informed the Plaintiffs that they owned two parcels of land which were also held in their family company, Hanzac. The lands were located close to a major hospital and they said that this could be suitable to carry out health related businesses. At the end of the dinner, the Plaintiffs were informed by Chan and Frederick that the following morning they would bring the Plaintiffs to Inanam to brief them further on their proposal and plans for the "Chinatown" project and later to view the two parcels of land.

[5] On the following day, the Plaintiffs were driven by Frederick to Hanzac's office at Inanam. After hearing the briefing on the "Chinatown" project at Inanam, the Plaintiffs were not impressed

with the proposed development and informed Kevin, Frederick and Chan of their impression. Frederick then drove the Plaintiffs to Damai to view the two parcels of land, namely the lands held under TL017519345 (hereafter, "Land A") and TL017519952 (hereafter, "Land B"). On arrival at Damai, the Plaintiffs noticed that the lands are located in a populated area close to a major hospital. The Plaintiffs then enquired whether it was possible to construct and carry out the business of a commercial postnatal care center on the two parcels of land. Kevin and Frederick then informed the Plaintiffs that the lands were suitable for establishing a commercial postnatal care center and that it would be profitable partnership venture between the Plaintiffs and them if the Plaintiffs agree to enter into this business.

[6] Kevin and Frederick orally informed the Plaintiffs of the following, namely:

i. That the rough estimated investment for the business of a postnatal care center was roughly around RM5 million.

ii. That the Plaintiffs were offered 60% interest in the proposed partnership whilst they would hold 40% interest of the remaining through their family company, Hanzac.

iii. For our 60% interest in the business, the Plaintiffs were required to pay a cash contribution of RM3 million towards the business whilst Kevin and Frederick's contribution to the business was to provide the two parcels of land held in the name of Hanzac which they had valued at RM2 million.

[7] The Plaintiffs informed Kevin and Frederick that since they are foreigners and are unfamiliar with the local laws and regulations, the Plaintiffs had to rely completely on them as their local partners to take all necessary steps to ensure that the postnatal care center was constructed and managed in accordance to the local laws and regulations. The 2nd and 3rd Defendants assured the Plaintiffs they would be responsible for obtaining all necessary approval required from the authorities for the purpose of carrying out their partnership business and developing the two parcels of land into a commercial postnatal care center. They further assured the Plaintiffs that the Plaintiffs could trust them as their local partners to carry out and manage the business profitably. The Plaintiffs were further informed by Frederick that he and Kevin would incorporate a local limited company for the purpose of running and managing the postnatal care center. They also further informed the Plaintiffs that they will prepare a joint venture agreement between themselves in the name

of Hanzac and the Plaintiffs to reflect the partnership agreement agreed between themselves.

[8] Kevin and Frederick told the Plaintiffs that if they agree to their terms of the partnership which they had orally proposed, the Plaintiffs must immediately pay to them through their family company a sum of RM50,000.00 and upon payment they would also confirm the terms of this agreement between the Plaintiffs. Upon the 2nd and 3rd Defendants' request, Ma Ping immediately paid the sum of RM50,000.00 to Hanzac. See ABODB at pages 847 - 848.

[9] Some days after the 25.06.2011, the Plaintiffs travelled back to China and sometime around the 14.07.2011, PW1 received an email from Frederick attaching a draft Joint Venture Agreement which PW1 believed was meant to reflect the agreement during their previous visit to KK. The Plaintiffs also received the draft Trust Deed through email from Frederick on 14.07.2011. See ABODB at pages 849 - 882.

[10] Ma Ping and PW1 had fully paid their contribution towards the partnership between June 2011 and June 2012. The particulars of payment are as follows:

Particulars of payment

No.	Date	Particulars	Amount
1	25.06.2011	Paid through Hanzac	RM50,000.00
2	05.08.2011	Paid through Kevin	RM279,008.88
3	05.08.2011	Paid through Frederick	RM300,169.88
4	05.08.2011	Paid through Hanzac	RM250,000.00
5	15.09.2011	Paid through Tan Poh Chee	RM307,377.00
6	15.09.2011	Paid through Chan	RM306,836.50
7	28.11.2011	Paid through Chan	RM1,360,000.00
8	28.11.2011	Paid through Hanzac	RM149,946.00
9	26.06.2012	Paid through Frederick	RM500,000.00
		Total	RM3,503,338.26

Refer to the ABODB at pages 847, 848, 898 - 907, 925 - 935 and 955 - 956 for the relevant payment receipts, bank slips, bank statements and the respective English translations of the same. The Defendants (by Counterclaim) had also acknowledged this payment by issuing a statement of account dated 28.11.2011. See ABODB at page 936.

[11] The RM500,000.00 was part of a loan of RM2,000,000.00 given to Frederick sometime on or around 26.06.2012. However, Frederick claimed that the RM500,000.00 had been utilised towards the partnership and as a result the Plaintiffs are claiming for this sum of RM500,000.00 on Frederick's admission that it was treated by him as the Plaintiffs contribution to the partnership. See ABODB at pages 145 - 146.

[12] Despite receipt of RM3.5 million from the Plaintiffs, the Defendants (by Counterclaim) refused to carry out their obligations to do the following: -

i. Failure to obtain the necessary planning approval for the construction of a commercial postnatal care center over the two parcels of land; and

ii. Failure to construct and complete the postnatal care center on the two parcels of land by 10.01.2013 or any later date.

[13] On 21.05.2020, PW1 was served with the Writ and Statement of Claim (hereafter, "Writ and Claim") by the 1st and 2nd Plaintiffs (by Original Action). In this action, the Plaintiffs (by Original Action) claimed from Ma Ping and PW1 a sum of RM856,661.74 as the outstanding contribution towards the capital of the partnership business. In view of the Plaintiffs' payment of at least RM3 million to the Defendants (by Counterclaim), their claim was clearly dishonest and fraudulent. After PW1 received the Writ and Claim, she consulted with her solicitors and after reviewing all the past conducts of the Defendants (by Counterclaim), the Plaintiffs then realised that the Joint Venture Agreement dated 10.01.2012 (hereafter, "JVA") was never meant to reflect the oral agreement made between Ma

Ping and PW1 and the Defendants (by Counterclaim) on the 25.06.2011. The Plaintiffs concluded that the JVA was used merely to induce the Plaintiffs into paying the sum of RM3 million to the Defendants (by Counterclaim).

Ma and Li fully paid RM3 million

[14] It is submitted by the Plaintiffs that the only obligation of Ma and Li in the oral partnership agreement and JVA was to contribute a sum of RM3 million towards the capital of the partnership business, which they had duly fulfilled through the various transfers of monies to the Defendants and other individuals nominated by them to receive them.

[15] That by the 28.11.2011, Ma and Li had fully discharged their obligation and paid a sum totaling RM3,003,338.26 towards the capital of the partnership business as set out in the table below:

Particulars of payment

No.	Date	Particulars	Amount
1	25.06.2011	Paid through Hanzac	RM50,000.00

2	05.08.2011	Paid through Kevin	RM279,008.88
3	05.08.2011	Paid through Frederick	RM300,169.88
4	05.08.2011	Paid through Hanzac	RM250,000.00
5	15.09.2011	Paid through Tan Poh Chee	RM307,377.00
6	15.09.2011	Paid through Chan Choon Huat	RM306,836.50
7	28.11.2011	Paid through Chan Choon Huat	RM1,360,000.00
8	28.11.2011	Paid through Hanzac	RM149,946.00
		Total	RM3,003,338.26

[16] The above payments towards the capital of the partnership business were set out in a table under Q&A12 of PW1-WS. All these payments were further supported by contemporaneous documents of payment receipts, bank slips and bank statements at Bundle B3 p. 847, 848, 898 - 907 and 925 - 935 respectively.

[17] The total payment of RM3,003,338.26 which were made by Ma and Li towards the capital of the partnership business was further confirmed by Hanzac through a Statement of Account dated 28.11.2011 produced by Hanzac (See: Bundle B3 at p. 936) (hereinafter, "1st Statement of Account"). The original of the 1st Statement of Account was also produced in court and marked as ID6.

[18] It is submitted by the Plaintiffs that ID6 should now be admitted as Exhibit for the following reasons:

i. The copy of the ID6 of the 1st Statement of Account had formed part B of the Agreed Bundle of Documents at p. 936 of Bundle B3.

ii. The original of the 1st Statement of Account was tendered during cross-examination of DW1 (See: the Notes of Proceedings (hereinafter, "NOP") at p. 184 lines 4607 - 4608).

iii. Despite the Defendants' counsel objection to the original (ID6), Frederick during cross examination did not dispute that it was not an original. When asked whether it was the original, he merely stated that he did not know (See: NOP at p. 183 – 184 Q&A275).

Therefore, in view of the above, the Plaintiffs contend that the Court should admit ID6 as the original of the 1st Statement of Account and mark it accordingly.

[19] In addition to the sum of RM3,003,338.26, Frederick had claimed that a sum of RM500,000.00 subsequently paid to him on 26.06.2012 by Ma and Li was utilised towards the construction of

the Care Centre (See: Bundle B3 at p. 955 - 956). For this reason, the Plaintiffs regard this RM500,000.00 as their additional contribution paid towards the capital of the partnership business.

The state of the construction on 'Land A'

[20] Following the oral partnership agreement of 25.06.2011, the Defendants had sometime in September 2011 commenced construction of the ground slab purportedly for a Care Centre on Land A. Pictures of the works being carried out were sent to Ma and Li on 08.09.2011 (See: Bundle B3 at p. 915 - 922). A few days later, Frederick wrote to Ma and Li requesting for further payments of the balance of the capital contribution of RM3 million (See: Bundle B3 at p. 923 - 924).

[21] That after the construction of the grounds slab and columns on Land A, construction work on Land A ceased on 01.12.2011 following a "Stop Work Order" from DBKK. No further work was being carried out on Land A following this stoppage.

[22] DBKK had ordered a stoppage of work on Land A after receiving a complaint from the neighbour that the works on Land A were illegally

constructed without complying with the approved set back line of 4 meters (157 inches) as shown in the building plans exhibited as P1(1-3). Instead, Hanzac had constructed the grounds columns a mere 33 inches away from the common boundary with the neighbour's land.

[23] By the time of the above stoppage of work, the Plaintiffs contends that they had fully paid their contribution of RM3 million towards the capital of the partnership business (See: paragraph 19 above of the 1st Statement of Account).

2015 suit

[24] In view of the abandonment of construction works on the Care Centre since 01.12.2011 and the absence of any indication that the illegal works on Land A will be demolished and replaced by works approved by DBKK, Ma and Li commenced legal action against Hanzac in January 2015 (hereinafter, "the 2015 suit").

[25] In the 2015 suit, the Plaintiffs claimed that the Hanzac were in breach of their undertaking in the JVA to complete the construction

of the Care Centre within 12 months from the date of the JVA and prayed inter alia for return of the capital contribution of RM3 million.

[26] In the same suit, Hanzac counter-claimed for the costs allegedly incurred by them in the construction of the Care Centre in the sum of RM3,078,084.53.

[27] After the trial in the 2015 suit, the trial judge dismissed the Plaintiffs' claim. The trial judge allowed Hanzac's Counterclaim against Ma and Li in the sum RM856,661.74 based on the learned trial judge's finding that the Plaintiffs had only contributed RM2,143,338.26 towards the capital of the JV business (See: Bundle B3 at p. 833 lines 548 - 552).

[28] The Plaintiffs appealed against the learned trial judge's above finding on the Counterclaim. The Court of Appeal on 14.11.2018 allowed the Plaintiffs' appeal and set aside the judgment for the sum of RM856,661.74 (See: Bundle B3 at p. 978 - 979).

[29] Since the decision of the Court of Appeal in November 2018, the works on Land A remained and continued to be abandoned.

Proposal to sell Lands A and B to the Plaintiffs

[30] Despite the oral partnership agreement and the JVA, the Defendants continued to improperly treat Lands A and B as properties belonging to Hanzac and Kevin instead of the partnership. In March 2019, the Defendants offered to sell to the Plaintiffs Lands A and B on an "as is where is" basis for a sum of RM5 Million pay to the Defendants (See: DBOD1 at p. 1 – 2).

[31] By a letter from the Plaintiffs' then solicitors, Messrs. P. K Lim & Co. dated 18.07.2019, the Plaintiffs rejected the Defendants proposal (See: para 3.2 in DBOD1 at p. 11 – 12).

The Present Suit

[32] Following the Plaintiffs' rejection of the Defendants' above offer to sell to them Lands A and B for RM5 Million, Hanzac and Kevin Chan commenced the present action (as the Plaintiffs in the Original Action).

[33] That the Plaintiffs had in the course of preparing their defences to the Defendants' claim in the Original Action concluded that the claim

was frivolous and vexatious and was merely another dishonest attempt at pressurizing the Plaintiffs into making further payments to them for the following reasons:

i. That their prayer (1)(a) claiming from Ma and Li the sum of RM856,661.74 was clearly frivolous as the Defendants' claim for this exact sum was rejected by the Court of Appeal in the 2015 suit.

ii. That their prayer (1)(b) was frivolous in that under the JVA, the sum of RM3 million which was paid by the Plaintiffs, were deemed sufficient not only for the purpose of constructing the Care Centre but also for the renovation costs of the Care Centre and working capital for the partnership business.

iii. That their prayer (1)(c) for an order that upon the completion of the Care Centre and the issuance of the occupation certificate, Lands A and B be sold at market value and the proceeds be distributed in the ratio of 60:40 was wholly without basis and contrary to the agreement that Lands A and B are Hanzac's capital contribution to the intended partnership and JVA.

iv. That their prayer (1)(d) for damages for the loss of use of two lands and a completed Care Centre in the circumstance of this

case was clearly frivolous and vexatious, as Lands A and B are assets of the partnership and Damai Care Centre, and not Hanzac or Kevin.

[34] It is submitted by the Plaintiffs that from the totality of the evidence, the Plaintiffs (by Counterclaim) have shown on a balance of probabilities that the Defendants (by Counterclaim) had misrepresented to the Plaintiffs that they would form a partnership and a JVA for the purpose of fraudulently inducing the Plaintiffs into paying the sum of RM3 million. The Plaintiffs refer to the Federal Court case of **Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584** and the judgment of Richard Malanjum CJSS at page 585 H :

"if fraud is the subject in a civil claim, the standard of proof is on the balance of probabilities."

[35] It is also shown on a balance of probabilities that the Defendants (by counterclaim) had never intended to carry out a postnatal care business on the terms of the oral partnership agreement or the JVA.

[36] Alternatively, if the Defendants had initially intended to carry out the partnership business, which is denied, the Defendants as the intended partner then owes the Plaintiffs a duty to act in utmost good faith and such duty was further reinforced under the JVA:

> *"The parties further agree to be fair just and faithful in their dealings with each other and to act in the best interests of the JV and each other…".* (See: Clause 1.1(b) of the JVA)
>
> And
>
> *"The parties hereto undertake and covenants to co-operate in good faith to do all such things, take all such steps and execute all such documents as are necessary to give effect to this agreement".* (See: Clause 15.2 of the JVA)

[37] Evidence has shown that the Defendants had received the RM3,003,338.26 capital contribution from the Plaintiffs and failed to account for how these sums were used for the benefit of the proposed partnership business. Therefore, the Plaintiffs submit that it can be fairly concluded that the Defendants had misappropriated the monies paid by the Plaintiffs for their own benefit.

[38] The Plaintiffs refer to the decision of Federal Court case in **Vasu Devan T.K. Nair & Ors v Velu Achuthan Nair [1985] CLJ (Rep) 333** at page 333 [3]:

> *"[3] The delay by the respondent in making his written complaint did not displace the preponderance of evidence against the appellants that the sale agreement was tainted with fraud or at least with absence of good faith on the matter of directorship.*
>
> *The utmost good faith is due from every member of a partnership towards every other member and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm he will be required to show not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour."*

[39] By reason of the Defendants above fraud and/or breach of duty of utmost good faith towards the Plaintiffs, the Plaintiffs had suffered loss and damages to the extent of their capital contribution of RM3,003,338.26 and loss of an additional sum of RM500,000.00

admitted by Frederick as paid by Ma and Li towards the construction on Land A.

Contentions, evaluation and findings

[40] It is undisputed that the Plaintiffs and the 1st Defendant had entered into the JVA with the 1st Defendant with the main object of constructing, managing and operating a post maternity Care Centre for women (the JV business). Under the terms of the JVA, the capital contribution of the parties was RM5,000,000.00 and the Plaintiffs shall contribute RM3,000,000.00 in cash whereas the 1st Defendant shall contribute Lands A and Lands B worth RM2,000,000.00. It is common ground that under the terms of the JVA, it is the duty and responsibility of the 1st Defendant to obtain approval from the relevant authorities and to construct and complete the Care Centre within one year from the date of the JVA dated 10.1.2012 in accordance with the approved plans subject to extension of time as may be mutually agreed upon.

[41] It is further undisputed that until today, the Care Centre has not been constructed by the 1st Defendant and the parties became embroiled in litigation since the 1st Suit was filed in 2015. The parties does not

dispute that only preliminary works such as construction of the ground slab and ground columns were carried out by the 1st Defendant and the construction works stopped due to complaints by nearby residents and a Stop Work Order issued by Dewan Bandaraya Kota Kinabalu (DBKK) in 2011 for non-compliance with the requirements of DBKK and/or the approved development plan. It is also undisputed that after the 2015 Suit was filed, Lands A and Lands B has been sold to successful bidders in foreclosure and/or execution proceedings by public auction to settle the liabilities or debts of the Defendants and consequently, the terms and object of JVA could no longer be performed.

Main issues

[42] The main issues in dispute are whether there is an oral partnership agreement between the parties for the construction, management and/or operation of the Care Centre or JV business and whether there was fraud or misrepresentation by the Defendants in inducing the Plaintiffs to invest and pay RM3 million as capital contribution for the JV business. Apart from the issues of oral partnership, fraud and misrepresentation, other pertinent issues are whether the Plaintiffs' claim is barred by res judicata and limitation and whether the

Defendants has breached the terms of the JVA for failing to construct the Care Centre with the timeframe or extension of time set out in the JVA and whether the Defendants are liable in damages and/or to indemnify the Plaintiffs for the loss and damage suffered as a result of the delay or neglect or refusal by the Defendants to construct and complete the Care Centre.

Oral Partnership

[43] The Plaintiffs contends that there is an oral partnership agreement between the Plaintiffs and the Defendants. Based on the Plaintiffs' pleaded case, the terms of the purported "oral partnership agreement" contradicts the written JV Agreement between the parties. The Defendants contends that the followings are clear contradictions: -

	Purported Oral Agreement	**Written JV Agreement**
1	Land A and Land B to be transferred to the JV company Damai Care. See paragraph 35(vi) at page 82 of the bundle of pleadings, BP.	Land A and Land B to be held in trust for the Plaintiff. See clause 3(c) in page 4 of Bundle B1.

2	Money to be deposited into the JV Company. See paragraph 345(ii) at page 85 of bundle of pleading, BP.	Money to be deposited into the 1st Defendant's bank account in Maybank. See clause 2(b) in page 4 of Bundle B1.
3	Land A and Land B to be transferred immediately to the JV Company. See paragraph 46 at page 86 of the bundle of pleading.	JV Agreement is silent but by clause 3(c) of the JV Agreement, the 1st and the 2nd Defendants are to execute a trust deed that 60% of Land A and Land B are to be held in trust for the Plaintiffs. See page 4 of Bundle B1.
4	Land A and Land B cannot be charged at all by the Defendants. See paragraph 46(ii) and (iii) at page 86 of bundle of pleadings, BP.	By clause 3.1(g) of the JV Agreement, the 1st Defendant shall not create any encumbrances on Land A and Land B beyond the value of 40% of the value of its shareholdings without the prior written consent of the Plaintiffs. See page 5 of Bundle B1.
5	The Centre to be constructed is a commercial centre. See	The JV Agreement is silent, however, Land A and Land B

	paragraph 35(ii) at page 82 of the bundle of pleadings, BP.	are zoned in residential area see pages 993 to 1004 of Bundle B2, i.e. the land title for Land A and Land B.
6	The Defendants are to open bank account for the JV company, Damai Care. See paragraph 47(x) at page 89 of Bundle BOP.	No such requirement under the JV Agreement.
7	The Defendants are to activate the JV company Damai Care immediately. See paragraph 47(ix) at page 88 of the bundle of pleadings, BP.	There is no such obligation as clause 3 of the JV Agreement only provides that the 1st Defendant is to complete the construction of the said centre. See page 5 of Bundle B1.
8	The JV company, Damai Care is to supervise and carry out the construction of the commercial postnatal maternity care centre. See paragraph 47(ix) of the bundle of pleadings, BP.	Only the 1st Defendant is to complete the construction of the centre as provided in clause 3.1(b) of the JV Agreement. See page 5 of Bundle B1.

[44] Apart from the clear contradiction above, the Defendants submit further that based on the parol evidence rule, the Plaintiffs' purported oral partnership agreement cannot be admissible based on the followings: -

(a) That the Defendants have acted and regulated their affairs based on the written JV Agreement and it is not now for the Plaintiffs 8 to 10 years later, invent an oral agreement and make claims against the Defendants. The Defendants submit that the Plaintiffs are estopped from doing so.

(b) That the said JV Agreement was drafted by a lawyer engaged by both parties. In fact, prior to the signing of the JV Agreement, drafts were forwarded to the Plaintiffs and the Plaintiffs fully understood the JV Agreement.

- See pages 850 to 874 of Bundle B1 wherein the draft JV Agreement was duly translated into Chinese for the benefit of the Plaintiffs.
- See page 883 of Bundle B3, which is the 3rd Defendant's email to the 2nd Plaintiff enclosing the draft JV

Agreement and the 2 trust deeds prior to the execution of the JV Agreement.

- See page 890 of Bundle B3, whereby the 2nd Plaintiff has replied to the 3rd Defendant's email in page 883 of Bundle B3. In this email, the 2nd Plaintiff had clearly stated that she has received the 3rd Defendant's email and stated that they are reading the documents forwarded by the 3rd Defendant and that she will email to the 3rd Defendant if she did not understand.

(c) There is no evidence whatsoever to suggest that the Plaintiffs did not understand the contents of the JV Agreement when they decided to proceed to sign the JV Agreement. Further, if indeed the Plaintiffs did not understand the JV Agreement, how then did they commenced an action in 2015 without understanding the JV Agreement. The Defendants therefore submit that PW1's contention in Q43 and Q44 of the notes of proceedings at page 30 when cross examined that she did not understand the JV Agreement is a pure lie.

(d) The Defendants further submit that the JV Agreement signed between the Plaintiffs and the 1st Defendant is a highly formal,

properly negotiated and professionally drawn up document by a lawyer, therefore, it is inconceivable that the Plaintiffs had proceeded to bank in the money based on the JV Agreement if they did not understand the JV Agreement or if the JV Agreement did not contain all the agreed terms prior to its signing. See **Sime Bank Bhd (formerly known as United Malayan Banking Corp Bhd) v Kuala Lumpur City Securities Sdn Bhd [2001] 5 MLJ 670**.

> *"It would be totally inconceivable in my view, that for a contract of such importance, the contracting parties would not have drafted into the put option agreement all the essential terms and conditions they had agreed upon with accuracy and certainty, so as to leave little or none to construction in the event of a dispute. Least of all it is inconceivable that they would have left unsaid those other terms and conditions they had orally agreed upon that would bind them. In the event, I would have to find that the agreement is conclusive of all the essential terms that would govern their contractual relationship at the time they signed it. It follows that any such precontract promises, representations and*

understandings, verbal or otherwise, whether made by Mr Robert Young, Ms Chan Mo Lin or by anyone else, even if true, are clearly extrinsic evidence which can never be allowed into evidence to add, subtract, vary or contradict the black and white terms and conditions of the put option agreement in a trial."

(e) The Defendants therefore submit that the Plaintiffs' pleaded case of the existence of an oral partnership agreement between the Plaintiffs and the 2nd and 3rd Defendants are mere recent invention of the Plaintiffs and should not be admissible to contradict the written JV Agreement signed.

[45] From the facts and evidence, the Court finds that there is merit in the Defendants' submission that the purported oral partnership agreement is baseless and if it exists, it has been superseded by the JVA. For over 12 years since the JVA was entered on 10.1.2012, the parties had conducted themselves and their business dealings in accordance with the terms of the written JVA. The Plaintiffs had even instituted a Suit in 2015 in the High Court, Kota Kinabalu against the Defendants for, inter alia, breach of the terms of the JVA to complete the construction of the care centre within the one year

contractual period and obtained a judgment in their favour after a successful appeal to the Court of Appeal when their claim was initially dismissed by the High Court after full trial.

[46] After the judgment of the Court of Appeal was made on 14.11.2018, the parties did not terminate the JVA. Instead they still acted as though the JVA was valid and tried to negotiate for an amicable settlement of the dispute arising from the JVA by proposing to sell Lands A and B. Further, the Defendants obtained the approval of DBKK of the amended development plan for the Care Centre after the 2015 Suit was filed. From the body of evidence adduced at the trial, the Court finds that the purported oral agreement or representations between the parties (if any), has been superseded by the terms of the JVA. The Plaintiffs cannot approbate and reprobate by claiming for breach and/or enforcing the terms of the JVA in the 2015 Suit wherein they have obtained a judgment in their favour and now claims that the JVA is invalid on grounds of fraud or misrepresentation. The Plaintiffs have the benefit of legal advice in the 2015 Suit and remained silent on the purported oral partnership, fraud and misrepresentation. The Plaintiffs elected to claim under or enforce their rights under the JVA.

[47] The Plaintiff had obtained a benefit under the terms of the JVA when Judgment was given in their favour in the 2015 Suit and they could not now turn around and adopt an inconsistent stand when the position taken earlier is no longer beneficial to them. To hold otherwise would be tantamount to allowing the Plaintiffs to blow hot and cold and take inconsistent stands or attitudes after obtaining a benefit from their earlier stand in the 2015 Suit. This would be unfair and unjust to the Defendants. In **Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor & Another Appeal [2016] 8 CLJ 804,** the Court of Appeal held:

> ***"[20]*** *The appellant's conduct as described hereinbefore is plainly inconsistent and contradictory. The alleged rights pursued and relief sought through the present action are remarkably inconsistent with and contradict the right pursued and relief sought in the land references. Despite being fully aware of all relevant facts and matters, the appellant has elected and continued to elect seeking relief by means of the land references which remain current. Despite having been paid and enjoying the RM114,964,890 compensation for the seven plots of land, the appellant now also wishes to recover the seven plots of land. Obviously, after the appellant had*

obtained some advantage, to which they could only be entitled on the footing that it was valid, they now turned around and said that the acquisition of the seven plots of land was void for the purpose of securing some other advantage. The appellant's conduct, as it were, could thus be properly described as blowing hot and cold that while the appellant approved the acquisitions they also rejected it. The appellant is not permitted to approbate and reprobate on the issue of the acquisition of the seven plots of land….

….*There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and,* ***having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance****."*

[48] It is an undisputed fact that Clause 21.6 and 21.7 of the JVA provides as follows:

"21.6 This Agreement shall reflect the acceptance of both parties as the finalize of the negotiated terms and shall constitute the entire agreement between the both parties with respect to the subject matter hereof.

21.7 This Agreement may at any time be amended by an agreement mutually agreed in writing between the parties hereto."

[49] Whilst there are oral negotiations and discussions between the parties prior to the signing of the JVA in 2012, pursuant to Clause 21.6, the JVA containing contractual terms will constitute the entire agreement between the parties and both parties are bound by the terms and conditions of the JVA after signing it. If any party to the JVA wishes to amend the terms of the JVA, the party in question could do so pursuant to Clause 21.7 of the JVA provided the mutual consent in writing of the parties has been obtained. Unilateral variation of the terms and conditions is not allowed as it has far reaching effect. This point was succinctly explained by her Ladyship, Che Mohd Ruzima Ghazali JCA in **555 Films Sdn Bhd & Ors v Adamancy Construction Sdn Bhd [2023] MLJU 986 CA** as follows:

"[21] *Under the law, if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. See s 63 of the Contract Act 1950. The alteration or commonly referred to as a 'variation' of a contract has a far-reaching effect. It modifies the right or obligation of the contracting parties, and it relieves the contracting parties from performing the original contract. That's why the law used the words "if the parties to a contract agree to alter" in the variation of a contract. In other words, the parties must mutually agree to vary the contract and the parties must mean or intend that the variation will permanently affect their rights. As a basic requirement under the contract law, the agreement to vary a contract will need to be supported by consideration, that is, something of value must be given in exchange for the variation. If there is no such consideration, then the validity of the variation can be subject to challenge.*

[22] *Based on the consequences of the variation, we are of the view that the courts must always be strict in interpreting clauses in relation to variation if the variation is in writing or the courts had to scrutinise the conduct of the parties if the*

variation is by conduct. See the decision of Abdul Malik Ishak J in Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia BHD [2004] 6 MLJ 1."

[50] In **Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd [2005] 1 SHLR 117,** the High Court held:

"(2) A party is not entitled to unilaterally vary a contract and then found a cause of action for breach of contract against the other party based on that unilateral variation. This goes against the prevailing law in this country. It was the plaintiff that wished to change the terms of the preexisting contractual relationship, the defendant was entitled to either accept such a change or reject such changes or to accept those changes subject to any new terms it might wish to add. The defendant was certainly entitled to insist on strict compliance with the Al-Istisnaa' facility agreements (see para 71, 76, 82)."

[51] Having considered the evidence and submissions of the parties, the Court finds that the JVA constitutes an entire agreement between the parties which supercedes any oral agreement or representations that took place prior to the signing of the JVA.

Fraud or Misrepresentation

[52] Here the Plaintiffs alleged as follows: -

(a) The Defendants had no intention and/or caused to transfer Land A and Land B to the partnership business.

(b) Continued to treat the lands as their own by charging to the banks.

(c) Behind the Plaintiffs' back, transferred Land B to the 2nd Defendant after the purported oral partnership agreement.

(d) Refused to convert Land A and Land B from residential purposes to commercial use.

[53] The Defendants submit that the evidence tendered during trial clearly showed that the Plaintiffs' allegations are indeed unfounded. To begin with, there was never any obligation whatsoever for the Defendants to transfer and/or cause to transfer Land A and Land B to the JV Company and/or the partnership business. This is clearly provided in clause 1, 2 and 3 of the JV Agreement as shown in pages 3, 4 and 5 of Bundle B1. Under these clauses, the Defendants' obligations under clauses 2(a) and 2(c) of the JV Agreement were merely to contribute Land A and Land B and the

Defendants were merely required to execute a trust deed in favour of the Plaintiffs declaring that the 1st and 2nd Defendants held 60% of Land A and Land B in trust for the Plaintiffs.

[54] As for the Plaintiffs' allegation that the Defendants had charged Land A and Land B and taken loans unconnected with the partnership business, DW1 has testified that, as shown in page 998 of Bundle B3, the charge on Land B was registered on the 13th July 2011 and in page 1003, the charge on Land A was registered on the 15th April 2009, both before the signing of the JV Agreement, further there is no provision in the JV Agreement which provides that Land A and Land B contributed by the 1st Defendant must be free from encumbrances. The Defendants submit that under clause 3.1(g) of the JV Agreement (see page 5 of Bundle B1), the Defendants were clearly allowed to create encumbrances on Land A and Land B up to 40% of the value of their shareholding in the joint venture without the consent of the Plaintiffs. Under this clause, the consent of the Plaintiffs is only required if the encumbrance is above the 40% of the Defendants' shareholdings. In fact, a similar right is afforded to the Plaintiffs in clause 4.1(b) of the JV Agreement based on the Plaintiffs' 60% shareholding. The Plaintiffs in paragraph 47(ii) of their counterclaim (see pages 86 and 86 of bundle of pleadings)

pleaded that the Defendants had charged Land A and Land B totaling to RM900,000. The Defendants submit that this is not a breach of the JV Agreement let alone it being fraudulent or wilful. This is because 40% of RM5 million amounts to RM2 million, the encumbrance of RM900,000 on Land A and Land B only amounts to 18% of the Defendants' shareholding in the joint venture, hence there is no breach of the JV Agreement. The Defendants contend that this therefore surely cannot amount to any fraud or wilful act as alleged by the Plaintiffs.

[55] On the Plaintiffs' allegations that the Defendants had behind the Plaintiffs' back transferred Land B to the 2nd Defendant after the purported oral partnership agreement having been agreed on the 25th June 2011, the Defendants submit that this allegation is again baseless. The Defendants support their submission based on recital 3 of the JV Agreement which expressly provided that the 2nd Defendant is the registered owner of Land B. This JV Agreement was signed on the 10th January 2012 which is after the purported oral partnership agreement. This shows that Land B was never transferred behind the Plaintiffs' back because a full disclosure was made as shown in recital 3 of the JV Agreement (see page 2 of

Bundle B1) and the Plaintiffs proceeded to signed the JV Agreement.

[56] Further, from the testimony of PW1, she has expressly admitted that prior to her signing the JV Agreement, a draft of the JV Agreement was emailed to her and the draft JV Agreement is shown in pages 851 of Bundle B3. It can be seen that recital 3 was in the draft JV Agreement which was emailed to PW1 and which she admitted that she had read the draft JV Agreement emailed to her by the 3rd Defendant. See pages 20 to 23 of the Notes of Proceedings.

[57] The Defendants submit that PW1's purported ignorance of the clauses in the JV Agreement and that she did not understand the JV Agreement is a lie and it only speaks volume of the credibility of PW1 which cannot be believe. It is inconceivable that the Plaintiffs had sued the Defendants in 2015 based on an agreement which she did not understand. Further, the 1st Plaintiff had previously testified on the JV Agreement in the 2015 case and has never once even mentioned that she did not understand the JV Agreement (see PW1's testimony in the 2015 Case in pages 437, 438, 439, 440 to 445 of Bundle B2) wherein PW1 had testified to more than 15 questions relating to the contents of the JV Agreement, which she

now claimed she did not understand. It is inconceivable that both the Plaintiffs would proceed to sign an agreement which they did not understand. Not only that, the Plaintiffs made further payments on the 25th June 2012 in the sum of RM500,000 pursuant to the JV Agreement after the signing of the JV Agreement. See Q12 in PW1's witness statement in page 11 of the Notes of Proceedings, wherein PW1 had listed out the money she had purportedly paid pursuant to the business. This shows that the Plaintiffs' allegations are unfounded.

[58] As for the Plaintiffs' contention that the Defendants had refused to convert Land A and Land B for commercial use, this allegation is related to the Plaintiff's allegation that the Defendants has no intention to construct a commercial postnatal maternity centre, hence this issue will be addressed together later herein below.

Allegation on the Defendants' Failure to Bank in the Contributions to the JV Company

[59] Under this heading, the Plaintiffs alleged as follows: -

(a) The Defendants failed to activate the JV Company as the corporate vehicle to manage the partnership business including to supervise and carry out the construction of the commercial postnatal centre.

(b) Open a bank account for the JV Company and pay all contributions into the JV Company.

(c) Refused to prepare the audited account for the JV Company.

(d) Failed to re-appoint a company secretary for the JV Company after the old company secretary was forced to resign.

(e) The Defendants have misappropriated the money deposited by the Plaintiffs for their own use.

[60] In the Federal Court case of **Veheng Global Trades Sdn bhd v AmGeneral Insurance Bhd (formerly known as Kurnia Insurance (M) Bhd) & Anor and another appeal [2019] 4 MLJ 581,** the basic element of "fraud" was said to be as follows: -

"The basic element of "fraud" as cited by Mance LJ in that case was that "fraud" was not mere lying, it was seeking to obtain an advantage, generally monetary, or to put someone else as a disadvantage by lies and deceit, and it would be sufficient to come within the definition of fraud if there was evidence to

show that deceit had been used to secure payment or quicker payment of the money that would have been obtained if the truth had been told."

[61] In the case of **CIMB Bank Berhad v Veeran Ayasamy [2015] 5 MLRA 603** the Court of Appeal had this to say on the need to distinctly alleged and proved and that it was not allowable to leave fraud to be inferred from the facts. The Court had this to say: -

"[15] In Davy v. Garrett [1878] 7 Ch D 473, Thesiger LJ at p 489 acknowledged the principle as follows:

> *"In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts … It may be not necessary in all cases to use the word "fraud" … It appears to me that a plaintiff is bound to shew distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence.*

… The elements of fraud and/or conspiracy must be proved by clear, cogent and convincing evidence. There must be something more than mere failure or an omission on the part of the 3rd defendant. There can never be fraud and/or conspiracy cannot exist, where the intent to deceive does not exist.

"To sum up, fraud implies some base conduct and moral turpitude and a person is taken to have acted fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person. That is what is known, as "fraud" or fraudulently….."

[62] In the case of **Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd & Ors [2021] 9 MLJ 581** the Court has dismissed the Plaintiff's claim of fraud against the Defendants as full disclosures were made by the Defendant in the recital to the agreement, which was signed between the parties. The Court had this to say: -

"[23] My finding is that there was no misrepresentation by the defendants as P knew that D1 had not finalised the acquisition of the land. Recital (i) of the SPA executed by P clearly states that D1 is still in the midst of negotiating and finalising the purchase of the land from the landowners. Moreover, numerous contemporaneous documents and P's own viva voce evidence also corroborate the same."

[63] It was also held that there can be no fraud when full disclosures were made: -

"[27] The above email indicates that D3 had informed PW3 that D1 had not entered into a back to back SPA with the landowners. There was no hiding of this fact and disclosure is the antithesis of fraud. According to P, it discovered the alleged fraudulent misrepresentation on 27 December 2011 (a mere five days after the execution of the SPA). Strangely however, P then reacted in the following manner:

(a) P continued to pay to D1 a sum of RM758,182.75 on 4 January 2012 as additional earnest deposit towards the purchase of the land; and

(b) P entered into a supplemental ('supplemental agreement') agreement dated 13 March 2012 to correct an erroneous description of the land in the SPA, but without amending any terms of the SPA."

[64] The Learned Judge in the case went further and held that the Plaintiff's attempt to prove that there was a representation by D3 and D1 contravenes the parol evidence rule. The Learned Judge said as follows; -

"[37] Furthermore, P's attempt here to prove that there was a representation by D3 that D1 had acquired the land contravenes the parol evidence rule. I am guided by the Federal Court case of Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124 at p 125 which said:

The contents of this letter therefore amounts to nothing else than an oral evidence which the respondents wish to lead in order to prove the second proposition, ie the goods were ordered on behalf of Syahazam, and to support the first proposition, ie the goods were not ordered for the respondents, and thus contradict the sales invoice and

delivery note. We feel that this course of action is not open to the respondents, as it is clear that under s 92 of the Evidence Act, 1950, oral evidence to contradict, vary, add to or subtract from, the terms of any contract, grant or other disposition of property which has been reduced in writing is not admissible."

[65] Applying the above principles to this case before this Court and from the body of evidence adduced by the parties during the trial, the Court finds that Plaintiffs have failed to prove their case of fraud or misrepresentation against the Defendants. There appears to be no element of deceit in that the draft JV Agreement was clearly extended to the 2nd Plaintiff prior to its execution. It must also be highlighted here that the Plaintiffs' only witness PW1 had also never testified that she was deceived by the purported fraud or misrepresentation as pleaded by the Plaintiffs in their statement of claim, which had led the Plaintiffs into signing the JV Agreement. As so decided in the case **Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd & Ors [2021] 9 MLJ 581,** at law, the false representation must take place before the fraud is committed, to succeed, the Plaintiffs must have acted in reliance on the false representation in entering into the agreement. The Court of Appeal had this to say: -

"[61] According to this letter, the land became unavailable for sale subsequent to the date of the SPA. Implicit therein is an acknowledgement by P that the land was available for sale prior to the date of the SPA. That would be fatal to P's pleaded case of fraudulent misrepresentation. At law, the false representation must take place before the fraud is committed. To succeed in its claim, P must have acted in reliance on the false representation in entering into the SPA. Here P's position that the land became unavailable for sale only subsequent to the date of the SPA would mean that the elements of fraudulent misrepresentation are not met. As there was no misrepresentation prior to the SPA which induced P to enter into the SPA.

[62] In Victor Cham & Anor v Loh Bee Tuan [2006] 5 MLJ 359 at p 366, the Court of Appeal explained the elements of fraudulent misrepresentation as follows:

> *[13] Fraudulent misrepresentation comes under the tort of deceit. To succeed in his claim, the respondent in this case needs to establish that he had acted in reliance on the fraudulent misrepresentation and that the*

representation was false. He further needs to establish that the first appellant had made those statements knowingly or recklessly without caring whether it was true or false. And that as a result of reliance on such representation, the respondent had suffered damage."

[66] The Plaintiffs in this case before this Court however never felt deceived until the 2nd Plaintiff met his present lawyers. In the words of PW1: -

Q7: Do you agree that from your answers in these two paragraphs in your witness statement, you are actually alleging that the Defendants have misled you and the 1st Plaintiff into signing the Joint Venture Agreement?

A: Before 21.05.2020, I didn't think we were misled into singing the Joint Venture. After 21.05.2020, when I was served with the Writ and Statement of Claim by the 1st and 2nd Plaintiffs by original action, then I immediately consult with my solicitors. After reviewing all the documents and the past conducts of the Defendants, so I realised we were misled to sign the Joint Venture Agreement.

See pages 19 and 20 of the notes of proceedings.

[67] During the trial, the Plaintiffs have crossed examined the 3rd Defendant almost 400 questions which centres mainly on the issue of the construction carried out on Land A. This is not even the Plaintiffs' pleaded case on their allegations against the Defendants in this case and there is no element of deceit. The undisputed evidence shows that construction works on the ground floor at Land A was carried out by the Defendants until it was stopped due to objections from residents and the stop work order issued by DBKK. It may amount to breach of contract or negligence on the part of the Defendants instead of fraud. The Plaintiffs only witness had never testified how the construction carried out on Land A by the 1st Defendant had in anyway deceived her and how the purported construction carried out by the 1st Defendant had deceived her into signing the JV Agreement. As decided by the Court of Appeal in the case of **CIMB Bank Berhad v Veeran Ayasamy [2015] 5 MLRA** allegation of fraud must be proved with clear, cogent and convincing evidence and not by way of cross examination. The Court of Appeal held: -

> *"(4) Counsel for the plaintiff attempted to allege fraud and/or conspiracy against the 3rd Defendant by way of cross-examination of the bank officer. However, a mere suggestion*

in cross- examination without any foundation being laid by way of pleading was unacceptable. There was also hardly any evidence from which fraud or conspiracy could reasonably be inferred."

[68] From the facts and evidence, the Court finds that the Plaintiffs have failed to adduce sufficient cogent and clear evidence to substantiate their allegation of fraud and misrepresentation on a balance of probabilities.

Res Judicata

[69] The Defendants contends that the issue of the purported oral partnership agreement, fraud and misrepresentation was not raised in the 2015 Suit and the Defendants submit that the Plaintiffs' cause of action now is res judicata. The Defendants brought to the attention of this Court that the facts in this case are the exact same facts as in the 2015 Case. In the 2015 Case, the Plaintiffs had sued the Defendant for breach of the JV Agreement. If indeed there was an oral partnership agreement, fraud or misrepresentation, why did the Plaintiffs not include such allegations against the Defendants in the 2015 Case.

[70] In the Federal Court case of **Kerajaan Malaysia v Mat Shuhaimi Shafiei [2018] 2 MLRA 185,** the Federal Court had quoted with approval the following authorities on the principles of res judicata:-

> *"[19] The Latin term "res judicata" literally translated means 'a matter adjudged'. The full maxim is res judicata pro veritate accipitur which means 'a matter adjudged is taken as truth'. In explaining what is res judicata, in Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 1 MLRA 611, the Supreme Court said:*
>
> *"What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that, it is in the public interest that there should be finality in litigation - interest rei publicae ut sit finis litium. It is only just that no one ought to be vexed twice for the same*

cause of action - nemo debet bis vexari pro eadem causa. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy….

The starting point ought to be the celebrated passage by Wigram VC in the case of Henderson v. Henderson [1843] 3 Hare 100 at p 115 which is:

The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to ***every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time."***

[71] Dato Sivananthan Shanmugam v Artusan Fokus Sdn Bhd [2015] 4 MLRA 674:

"the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue estoppel to bar the respondent from relitigating a

specific issue that had been decided in the prior separate action. The ***doctrine also applies to a nonparty****. It is therefore not necessary for parties to be the same in both actions. What the doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan Umno Negeri Pahang Darul Makmur [2015] 5 MLRA 658).*

[29] We would further add at this point that, even if there has been no actual decision as to the issues involved in the instant action, but if the respondent did not raise these issues in the earlier proceedings which it could and should have done so, in our view the plea of this doctrine of res judicata in its amplified and wider sense is available to the appellant to prevent an abuse of the process of the court. We would refer to the Supreme Court decision in Superintendent Of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 MLRA 131: ...”

[72] Government Of Malaysia v. Dato Chong Kok Lim [1973] 1 MLRH 318 on the wider rule of res judicata: -

> *"It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively res judicata. The rule of constructive res judicata is really a rule of estoppel."*

[73] Bradford and Bingley Building Society v. Seddon [1999] 1 WLR 1482, at pp 1490-1491, Auld LJ said:

> *"…abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue."*

[74] A summary of the principles of res judicata in Malaysia as expounded by the Federal Court in the case of **Kerajaan Malaysia v Mat Shuhaimi Shafiei [2018] 2 MLRA 185** are as follows: -

(a) That the principles of res judicata will equally apply even if the parties are different.

(b) It is also an abuse of process where there is such an inconsistency between the two suits that it would be unjust to permit the later one to continue.

(c) Even if there has been no actual decision as to the issues involved in the instant action, but if the Plaintiffs did not raise these issues in the earlier proceedings which it could and should have done so, the principles of res judicata will equally apply.

(d) It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively res judicata.

(e) That the broader and wider principles of res judicata is applicable in Malaysia.

[75] During cross examination of the Plaintiffs' only witness, PW1 appears to not understand the questions posed to her although she took her oath in English. When cross examined as follows: -

Q4: Do you agree you never in the 2015 Case claimed that you were misrepresented into signing the Joint Venture Agreement in pages 1-16 of B1 (Enclosure 60?

A: I don't understand this question.

Q5: Do you agree you never in the 2015 Case claimed that you were misled into signing the Joint Venture Agreement in pages 1-16 of B1 (Enclosure 60)?

A: Sorry, I don't understand this question and I am not sure.

See page 19, at Q4 and Q5 of the Notes of Proceedings.

[76] When asked further as to which part of the question that she did not understand, PW1 answered "can you explain you were misled into signing the Joint Venture Agreement"? PW1 was referred to Q7 and Q18 of her witness statement and was cross examined as follows: -

Q7: Do you agree that from your answers in these two paragraphs in your witness statement, you are actually alleging that the

Defendants have misled you and the 1st Plaintiff into signing the Joint Venture Agreement?

A: Before 21.05.2020, I didn't think we were misled into singing the Joint Venture. After 21.05.2020, when I was served with the Writ and Statement of Claim by the 1 st and 2nd Plaintiffs by original action, then I immediately consult with my solicitors. After reviewing all the documents and the past conducts of the Defendants, so I realised we were misled to sign the Joint Venture Agreement.

See pages 19 and 20 of the notes of proceedings.

[77] During cross examination, PW 1 also admitted that when she commenced the 2015 case, she had never said anything about the oral partnership agreement although in October 2014, she already knew the Defendants did not comply with the purported partnership agreement. This is what PW1 had testified: -

Q76: PUT: When you commenced the 2015 Case, you had never said anything about this oral partnership agreement although in October 2014, you already knew that the Defendant did not comply with the purported oral agreement. Agree or Disagree?

A: Yes I agree. But during that time, I only focused on the point that they didn't finish building Damai Care Centre within one year.

See page 38 at Q76 of the Notes of Proceedings.

[78] From the testimony above, it can clearly be seen from the Plaintiffs' own admission that the cause of action now is not new in that whatever facts relied on by the Plaintiffs were all available to them. Instead, the Plaintiffs had admitted that they did not feel they had been misled until their lawyer told them so. The only difference between 2015 and 2020 is the Plaintiffs' have changed lawyers. PW1 during cross examination had given excuses that the Plaintiffs did not understand the JV Agreement which they have signed, and which was duly translated into Chinese to them. The Defendants submit that such excuse does not preclude the application of the principles of res judicata to the Plaintiffs' cause of action against the Defendant in this case.

[79] As held in the Federal Court case of **Kerajaan Malaysia v Mat Shuhaimi Shafiei [2018] 2 MLRA 185,** such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or

asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.

[80] Applying the principles as enunciated in the Federal Court case, the Defendants therefore submit that the Plaintiffs' case should be dismissed based on the principles of res judicata: -

(a) The Plaintiffs' cause of action now although has added the 2nd and 3rd Defendants, the same cause of action could have been brought in the 2015 Case, but the Plaintiffs failed to do so. By now adding the 2nd and 3rd Defendants does not mean that the principles of res judicata does not apply in these circumstances.

(b) The issue of the purported oral partnership agreement if it existed could have equally been raised in 2015, but the Plaintiffs did not do so.

(c) There is no iota of evidence to suggest that the same cause of action in the Counterclaim cannot be brought in 2015 as whatever facts that the Plaintiffs now relied on were and are at all times available to them in 2015.

(d) The Plaintiffs' present Counterclaim is so inconsistent with the 2015 Suit, in that in 2015 the Plaintiffs were happily suing the

1st Defendant for breach of the Joint Venture Agreement and had never raised fraud or misrepresentation nor question on the validity of the said Joint Venture Agreement. In 2015 the Plaintiffs had sought to enforce the very said Joint Venture Agreement, which in the present Counterclaim, the Plaintiffs now prayed for the Joint Venture Agreement to be rescinded. In short, in 2015 the Plaintiffs claimed that the Defendants were in breach of the Joint Venture Agreement but in 2020, the Plaintiffs claimed that the Joint Venture Agreement was entered through misrepresentation, fraud and they did not understand the JV Agreement. The Plaintiffs' present Counterclaim is obviously so inconsistent with their 2015 Suit.

(e) That the Plaintiffs in the Counterclaim are basically relying on the same facts, same parties and same documents. Basically, what has been tendered in the 2015 Suit are now re-tendered all over again in this present suit. There is nothing new nor are there any facts that were not available in 2015.

[81] As decided in the case of **Radiant Splendour Sdn Bhd & Ors v Dato Seri Mohd Najib Tun Abdul Razak & Ors [2021] 1MLRH 397**;-

"[46] This court opines that it should not simply allow a party to renege and turn against its own admissions and prior conducts of prior litigations merely for a "reserved narrative" of fraud or conspiracy. If that shall be the case, then the courts by and large would be inundated by infinite litigation and application of the same kind."

[82] It is undisputed that the facts and evidence in the 2015 Suit and the present Suit are the same or similar. The evidence shows that the Plaintiffs had the benefit of legal advice in the 2015 Suit and had the knowledge of the progress of the construction works on Lands A and B including the alleged fraudulent conduct of the Defendants. The Plaintiffs could have but did not plead or assert the JVA is not enforceable and is liable to be rescinded on the grounds of fraud or misrepresentation in the 2015 Suit. Instead, the Plaintiffs instituted the 2015 Suit and claimed for breach of the JVA pertaining to the delay in construction of the healthcare centre on Land A and Land B and to enforce their rights under the JVA. In the premises, the Court is inclined to agree with the Defendants submission that the Plaintiffs' cause of action for fraud and/or misrepresentation herein is caught by the principles of issue estoppel and res judicata

enunciated by the appellate Courts in Asia Commercial Finance and Mat Shuhaimi above.

[83] From the available evidence adduced in the trial of the 2015 Suit, the Plaintiffs' contention that they only realized for the first time that the Defendants never had the intention to carry out any of the terms under the oral partnership agreement or the JV Agreement when they were preparing their case against the Defendants' initial claim in 2020 appears to be incorrect. The Plaintiffs in the 2015 Case had during their own examination in chief testified as follows: -

Q37. Why do you think the Joint Venture failed?

A37. There are a number of factors, namely:-

(a) The Defendants were not genuine about undertaking this Joint Venture. They saw this an opportunity to get our money.

(b) The Defendants were incapable of carrying out this Joint Venture. They mismanaged the whole enterprise whether intentionally or negligently.

(c) The Defendants were solely responsible for all the carrying out of works but because they had no track record, they bungle the whole project.

(d) The Plaintiffs had no role to play in the carrying out of the project and decision making. The Plaintiffs provided the funds but they did not have the power to make decision.

Q38. Perhaps the project was under funded and therefore could not be completed. Do you agree?

A38. No, I don't agree because the Defendants receive RM3 million. On top of that they had 2 landed properties. These properties were prime properties. So, there were sufficient funds to undertake the projects. However, I think the real reason is that the Defendants purposely created a situation whereby the project fail and after that used excuses for the project to be abandoned without having to pay for such failure.

See pages 450 to 451 of Bundle B2.

[84] From the above testimony of the 2nd Plaintiff in the 2015 Case, the Plaintiffs were already making similar allegations against the Defendants. Hence, the unrebutted evidence shows that it is not a case of the Plaintiffs "only realized after they reviewed the conduct of the 2nd and 3rd Defendants with their lawyers" of the purported fraud and misrepresentation. The principles of issue estoppel and res judicata would apply in this situation in that the Plaintiffs are

trying to have a second bite of the cherry by relitigating the same facts and/or dispute when the issue of oral partnership agreement, fraud or misrepresentation could have been raised and litigated in the 2015 Suit. Thus, the Court finds that the issue of oral partnership, fraud and misrepresentation is barred by the principles of issue estoppel and res judicata.

[85] It is undisputed that the Plaintiffs and the Defendants did not terminate the JVA before or after the 2015 Suit was tried and/or determined by the Kota Kinabalu High Court and the Court of Appeal. The undisputed facts and evidence shows that both parties sought to perform their obligations or enforce their rights under the JVA including obtaining approval by DBKK of the amended development plan and proposals to sell Lands A and Lands B and reach an amicable settlement of the dispute under the JVA right until the present Suit was filed in 2020. From the undisputed facts and evidence, the Court finds that the JVA subsists after the determination of the 2015 Suit by the Court of Appeal on 14.11.2018 and the issue of continuing breach of the JVA after the disposal of the 2015 Suit and the present claim for breach of the JVA is not barred by the doctrine of res judicata.

Payment of RM3 Million

[86] It is submitted by the Plaintiffs that the key obligation of Ma and Li in the oral partnership agreement and JVA was to contribute a sum of RM3 million towards the capital of the partnership business, which they had duly fulfilled through the various transfers of monies to the Defendants and other individuals nominated by them to receive them.

[87] The Plaintiffs contends that by the 28.11.2011, Ma and Li had fully discharged their obligation and paid a sum totaling RM3,003,338.26 towards the capital of the partnership business as set out in the table below:

Particulars of payment

No.	Date	Particulars	Amount
1	25.06.2011	Paid through Hanzac	RM50,000.00
2	05.08.2011	Paid through Kevin	RM279,008.88
3	05.08.2011	Paid through Frederick	RM300,169.88
4	05.08.2011	Paid through Hanzac	RM250,000.00
5	15.09.2011	Paid through Tan Poh Chee	RM307,377.00
6	15.09.2011	Paid through Chan Choon Huat	RM306,836.50
7	28.11.2011	Paid through Chan Choon Huat	RM1,360,000.00

8	28.11.2011	Paid through Hanzac	RM149,946.00
		Total	RM3,003,338.26

[88] The above payments towards the capital of the partnership business were set out in a table under Q&A12 of PW1-WS. All these payments were further supported by contemporaneous documents of payment receipts, bank slips and bank statements at Bundle B3 p. 847, 848, 898 - 907 and 925 - 935 respectively.

[89] The total payment of RM3,003,338.26 which were made by Ma and Li towards the capital of the partnership business was further confirmed by Hanzac through a Statement of Account dated 28.11.2011 produced by Hanzac (See: Bundle B3 at p. 936) (hereinafter, "1st Statement of Account"). The original of the 1st Statement of Account was also produced in court and marked as ID6.

[90] The Plaintiffs submitted that ID6 should now be admitted as Exhibit for the following reasons: The Court observed that the maker of ID6, Frederick Chan, DW1 was called as a witness. DW1 admitted that he signed ID6 but he stated he does not know whether ID6 is the

original statement of account issued by Hanzac. The uncontroverted evidence before the Court shows that:

i. The original of the 1st Statement of Account was tendered during cross-examination of DW1 (See: the Notes of Proceedings (hereinafter, "NOP") at p. 184 lines 4607 – 4608).

ii. Despite the Defendants' counsel objection to the original (ID6), Frederick during cross examination did not dispute that it was not an original. When asked whether it was the original, he merely stated that he did not know (See: NOP at p. 183 - 184 Q&A275).

Therefore, in view of the above, the Court would admit ID6 as the original of the 1st Statement of Account and convert and mark ID6 as an Exhibit.

[91] In addition to the sum of RM3,003,338.26, Frederick, the 3rd Defendant had claimed that a sum of RM500,000.00 subsequently paid to him on 26.06.2012 by Ma and Li was utilized towards the construction of the Care Centre (See: Bundle B3 at p. 955 - 956). For this reason, the Plaintiffs regard this RM500,000.00 as their

additional contribution paid towards the capital of the partnership business.

Frederick's denial

[92] Frederick now reneges from the 1st Statement of Account by a 2nd Statement of Account (of the same date) showing that only RM1,493,392.26 had been paid by Ma and Li towards the capital contribution (See: Bundle C at p. 90).

[93] The table of the 2nd Statement of Account shows the following:

Particulars of payment

No.	Date	Particulars	Amount
1	25.06.2011	Paid through Hanzac	RM50,000.00
2	05.08.2011	Paid through Kevin	RM279,008.88
3	05.08.2011	Paid through Frederick	RM300,169.88
4	05.08.2011	Paid through Hanzac	RM250,000.00
5	15.09.2011	Paid through Tan Poh Chee	RM307,377.00
6	15.09.2011	Paid through Chan Choon Huat	RM306,836.50
		Total	RM1,493,392.26

[94] This 2nd Statement of Account appears to be a self-serving account which was never served on Ma and Li. The non-service was admitted by Frederick during his cross examination (See: NOP at p. 187 Q&A283).

[95] The differences between the 1st and 2nd Statement of Accounts are that the payments under item 7 in the 1st Statement of Account (RM1,360,000.00) and item 8 in the 1st Statement of Account (RM149,946.00) were excluded from the 2nd Statement of Account.

[96] In respect of item 7 in the 1st Statement of Account, Frederick had chosen to dispute the payment of RM1,360,000.00 as payment towards the capital of RM3 million by taking advantage of the English translation in DBOD1 at p. 65 that the payment was for "stocks".

[97] Li had however explained during her cross examination in the NOP at p. 27 - 28 Q&A33 that Frederick's father, Chan Choon Huat needed RMB to purchase stocks in China for his business in the sum equivalent to RM1,360,000.00. Ma and Li then agreed to pay to Chan Choon Huat in RMB equivalent to RM1,360,000.00 on an agreement that Chan Choon Huat would transfer the Ringgit

Malaysia equivalent to Hanzac in Malaysia as part of their capital contribution. Chan Choon Huat was not called by the Defendants as a witness to dispute Li's above testimony.

[98] In respect of item 8 in the 1st Statement of Account, the sum of RM149,946.00 which was excluded in the 2nd Statement of Account, Frederick had during his cross examination admitted that this sum was paid towards the capital of the partnership business. He explained that this sum was excluded by him in the 2nd Statement of Account because at that time the credit card transaction had yet to be cleared. (See: NOP at p. 185 Q&A279).

[99] The 1st Statement of Account was never expressly revoked or retracted by the Defendants. There is a lack of credible evidence to show that the 1st Statement was erroneous and was amended by the Defendants. The undisputed evidence shows that Hanzac subsequently issued the 2nd Statement of Account without informing the Plaintiffs beforehand. Neither did the Defendants gave the 2nd Statement of Account to the Plaintiffs after its issuance. The failure of the 2nd and 3rd Defendants to call their father, Chan Choon Huat to give evidence in Court to substantiate the Defendants' contention that the sum of RM1,360,000.00 was a personal loan made by the

Plaintiffs to Chan Choon Huat and is unrelated to the Joint Venture business gave rise to serious doubts on the credibility of the evidence of DW1 in relation to veracity the 2nd Statement of Account. By reason of the matters stated above, the Court finds that the Plaintiffs have established on a balance of probabilities that they had fully paid their contribution of RM3,003,338.26 towards the capital of the joint venture business and had made a further financial contribution to the JV business in the sum of RM500,000.00 on 25.6.2012.

Limitation

[100] Further, even if the purported oral partnership agreement does exist, which the Defendants vehemently deny, the Defendants contends that the Plaintiffs' cause of action for the breach of the purported oral agreement is clearly time barred in that item 94 of the Sabah Limitation Ordinance clearly provides that the cause of action must be commence within 3 years from when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing when it ceases.

[101] At paragraph 26 of the Amended Defence to Amended Counterclaim, the Defendants merely pleaded that *"… the Plaintiff's cause of action is time barred".*

[102] It is submitted by the Plaintiffs that the Defendants' plea that *"… the Plaintiffs' cause of action is time barred"* does not qualify as a valid plea of limitation under the proviso to Section 3 of the Limitation Ordinance (Sabah Cap. 72) (hereinafter, "Limitation Ordinance"). Crucially, the Defendants had failed to specifically plead the Limitation Ordinance in their defence.

[103] The Plaintiffs refer to Order 18 Rule 8(1) of the Rules of Court 2012, which provides:

> *"8. Matters which shall be specifically pleaded (O. 18, r.8)*
>
> *A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example … any relevant statute of limitation."*

[104] The Plaintiffs further refer to the case of **K Kaliammal V. R G Manickam [1952] MLJ 162** at p. 163 : -

"The defendant … did not plead the statue of limitations. There is an obligation imposed by the law of procedure in this country … requiring the party relying upon the statute of limitations specifically to plead it. Failure to do so robs him of the value of the statute. It is no part of the duty of the Court to take notice of the statute of limitations unless it is specifically pleaded."

[105] The Plaintiffs contends that even if the Plaintiffs' present cause of action is breach of oral partnership agreement, which is denied, the time for computing the limitation period of 3 years under Item 94 of Limitation Ordinance has not started to run as the breaches have continued right up to the date the Counterclaim was filed. The Plaintiffs refer to Item 94 of the Limitation Ordinance where time begins to run *"… where the breach is continuing, when it ceases.".*

[106] The Court had earlier found that the JVA was not terminated by the parties and continues to subsist after the disposal of the 2015 Suit and the question of continuing breach the Defendants is a live issue that was not barred by the doctrine of issue estoppel and res judicata. The amended development plan for the care centre to be constructed by the Defendants pursuant to the JVA was approved by DBKK after the 2015 Suit was filed. However, the delay or neglect

by the Defendants to construct the care centre after the approval of the amended development plan continued until the filing this Suit and the Counterclaim in 2020. By reason of the above and due to the continuing breach of the JVA which the Defendants were trying to resolve by proposing to sell the said lands, the Court is inclined to agree with the Plaintiffs' submission that the present counterclaim for breach of the JVA is not barred by limitation.

Breach of the JV Agreement

[107] The Court had earlier found that the purported oral partnership agreement has been superseded by the JVA which forms an entire agreement between the parties and the Plaintiffs and the 1st Defendant are bound by the terms and conditions of the JVA. Thus, the question of breach of the oral partnership agreement is not in issue and does not arise. However, as alluded above, the JVA was not terminated when the 2015 Suit was filed or thereafter and continued to subsists when this Suit was filed in 2020 and therefore, the claim for breach of the JVA is not barred by the doctrine of res judicata and limitation and remains a live issue which the Court will now consider on the merits.

[108] Under Clause 3.1 (a), (b) and (c) of the JVA, the 1st Defendant undertook to obtain all relevant approvals from the relevant authorities for the construction of the Care Centre and shall complete the construction of the Care Centre within one year from the date of the JVA dated 10.1.2012 in accordance with the approved plans by the relevant authorities. It is not disputed that the main object of the JVA is the construction, management and operation of the Care Centre for the JV business of post maternity healthcare for women. Thus, the Court finds that the construction and completion of the Care Centre in accordance with the approved plans by DBKK is a fundamental term of the JVA.

[109] It is expressly provided in Clause 3.2 of the JVA that the 1st Defendant shall fully indemnify and keep indemnified the Plaintiffs in respect of any loss or damage that may be incurred by the Plaintiffs as a result of the wilful default, neglect, delay or refusal on the part of the 1st Defendant to perform any of its obligations as expressed in the JVA.

[110] The Plaintiffs had duly discharged their obligation and duly paid the capital contribution and construction expenditure amounting to RM3,503,338.26. It is undisputed that the amended development

plan was approved by DBKK after the 2015 Suit was filed. Until today the Care Centre has yet to be constructed. The Defendants contends that the delay in the construction of the Care Centre was mainly caused by the Plaintiffs failure to pay in full their share of the capital contribution of RM3 million and only a sum of RM2,143,338.26 was paid leaving a shortfall of RM856,661.74. The Defendants contend that this sum of RM 856,661.74 was required for the construction expenditure of the Care Centre which was the Plaintiffs' responsibility to contribute failing which, the Defendants is not responsible for the delay or non-construction of the Care Centre.

[111] The Court had earlier found that the Plaintiffs have paid more than their share of the capital contribution and the total amount paid by the Plaintiffs to the Defendants for the Care Centre project and JV business was RM3,503,338.26. Therefore, the Court finds that the reason put forward by the Defendants the Defendants' delay or neglect or refusal in the constructing the Care Centre i.e. the Plaintiffs' failure to pay the balance of the capital contribution sum of RM3 million is without merit and the 1st Defendant is in breach of the fundamental terms of the JVA.

[112] It is undisputed that Land A and Land B was auctioned off on 7.2.2023 and 17.8.2020 respectively to settle the debts and/or liabilities of the Defendants and the object of the JVA could no longer be performed. The Plaintiffs suffered loss and damage amounting to RM3,503,338.26 as a result of the Defendants' breach of the JVA. In the premises, the 1st Defendant is liable for damages and/or to indemnify the Plaintiffs against any loss or damage suffered by the Plaintiffs as a result of the Defendants' breach of the terms of the JVA.

Accounts and Damages

[113] The Defendants had claimed in their Original Action that the Plaintiffs owes them RM856,661.74 being the balance of the RM3 million which had to be contributed by the Plaintiffs. In advancing this claim, the Defendants alleged that only RM2,143,338.26 had been paid (See: NOP at p. 188 Q&A286).

[114] It was based on the Defendants' claim that only RM2,143,338.26 had been paid by the Plaintiffs that on June 2020, PW1 requisition for an EGM for the purpose of seeking inter alia an accounting from

the Defendants the sum of RM2,143,338.26 admitted to have been paid.

[115] The Defendants' refusal to requisition an EGM and to account for sums of RM2,143,338.26 admittedly received by the Defendants, showed that they never had any intention to account for the monies received by them.

[116] Instead, at this trial, the 3rd Defendant had claimed that the Defendants had already incurred RM3,557,039.41 on construction works on Lands A and B. The 3rd Defendant relied on a Statement of Expenditure prepared by himself at p. 1 to 32 of Bundle C (hereinafter, "Statement of Expenditure") to support his claim.

[117] It is submitted by the Defendants that the evidence of DW3, Mr. Samuel Chong, a qualified Quantity Surveyor was not intended to support the Defendants' claim that a sum of RM3,557,039.41 had in fact been incurred by the Defendants for works carried out on Lands A and B. It was merely intended to show what it would cost to construct a 2 storey detached house in accordance to the plan in 2017 (See: NOP at p. 270 Q&A27 and Q&A28).

[118] Even assuming that the estimated construction cost of a 2 storey detached house in 2017 by Samuel Chong is accurate, which is not admitted by the Plaintiffs, it showed at p. 63 of Bundle C that the total cost for the substructure works and all the whole frame of the building (which would include all the columns and beams encased in concrete) would costs RM680,00.00 and RM657,000.00 respectively. Both totaling RM1,337,000.00 (See: Bundle C at p. 63 items 1A and 2A).

[119] By the above reckoning, the works carried out by the Defendants on Land A namely, the ground slab and only the ground floor columns in 2011 could not have exceeded RM1,337,000.00. Yet, the Defendants claimed that a sum of RM3,557,039.41 was incurred for constructing the substructure work and part of the frame consisting only of the ground floor columns (See: photograph at Exhibit P7).

[120] From the facts and evidence, the Court finds that there is insufficient evidence to support the Defendants' contention that the 1st Defendant had incurred a sum of RM3,557,039.41 for the construction works on Land A and Land B. The Statement of Expenditure prepared by the 3rd Defendant appears to be a self-serving document and unsupported by audited financial statements

or bank statements or receipts or other relevant contemporaneous documents. The evidence given by Samuel Chong, DW3 on the estimated cost in 2017 for constructing the ground floor slab and the ground floor columns on Lands A and Lands B amounting to RM1,337,000.00 does not constitute proof that the said sum was actually incurred by the 1st Defendant in 2011 for such works but it could be used as a guide on the estimated costs if the ground floor slab and ground floor columns were constructed in 2017.

[121] Under Clause 8.1 of the JVA, the parties shall cause the JV company to keep records of and reports of all matters pertaining to the JV company and proper accounts of all expenditures incurred, rendering such monthly accounts to the Board together with such invoices and other documents. Since the resignation of the Plaintiffs as directors of Damai Care Centre on 15.2.2013, the 2nd and 3rd Defendants became the only 2 directors of the company. The evidence adduced at the trial shows that the Plaintiffs had paid their share of the capital contribution and construction expenditure for the Care Centre amounting to RM3,503,338.26 between June, 2010 to June,2011. It is the 1st Defendant's responsibility and obligation under Clause 3.1 (b) to construct and complete the care centre within one year from the date of the JVA dated 10.1.2012. The

Defendants had failed to construct and complete the Care Centre until today. The pictures taken at the site shows that the works carried out on Land A comprises of ground slab and ground floor columns which appears to be unfinished works. See Bundle 3 at Page 915 - 922.The Plaintiffs request for an EGM in June, 2020 for, inter alia, an account on the expenditures incurred for the construction of the Care Centre and the JV business was turned down by the Defendants. Hence, it is not unreasonable for the Plaintiffs to request the 1st Defendant for such account and the Defendants should account for all monies received from the Plaintiffs and the expenditures incurred in the construction of the Care Centre and JV business. During the trial of the Counterclaim, the 3rd Defendant has tried to account for the expenditures incurred for the works on Land A and land B by relying on his Statement of Expenditures which the Court had earlier found to be self-serving, unreliable and unsupported by relevant contemporaneous documentary evidence. In the premises, it is unnecessary for the Court to order the Defendants to render an accounts of such expenditures all over again.

[122] As alluded above, the estimated costs for the construction of the ground slab and ground columns on Land A could not exceed

RM1,337,000.00. The uncontroverted evidence shows that the Plaintiffs contributed and paid RM3,357,039.41 to the Defendants for the construction of the care centre and the JV business and the ground floor slab and ground floor columns on Land A was constructed by the 1st Defendant. In the circumstances, it would be fair and just to take into account the estimated costs for the ground slab and columns when deciding the amount of damages to be awarded to the Plaintiffs for the loss and damage suffered as a result of the Defendants delay and failure to construct or complete the Care Centre in accordance with the terms of the JVA.

[123] After taking into account the said estimated costs in 2017 amounting to RM1,337,000.00 as a guide and having regard to fact that the costs of the construction works on Land A in 2011 would be appreciably lower, the Court finds that it is fair and reasonable to award a sum of RM2,500,000.00 to the Plaintiffs as damages for the breach of the JVA by the 1st Defendant.

Conclusion

[124] After considering the totality of the evidence before the Court and the submissions of both parties, the Court finds that the Plaintiffs

have failed to prove their claim for breach of oral partnership agreement, fraud and/or misrepresentation on a balance of probabilities. However, having regard to same facts and evidence, the Court finds that the Plaintiffs have proven their claim for breach of the JVA and their loss and damage against the 1st Defendant on a balance of probabilities.

[125] Based on the aforesaid reasons, the Plaintiffs' claim for breach of the JVA is allowed and there shall be judgment for the Plaintiffs against the 1st Defendant in the sum of RM2,500,000.00 with interest thereon at the rate of 5% per annum from the date of this judgment until the date of full and final settlement to be paid by the 1st Defendant. As the both parties did not fully succeed in their claims or defences, the Court makes no order as to costs.

Dated 25th January, 2024.

Signed

Leonard David Shim

Judge

High Court Kota Kinabalu

For the Plaintiff : Raymond Szetu together with Zalikha Binti Abd Rhahman of Messrs Szetu & Co.

For the Defendants : Joan Goh of Messrs Goh & Associates