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MLGH (Sabah) Sdn Bhd v Rainbow Bay Sdn Bhd and another appeal

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-01(NCvC)(W)-163–04 OF 2019 AND S-01(NCvC)(W)-164–04 OF 2019

LEE SWEE SENG, RAVINTHRAN AND HADHARIAH SYED ISMAIL JJCA

C 28 APRIL 2023

Contract — Frustration — Illegality — State-owned company entered joint venture agreement and supplementary agreement with developer to develop State-owned land — State-owned company was required to give part of D *State-owned land to developer — Alienation of land to developer could not be completed due to amendment to Sabah Land Ordinance which prohibited such alienation — Whether there was breach of joint venture agreement and supplementary agreement when State-owned company failed to deliver title of land to developer — Whether there was frustration of joint venture agreement and* E *supplementary agreement — Whether frustration was self-induced — Whether State Government had induced State-owned company to breach joint venture agreement and supplementary agreement — Whether developer had proved various heads of damages — Civil Law Act 1956 ss 15 & 16 — Contracts Act 1950 s 57 — Sabah Land Ordinance (Cap 68) s 9A*

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The first appellant was a company wholly owned by the State Government of Sabah ('the second appellant') whereas the respondent was a developer that was appointed by the first appellant via a joint venture agreement and a supplementary agreement ('the JVA/SA') to construct and complete a mixed G development project on a 202 acre land fronting the Likas Bay ('the project') set at a total development cost of RM414m ('the vendor's entitlement') with a consideration that the respondent would be given a 150 acre land free from encumbrances within the total development area of 352 acre land ('the developer's entitlement'). The conflict between the parties arose when the first H appellant failed to deliver the title to the 150 acre land to the respondent which led to the termination of the JVA/SA. The respondent filed an action against the first appellant for breach of contract or wrongful repudiation of contract and claimed for all costs and expenses incurred up to the termination, loss of bargain and loss of profits to the tune of about RM2 billion. In the same action, I the respondent sought to make the second appellant as the principal of the first appellant to be jointly and severally liable with the first appellant premised on the tort of inducement of breach of contract whereby it was argued that the second appellant had wrongfully procured and induced directly or indirectly the first appellant to breach the JVA/SA. In this regard, the respondent

contended that the second appellant had engineered the amendment to the Sabah Land Ordinance (Cap 68) ('the SLO') to the effect that any alienation of land fronting the Likas Bay was prohibited and such amendment was made to release the second appellant of its obligation in its wholly owned subsidiary, the first appellant, under the JVA/SA. At the end of the trial, the court found in favour of the respondent and ruled that the first appellant could not rely on frustration as it was self-induced, it being the alter ego of the second appellant. The award given by the High Court was as followed: (a) a sum of RM6,355,371 for loss of expenditure, fees incurred, expenses and costs in carrying out the project from the year 1998 to 2003; and (b) damages in the sum of RM387,752,495 for loss of bargain in the 150 acre land. However, the High Court dismissed the respondent's claim for the expected loss of profit amounting to RM1,588,654,246 as being too remote and uncertain. Aggrieved by the decision, the parties filed the present appeals. Appeal 164 was filed by the respondent against the High Court's decision in dismissing its claim for loss of profit whereas Appeal 163 was filed by the appellants against the award of damages given against them jointly and severally. The issues arose in the present appeals were: (i) whether there was a breach of the JVA/SA when the first appellant failed to deliver title to the 150 acre land to the respondent; (ii) whether there was frustration of the JVA/SA with the rejection of the Detailed Environmental Impact Assessment ('DEIA') Final Report by the State Environmental Protection Department ('EPD') and also by supervening illegality with the coming into force of an amendment to the SLO where no title could be issued for the affected 150 acre land; (iii) whether there was self-induced frustration when the Sabah State EPD rejected the DEIA Final Report and when the State Legislature passed the said amendment to the SLO prohibiting alienation of the said land; (iv) whether the second appellant had induced its wholly owned subsidiary to breach the JVA/SA; and (v) whether the respondent had proved the various heads of damages.

Held, allowing Appeal 163 in part, setting aside the judgment entered against the second appellant, and dismissing Appeal 164 with each party bearing its own costs:

(1) In compliance with the JVA/SA, the first appellant gave a full and irrevocable power of attorney to the respondent with respect to the land for it to take all necessary actions including to charge the land to secure financing for the project as well as to deal with all relevant authorities to obtain the necessary approvals to enable the respondent to complete the project. Pursuant to the SA, the 150 acre title would be transferred to the respondent at the appropriate time when all the approvals for the development would have been obtained from the various authorities. From the chronology of events stretching from the date of the JVA on 7 April 1997 to the date of the notice of termination dated on 10 August 2015, the court could not say that the first appellant had breached a

fundamental term of the JVA/SA in the latter's failure to issue the title to the 150 acre land to the respondent when that issue was not at play throughout that period and the focus of the respondent was in getting the State EPD's decision quashed. The court found that there was plainly no breach on the part of first appellant to deliver the title to the 150 acre land to the respondent for that had been overtaken by two key events: the EPD's rejection of the DEIA Final Report on 21 October 2002 and the amendment to the SLO prohibiting any alienation of land in the affected Likas Bay coastal area effective 9 August 2012 (see paras 30, 45, 66 & 69).

(2) The common law doctrine of frustration had been given statutory force and recognition under s 57 of the Contracts Act 1950 and ss 15 and 16 of the Civil Law Act 1956. A contract was frustrated when there was a change in circumstances which rendered a contract physically or legally impossible of performance. The court agreed with the first appellant that the approval of the DEIA Final Report and the eventual alienation of the said land were fundamental terms of the JVA/SA without which the project would not be able to be performed. In the light of the rejection of the DEIA Final Report and the enactment of s 9A of the SLO, the JVA/SA was frustrated as it had become impossible and unlawful to be performed. There was thus a supervening illegality preventing the project from taking off and effectively frustrating the contract and discharging the parties of their respective obligations under the JVA/SA (see paras 78, 80, 82, 87 & 92–93).

(3) In contracts where the Government was a party, for so long as the Legislature had made the law or passed an amendment in good faith and reasonably for a proper purpose, it could not be said that it was a case of self-induced frustration for a legislature must be free to form its views without any fetters as to what was best for the people where its policy of development affecting the environment and eco-system was concerned. In the present case, there was no evidence that the respondent was targeted for discrimination and the project was then sabotaged and given to another party. There was also no evidence that members of the Legislative Assembly had conspired with the Executive that had introduced the Amendment Bill to use their legislative powers to veto the whole project. With respect to the rejection of the DEIA Final Report, if the State EPD had wanted to make sure that the approval was rejected, it would not have written to the Federal Department of Environment and urged them to decide fully and finally on the said application for approval. On totality, there was no evidence of self-induced frustration. However, the first appellant would remain liable to pay the respondent all costs and expenses incurred until the ultimate frustrating event ie, the coming into force of the amendment, in line with the method of assessing compensation under s 15 of the Civil Law Act 1956 when a contract had

become frustrated as in this case where it had become legally impossible to perform (see paras 102, 122, 136, 138 & 144–145).

(4) As the court had held that there was no breach of the contract in the JVA/SA but that it was a case of the contract having been frustrated by a supervening legislation, the question of a third party inducing a breach of its wholly owned subsidiary did not arise. The court rejected the respondent's argument that the first appellant was the alter-ego of the second appellant considering that there was no fraud pleaded and no evidence of abuse of the separate legal entity doctrine for the purpose of avoiding contractual obligation. There was also no plea for lifting or piercing the corporate veil. For the tort of inducement of breach of contract, there must be inducement from a complete stranger to the contract alleged to have been broken. In the present case, as the respondent had taken the stand that the first appellant was the alter-ego of the second appellant, the respondent could not resile from that stand for the purpose of making the State liable for inducement of breach of contract, to now say that the State Government was a stranger and a separate entity from its wholly owned subsidiary. That would be to approbate and reprobate (see paras 146–149).

(5) Under s 15 of the Civil Law Act 1956 the respondent was not entitled to claim damages arising out of what the respondent said was a loss of bargain under Part A of the respondent's claim. For Part B of the claim, the court agreed with the High Court and found that the respondent had proved on the balance of probabilities the amount expended by it before the contract was frustrated, both under s 15 of the Civil Law Act 1956 as well as under the principle of estoppel. The respondent was entitled to claim for that amount which was produced as evidence before the High Court and which the High Court allowed in the sum of RM6,355,371 as reflected in the audited accounts for the year of 1998 to 2003 which ledger and source documents were not seriously challenged by the first appellant. As for Part C of the respondent's claim, the court found that the claim of RM1,588,654,246 for consequential loss of profits was rather spurious and speculative. As no construction works whatsoever could be done because of supervening impossibility with the passing of the amendment, there could not be any damages to that tune of RM1.5 billion if the project were to be completed (see paras 155, 157 & 160–161).

[Bahasa Malaysia summary

Perayu pertama ialah sebuah syarikat milik penuh Kerajaan Negeri Sabah ('perayu kedua') manakala responden adalah pemaju yang dilantik oleh perayu pertama melalui perjanjian usaha sama dan perjanjian tambahan ('PUS/PT') untuk membina dan menyiapkan projek pembangunan bercampur di atas tanah seluas 202 ekar berhadapan Likas Bay ('projek tersebut') yang ditetapkan

pada jumlah kos pembangunan RM414 juta dengan pertimbangan bahawa responden akan diberi tanah seluas 150 ekar bebas daripada bebanan dalam keseluruhan kawasan pembangunan tanah seluas 352 ekar. Konflik antara pihak-pihak timbul apabila perayu pertama gagal menyerahkan hak milik tanah seluas 150 ekar tersebut kepada responden yang membawa kepada penamatan PUS/PT tersebut. Responden memfailkan tindakan terhadap perayu pertama kerana melanggar kontrak atau penolakan kontrak yang salah dan menuntut semua kos dan perbelanjaan yang ditanggung sehingga penamatan tersebut, kerugian tawar-menawar dan kehilangan keuntungan berjumlah kira-kira RM2 bilion. Dalam tindakan yang sama, responden memohon untuk menjadikan perayu kedua, sebagai prinsipal perayu pertama, bertanggungjawab secara bersesama dan berasingan dengan perayu pertama berdasarkan tort dorongan kemungkiran kontrak di mana ia dihujahkan bahawa perayu kedua telah secara salah memperoleh dan mendorong secara langsung atau tidak langsung perayu pertama untuk melanggar PUS/PT tersebut. Dalam hal ini, responden berhujah bahawa perayu kedua telah merekayasa pindaan kepada Sabah Land Ordinance (Cap 68) ('SLO') yang mengakibatkan larangan apa-apa pemberian hak milik tanah di hadapan Likas Bay dan pindaan tersebut dibuat untuk melepaskan perayu kedua daripada tanggungjawabnya dalam anak syarikat milik penuhnya, perayu pertama, di bawah PUS/PT. Pada akhir perbicaraan, mahkamah membuat keputusan yang memihak kepada responden dan memutuskan bahawa perayu pertama tidak boleh bergantung pada kekecewaan kerana ia disebabkan oleh diri sendiri, mengambil kira bahawa ia adalah alter ego perayu kedua. Award yang diberikan oleh Mahkamah Tinggi adalah seperti berikut: (a) sejumlah RM6,355,371 bagi kehilangan perbelanjaan, fi yang ditanggung, perbelanjaan dan kos dalam menjalankan projek dari tahun 1998 hingga 2003; dan (b) ganti rugi berjumlah RM387,752,495 untuk kerugian tawar-menawar bagi tanah seluas 150 ekar tersebut. Walau bagaimanapun, Mahkamah Tinggi menolak tuntutan responden bagi anggaran kerugian keuntungan berjumlah RM1,588,654,246 sebagai terlalu jauh dan tidak pasti. Terkilan dengan keputusan tersebut, pihak-pihak memfailkan rayuan semasa. Rayuan 164 difailkan oleh responden terhadap keputusan Mahkamah Tinggi yang menolak tuntutannya untuk kerugian keuntungan manakala Rayuan 163 difailkan oleh perayu-perayu terhadap pemberian ganti rugi yang diberikan terhadap mereka secara bersesama dan berasingan. Isu-isu yang timbul dalam rayuan-rayuan ini adalah: (i) sama ada terdapat pelanggaran PUS/PT apabila perayu pertama gagal menyerahkan hakmilik tanah seluas 150 ekar tersebut kepada responden; (ii) sama ada terdapat kekecewaan PUS/PT dengan penolakan Laporan Akhir Penilaian Kesan Alam Sekitar Terperinci ('PKAST') oleh Jabatan Perlindungan Alam Sekitar Negeri ('JPAS') dan juga melalui 'supervening illegality' dengan mula berkuat kuasanya pindaan kepada SLO di mana tiada hakmilik boleh dikeluarkan untuk tanah seluas 150 ekar tersebut; (iii) sama ada terdapat kekecewaan yang disebabkan oleh diri sendiri apabila JPAS Negeri Sabah menolak Laporan Akhir PKAST dan apabila Dewan

Undangan Negeri meluluskan pindaan ke atas SLO yang melarang pemberian hak milik tanah tersebut; (iv) sama ada perayu kedua telah mendorong anak syarikat milik penuhnya untuk melanggar PUS/PT tersebut; dan (v) sama ada responden telah membuktikan semua ganti rugi yang dipohon.

Diputuskan, membenarkan sebahagian Rayuan 163 dan mengenepikan penghakiman yang dimasukkan terhadap perayu kedua, dan menolak Rayuan 164 dengan perintah bahawa setiap pihak menanggung kos masing-masing:

(1) Selaras dengan PUS/PT, perayu pertama memberikan Surat Kuasa Wakil penuh dan tidak boleh ditarik balik kepada responden berkenaan dengan tanah tersebut untuk responden mengambil semua tindakan yang perlu termasuk mencagar tanah tersebut untuk mendapatkan pembiayaan bagi projek tersebut serta untuk berurusan dengan semua pihak berkuasa yang berkaitan untuk mendapatkan kelulusan yang diperlukan bagi membolehkan responden menyiapkan projek tersebut. Menurut SA tersebut, hak milik 150 ekar tanah tersebut akan dipindahkan kepada responden pada masa yang sesuai apabila semua kelulusan untuk pembangunan tersebut diperolehi daripada semua pihak berkuasa yang berkaitan. Daripada kronologi peristiwa bermula dari tarikh JVA pada 7 April 1997 hingga tarikh notis penamatan bertarikh 10 Ogos 2015, mahkamah tidak boleh mengatakan bahawa perayu pertama telah melanggar terma asas PUS/PT dalam kegagalannya untuk memberikan hak milik tanah seluas 150 ekar tersebut kepada responden apabila isu tersebut tidak dimainkan sepanjang tempoh tersebut dan tumpuan responden adalah untuk membatalkan keputusan JPAS Negeri. Mahkamah mendapati bahawa secara jelas tiada pelanggaran di pihak perayu pertama untuk menyerahkan hakmilik tanah seluas 150 ekar tersebut kepada responden kerana ianya telah diatasi oleh dua peristiwa penting: penolakan JPAS terhadap Laporan Akhir PKAST pada 21 Oktober 2002 dan pindaan kepada SLO yang melarang apa-apa pemberian hak milik tanah di kawasan pantai Likas Bay yang terlibat berkuat kuasa 9 Ogos 2012 (lihat perenggan 30, 45, 66 & 69).

(2) Doktrin common law mengenai kekecewaan telah diberi kuasa berkanun dan pengiktirafan di bawah s 57 Akta Kontrak 1950 dan ss 15 dan 16 Akta Undang-Undang Sivil 1956. Sesuatu kontrak dikecewakan apabila terdapat perubahan dalam keadaan yang menyebabkan kontrak secara fizikal atau undang-undang mustahil untuk dilaksanakan. Mahkamah bersetuju dengan perayu pertama bahawa kelulusan Laporan Akhir PKAST dan pemberian hak milik tanah tersebut adalah syarat asas PUS/PT tersebut yang tanpanya projek tersebut tidak akan dapat dilaksanakan. Memandangkan penolakan Laporan Akhir PKAST dan penggubalan s 9A SLO, PUS/PT telah dikecewakan kerana ia menjadi mustahil dan menyalahi undang-undang untuk dilaksanakan. Oleh itu, wujudnya tindakan menyalahi undang-undang yang menghalang projek

tersebut daripada dimulakan dan secara kesanya telah mengecewakan kontrak tersebut dan melepaskan pihak-pihak daripada tanggungjawab masing-masing di bawah PUS/PT tersebut (lihat perenggan 78, 80, 82, 87 & 92–93).

(3) Dalam kontrak di mana Kerajaan adalah pihak, selagi mana Badan Perundangan membuat undang-undang atau meluluskan pindaan dengan suci hati dan munasabah untuk tujuan yang sepatutnya, ia tidak boleh dikatakan bahawa ia adalah kes kekecewaan yang disebabkan oleh diri sendiri kerana badan perundangan mesti bebas untuk membentuk pandangannya tanpa apa-apa belenggu tentang apa yang terbaik untuk rakyat berkenaan dengan dasar pembangunannya yang menjejaskan alam sekitar dan ekosistem. Dalam kes ini, tiada bukti bahawa responden disasarkan untuk diskriminasi dan projek tersebut kemudiannya disabotaj dan diberikan kepada pihak lain. Tiada juga bukti bahawa ahli-ahli Dewan Undangan telah bersekongkol dengan Eksekutif yang telah memperkenalkan Rang Undang-Undang Pindaan tersebut untuk menggunakan kuasa perundangan mereka untuk memveto keseluruhan projek. Berkenaan dengan penolakan Laporan Akhir PKAST, jika JPAS Negeri ingin memastikan bahawa kelulusan tersebut ditolak, ia tidak akan menulis kepada Jabatan Alam Sekitar Persekutuan dan menggesa mereka membuat keputusan penuh dan akhir mengenai permohonan kelulusan tersebut. Secara keseluruhan, tidak ada bukti kekecewaan yang disebabkan oleh diri sendiri. Walau bagaimanapun, perayu pertama akan tetap bertanggungjawab untuk membayar responden semua kos dan perbelanjaan yang ditanggung sehingga peristiwa yang mengecewakan tersebut berlaku iaitu, berkuatkuasanya pindaan tersebut, selaras dengan kaedah penilaian pampasan di bawah s 15 Akta Undang-Undang Sivil 1956 apabila kontrak telah menjadi kecewa seperti dalam kes ini di mana ianya menjadi mustahil untuk dilaksanakan secara sah (lihat perenggan 102, 122, 136, 138 & 144–145).

(4) Memandangkan mahkamah telah memutuskan bahawa tiada pelanggaran kontrak dalam PUS/PT tersebut tetapi ia adalah kes kontrak yang telah dikecewakan oleh undang-undang 'supervening', persoalan pihak ketiga mendorong pelanggaran oleh anak syarikatnya tidak timbul. Mahkamah menolak hujah responden bahawa perayu pertama adalah alter-ego perayu kedua memandangkan tiada fraud yang diplid dan tiada keterangan penyalahgunaan doktrin entiti undang-undang yang berasingan bagi tujuan mengelakkan kewajipan kontrak. Juga tiada rayuan untuk mengangkat atau menebuk tirai korporat. Bagi tort dorongan kemungkiran kontrak, perlu ada dorongan daripada orang yang tiada kaitan langsung dengan kontrak yang didakwa telah dilanggar. Dalam kes ini, oleh kerana responden telah mengambil pendirian bahawa perayu pertama adalah alter-ego perayu kedua, responden tidak boleh meninggalkan pendirian tersebut bagi tujuan menjadikan Negeri

bertanggungjawab untuk dorongan kemungkiran kontrak, untuk kini mengatakan bahawa Kerajaan Negeri adalah orang asing dan entiti yang berasingan daripada anak syarikat milik penuhnya. Itu terjumlah kepada 'approbate and reprobate' (lihat perenggan 146–149).

(5) Di bawah s 15 Akta Undang-Undang Sivil 1956 responden tidak berhak menuntut ganti rugi yang timbul daripada apa yang responden katakan sebagai kerugian tawar-menawar di bawah Bahagian A tuntutan responden. Bagi Bahagian B tuntutan tersebut, mahkamah bersetuju dengan Mahkamah Tinggi dan mendapati responden telah membuktikan atas imbangan kebarangkalian jumlah yang dibelanjakan olehnya sebelum kontrak tersebut dikecewakan, di bawah s 15 Akta Undang-Undang Sivil 1956 serta di bawah prinsip estoppel. Responden berhak menuntut jumlah tersebut yang dikemukakan sebagai keterangan di hadapan Mahkamah Tinggi dan yang dibenarkan oleh Mahkamah Tinggi dalam jumlah RM6,355,371 seperti yang ditunjukkan dalam akaun teraudit bagi tahun 1998 hingga 2003 yang mana dokumen lejar dan sumbernya adalah tidak dicabar secara serius oleh perayu pertama. Bagi Bahagian C tuntutan responden, mahkamah mendapati tuntutan RM1,588,654,246 untuk anggaran kerugian keuntungan adalah meragukan dan spekulatif. Memandangkan tiada apa-apa kerja pembinaan boleh dilakukan disebabkan oleh 'supervening impossibility' dengan kelulusan pindaan tersebut, tidak akan ada apa-apa kerugian yang bernilai RM1.5 bilion jika projek tersebut disiapkan (lihat perenggan 155, 157 & 160–161).]

Cases referred to

Adams and others v Cape Industries plc and another [1991] 1 All ER 929, CA (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Albacruz (Cargo Owners) v Albazero (Owners) [1977] AC 774, CA (refd)

Bank of Tokyo Ltd v Karoon [1987] AC 45, CA (refd)

Constantine (Joseph) Steamship Line Ltd v Imperial Smelting Corpn Ltd, The Kingswood [1942] AC 154, HL (refd)

Hong Leong Bank Bhd v Tan Siew Nam & Anor [2014] 5 MLJ 34; [2014] 7 CLJ 293, CA (refd)

Liew Mok Poh & Anor v Balakrishnan Muthuthamby [1990] 2 CLJ Rep 365, HC (folld)

Ng Kheng Yong @ Ng Tet Lai v Seng Hup Realty Co Sdn Bhd [2004] 3 MLJ 477, CA (refd)

Nyap Kui Fah v Len On Contractor [1978] 1 MLJ 208, CA (refd)

Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (folld)

Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors [2013] 8 MLJ 157, HC (refd)
Ramli bin Zakaria & Ors v Government Of Malaysia [1982] 2 MLJ 257, FC (refd)
Salomon v Salomon & Co Ltd [1897] AC 22, HL (refd)
Sidambaram a/l Torosamy v Lok Bee Yeong (representative to the estate of Soma Sundram a/l Doraiswamy) [2017] 4 MLJ 570; [2018] 3 CLJ 599, CA (refd)
Tan Sri Dato' Tajudin bin Ramli v Rego Multi-Trades Sdn Bhd [2018] MLJU 147; [2018] 7 CLJ 197; [2018] 2 AMR 912, CA (refd)
The State Government of Sabah & Ors v Clarence Chiuh Ken Loong & Ors [2017] 3 MLJ 127, CA (refd)
Wells v Newfoundland [1999] 3 SCR 199, SC (refd)
West Lakes Ltd v South Australia (1980) 25 SASR 389, SC (refd)

Legislation referred to

Chief Minister (Incorporation) Ordinance (Cap 23)
Civil Law Act 1956 ss 15, 16, 16(2), Part VI
Conservation of Environment (Prescribed Activities) Order 1999
Conservation of Environment Enactment 1996
Constitution of the State of Sabah arts 5, 6(1), (2), (3), 14(1), Part I, Chapter 2, Part II
Contracts Act 1950 ss 47, 57, 57(1), (2), (3), 66, 74
Environmental Quality Act 1974
Interpretation Acts 1948 and 1967 ss 77(c), 80
Land Ordinance (Cap 68) s 9A, Schedule IIA
Land Ordinance (Cap 81)
Public Utilities Act [CN]

Appeal from: *Rainbow Bay Sdn Bhd v MLGH (Sabah) Sdn Bhd & Anor* [2021] 10 MLJ 846 (High Court, Kota Kinabalu)

Roderic Fernandez (with Dgku Fazidah Hatun bt Pg Bagul, Chung Kai Lun and Wong Chik Kien) in Civil Appeal No S-01(NCvC)(W)-163–04 of 2019 for the first and second appellants.
Marina Tiu (with Carl Barnabas Malanjum and Leanne Lajingah) (Yap Chin & Tiu) in Civil Appeal No S-01(NCvC)(W)-163–04 for the appellant.
Marina Tiu (with Carl Barnabas Malanjum and Leanne Lajingah) (Yap Chin & Tiu) in Civil Appeal No S-01(NCvC)(W)-163–04 of 2019 for the respondent.
Roderic Fernandez (with Dgku Fazidah Hatun bt Pg Bagul, Chung Kai Lun and Wong Chik Kien) in Civil Appeal No S-01(NCvC)(W)-163–04 for the first and second respondents.

Lee Swee Seng JCA (delivering judgment of the court):

[1] This is a case of a joint venture turnkey contract between a Sabah State development company and a private developer that could have been better managed to avoid the colossal claim of damages to the tune of RM2 billion that the developer now seeks to claim from both the State-owned company and the State.

[2] The dispute arose primarily from a supervening amended legislation passed by the Sabah State Legislature that prohibits any alienation of land in the affected area of some 3,830 acres fronting the Likas Bay in Kota Kinabalu. The developer says in effect that the State had engineered the amendment to the Sabah Land Ordinance (Cap 68) to release it from its obligation in its wholly-owned subsidiary called MLGH (Sabah) Sdn Bhd ('MLGH') as the vendor which was the entity that had entered into the joint venture agreement ('JVA') dated 7 April 1997 with Rainbow Bay Sdn Bhd ('the developer').

[3] In the High Court below, the developer as the plaintiff had sued both MLGH as the first defendant ('D1') and the State Government of Sabah as the second defendant ('D2'). For the record, MLGH is a company limited by shares and is wholly-owned by the State Government of Sabah through the Chief Minister (Incorporation) Ordinance Cap 23. The plaintiff shall be referred to as the developer and MLGH as the vendor. MLGH and the State Government of Sabah shall be referred to collectively as the defendants.

THE BRIEF FACTS

[4] The crux and concept of the JVA is that the developer was to construct and complete a mixed development project consisting of a City Hall, Convention Centre, a promenade with landscaping and related infrastructure on a 202 acre site ('the project') set at a total development cost of RM414m (the vendor's entitlement') and for that the developer would be given a 150 acre land free from encumbrances ('the developer's entitlement) within the whole development area of a 352 acre State land ('the land') fronting the Likas Bay, of which the vendor's portion would be a 202 acre land and that of the developer, the 150 acre land.

[5] In the supplementary agreement ('SA') dated 23 June 1997, to assist with the developer's cash flow, the vendor was prepared to procure and/or assist to procure the issuance of a separate title for the balance 150 acre land in favour of the developer so that the developer may use it for financing the project. The JVA as amended by the SA constituting the contract between the parties shall be conveniently referred to as the JVA/SA.

A **[6]** The details of the vendor's entitlement and the developer's entitlement are as particularised in Appendix 2 of the SA and the area identified for the respective portions of the 202 acre land and 150 acre land is as identified in Appendix 1 of the SA.

B **[7]** The developer's entitlement consisted of the various Lots A1–A5, B1–B2 and C1–C5 as identified in Appendix 3 to the SA totalling 150 acres. The vendor's entitlement is marked as Lots D, E, F and G as identified in Appendix 3 of the SA and constituting the 202 acre land.

C BEFORE THE HIGH COURT

[8] The developer terminated the JVA/SA on 10 August 2015 on the ground that MLGH had breached the contract or that it had wrongfully repudiated the contract in its failure to deliver the title to the 150 acre land to
D the developer. The developer claimed against MLGH for damages for breach of the JVA/SA under the heads of damages consisting of all costs and expenses incurred up to the termination, loss of bargain and for loss of profits to the tune of about RM2 billion together with interest and costs.

E **[9]** The developer sought to make the State Government of Sabah liable for such loss arising out of the breach of contract or wrongful repudiation of it in that the State is the principal of MLGH and that MLGH is being controlled and manage by the Chief Minister of the State of Sabah and the officers and
F servants of the State Government in a manner that MLGH is in effect the alter ego of the State Government of Sabah.

[10] The developer also mounted another cause of action against the State Government of Sabah for the tort of inducement of breach of contract in that
G it had wrongfully procured and induced directly or indirectly MLGH to breach the JVA/SA. Thus, the developer as the plaintiff sought to make the State Government of Sabah jointly and severally liable with MLGH for all the loss and damage arising out of the breach of the contract.

H **[11]** MLGH's defence was that as the project did not get the approval of the State Environmental Protection Department ('EPD') and that further in August 2012, an amendment to the Sabah Land Ordinance had come into force prohibiting alienation of land fronting the Likas Bay Area, the said land was affected such that no development could be undertaken in the affected
I area.

[12] MLGH thus pleaded that the contract had been frustrated and suggested a mutual termination which was rejected by the developer. The developer further argued that the frustration was self-induced in that the

Executive of the State Government of Sabah, being in control of the State Legislative Assembly, had procured the passing of the amending legislation to excuse its contractual commitment and that of its wholly-owned subsidiary in MLGH under the JVA/SA.

[13] The defendants further argued that they are separate legal entities and that the actions of the Executive of the State Government cannot be confused with and conflated as one with the State Legislature and that the latter must be free to pass laws having regard to the interest of the people of Sabah as a whole as well as concerns of environment degradation and damage that such a project may cause, involving as it is a massive land reclamation in the Likas Bay Area.

[14] The High Court after a full trial, found for the developer as the plaintiff primarily on breach of the contract in the JVA/SA in the failure of MLGH to deliver the title to the 150 acre land to the developer within a reasonable time and that MLGH cannot rely on frustration as it was self-induced, it being the alter ego of the State Government.

[15] The High Court also had no difficulty in finding that the State Government had induced its wholly-owned subsidiary to breach the contract. Damages was assessed under the head of loss of expenditure, fees incurred, expenses and costs in carrying out the project from Year 1998–2003 at RM6,355,371.

[16] The High Court also awarded a further sum of RM387,752,495 being damages for loss of a bargain in the 150 acre land. The High Court dismissed the loss of profits expected under the JVA/SA of RM1,588,654,246 as being too remote and uncertain for as yet there was no submission of the detailed development plan for approval of the local authority and in any event the local authority has not approved any development plan for the project.

[17] Thus a combined total of RM6,355,371 and RM387,752,495 amounting to RM394,107,866 was allowed as damages together with interest at the rate of 5%pa form 10 October 2015 until full payment and costs of RM100,000 subject to allocator.

[18] The decision was delivered on 26 February 2019 and the full grounds of judgment ('GOJ') given on 18 November 2020.

[19] Against that decision of the High Court, both the plaintiff and the defendants appealed to the Court of Appeal. The developer as plaintiff appealed against the dismissal of the loss of profits in Appeal S-01(NCvC)(W)-164–04 of 2019 ('Appeal 164'). On the other hand, both the defendants appealed in Appeal S-01(NCVC)(W)-163–04 of 2019

('Appeal 163') against the award of damages given against them jointly and severally. The main grounds of appeal shall be considered under the issues listed below.

Whether there was a breach of the JVA/SA when MLGH failed to deliver title to the 150 acre land to the developer

[20] The developer sought to terminate the JVA/SA by way of a 90-day notice of termination dated 10 August 2015 under cl 8 of the JVA/SA for the failure to deliver the title to the 150 acres land (the developer's entitlement). A few observations must be made of cl 8 on MLGH's obligation to deliver the said title.

[21] The 1997 East Asian Financial Crisis was still raging and in view of the economic downturn suffered by most countries in East Asia during that time, MLGH sought in its letter to the developer of 5 May 1998 for deferment of the project for at least three to five years which was accepted by the developer. However, the developer was allowed to proceed to getting the necessary approvals from all the relevant authorities for the project.

[22] It was thus a case of all systems go except for the commencement of the construction works for the project. In discharge of its obligation under cl 2(a) of the JVA/SA, MLGH as far back as 27 May 1998 had procured the issuance of a letter of offer to alienate land by the Lands and Surveys Department.

[23] There was a further obligation on the part of MLGH as represented in cl 2(b) of the JVA as follows:

> *The vendor is to procure the issuance of a title deed(s)* in respect of the said land free from registered encumbrances within a *reasonable period* from the date of issuance of the said letter of offer and the said land is to be suitable for the purpose of carrying out the mixed commercial development approved by the Local Authorities or other relevant authorities. (Emphasis added.)

[24] The above obligation of MLGH as the vendor was further modified by the SA to read as follows in cl 4(b)(i):

> (i) For the consideration aforesaid *the vendor shall procure and/or facilitate and/or assist to procure the issuance of separate title deeds for the said 150 acres in favour of the developer*, which are freely transferable, free from encumbrances and duly endorsed thereon with a land use/zoning that is unconditionally commercial and with vacant possession. (Emphasis added.)

[25] As can be seen in cl 4(b)(i) the procurement of the title to the 150 acre land is not couched in peremptory language for it reads that '… *the vendor shall procure and/or facilitate and/or assist to procure the issuance of separate title deeds*

for the said 150 acres in favour of the developer ...'. (Emphasis added.)

[26] A change in the language and expression used within the same document on what is substantially the same obligation would indicate a change in the meaning intended with respect to the obligation referred to. Instead of procuring the title to the 150 acre land the obligation may be discharged by either facilitating or assisting to procure the issuance of a separate title to the 150 acre land.

[27] MLGH duly made an application to the Lands and Surveys Department of the State on Land Application PT 96010390 for the alienation of the land for development of commercial and residential purposes and other infrastructural requirements. It was duly approved with a nominal premium of RM1,000. The offer was open and valid until and shall lapse on 27 August 1998. However, certain conditions in the letter of offer to alienate the land were not agreeable to the developer. Under the Special Terms and Condition, cl 2(a) requires MLGH to complete before 1 January 2004 the development of the whole of the project.

[28] As the land was to be reclaimed from the sea, cl 2(d) requires MLGH to take all necessary precautions against pollution and submit plans for the environmental protection and control of the area during and after the development of the said land for the approval of the relevant authority in accordance with the Environmental Quality Act 1974.

[29] Clause 8 further required that sub-division of the said land is prohibited without the written permission of the Director of Lands and Surveys. There was also cl 9 of the Special Terms and Conditions that prohibits the transfer, charge or sublease of the land until such time as the land has been fully developed in accordance with the terms and conditions stipulated and without the written permission of the Director of Lands and Surveys who shall charge additional premium and enhanced rent when giving permission.

[30] Two days later after the issuance of the letter of offer to alienate, MLGH on 29 May 1998, also in compliance with the JVA/SA, gave a full and irrevocable power of attorney ('PA') to the developer with respect to the land for it to take all necessary actions including empowering the developer to charge the said land for financing relating to the development of the project as well to deal with all relevant authorities to obtain the necessary approvals to enable the developer to complete the project.

[31] The scope of the cl 5(b) as added by the SA reads as follows:

(b) The Power of Attorney to be granted pursuant to Clause 5(a) above in favour of the developer shall, inter alia, empower the developer to charge the said land for financing relating to the development of the project and to attend to all acts and matters relating to the project including but not limited to empowering the developer to deal with all relevant authorities to enable the developer to complete such works as shall be set out in the said supplementary agreement.

[32] The recitals of the irrevocable PA includes the following:

3. Pending the issuance and registration of title deed(s) to the said land and pursuant to Clause 5 of the said JV Agreement, the Donor wishes, by this Power of Attorney, to fully empower the Attorney to do all such things in respect of the said land and the said land Application, inter alia, to facilitate the Attorney's development of the project.

4. This Power of Attorney shall extend to the title deed(s) to the said land when issued.

[33] The irrevocable PA empowers the donee developer to do the following important tasks with respect to the issuance of the title to the land including the 150 acre land and application for all necessary approvals for the project such as:

1. To enter into the said land with any form of machinery or equipment and with building materials and other plant together with the Attorney's agents, consultants, employees or contractors all or any of the following purposes:

(a) to *survey* the said land;

(b) to *clear, level, reclaim or do any other preparatory work for the development* of the said land;

(c) to *develop the said land* in accordance with plans approved by the authorities concerned.

2. To instruct architects, engineers, surveyors and any other consultant, person or firm for the purpose of the *preparation of development and other plans for the project and to submit the same to the authority concerned for approval and to any other authorities or governmental bodies necessary for the construction and completion of the project.*

3. To appear before any Governmental Municipal or other authority *to make all applications or representations* or to howsoever deal with the same for any purpose hereunder.

4. To apply for change of use and sub-division of the said land. For this purpose, to execute the Memorandum of Surrender of Title to the said land.

5. To sign all deeds, draft titles, agreements, plans, instruments, correspondences, offers, applications, memorandum, statutory declarations or any document in order to facilitate the sub-division and the commencement of the development on the said land. The powers in this Deed shall *extend in effect to the title(s) and/or amended and/or sub-divided titles issued*.

6. To collect all such draft titles, offer and to deliver such draft or other titles and

other documents to the land authorities or other authorities for registration and *to pay all survey charges, land premium, annual rent, assessments, sub-division charges, title preparation fees and all other necessary outgoings for the issuance and registration of titles to and/or the conversion and/or sub-division of the said land.*

...

12. The Attorney is empowered to *execute any letter of offer to pay any premium and further execute the Memorandum of Transfer transferring the said 150 acres (as defined and identified in the said JV Agreement) in the project into its own name* or in the name of its nominees.

13. *To charge the said land on such terms as the Attorney deems fit and to sign the Memorandum of Charge* and annexure thereto and to deliver the same as security

PROVIDED:

(a) such charge shall be to a licensed financial institution; and

(b) the Donor shall not be personally liable under the charge save that the said land may be disposed by public auction but any shortfall due to the chargee cannot be claimed against the Donor;

AND this Power shall extend to all sub-divided titles issued from or in relation to the said land.

AND all or any of the powers herein may be substituted by the Attorney to any party.

AND in consideration of the terms of the said JV Agreement *this Power of Attorney given for valuable consideration shall be irrevocable.* (Emphasis added.)

[34] The commitment of MLGH to the project was such that it was prepared to take the risk that comes with the granting of an irrevocable PA with full powers even to charge the land for the purpose of financing the project. The effect of the irrevocable PA was such that the developer would step into the shoes of MLGH to do all that is necessary for the issuance of the title(s) to the land and to apply for all necessary approvals and once the approvals have been obtained, to commence construction to completion of the vendor's entitlement and to give vacant possession of it free from all encumbrances within the stipulated time. The only safeguard was that the title(s) to the said land or to the 150 acre land had not been issued by the Land Office yet.

[35] The Court of Appeal in the case of *Sidambaram a/l Torosamy v Lok Bee Yeong (representative to the estate of Soma Sundram a/l Doraiswamy)* [2017] 4 MLJ 570; [2018] 3 CLJ 599 observed on the effect of an irrevocable PA as follows:

[19] A power of attorney coupled with interest to the donee will normally be referred to as irrevocable power of attorney to at least give effect to the intention of the parties which may be expressed or implied within the four corners of the terms of the power of attorney itself ...

A ...

[21] Once a valid power of attorney is given, it remains in full force until it is lawfully revoked. That is to say, the common law principles of revocation by conduct by the donor will not be applicable.

B [22] Sections 6 and 7 of the PA 1949 deal with limited instances of an irrevocable power of attorney. That is to say, notwithstanding the ability of the donor to revoke a power of attorney, the power of attorney under the PA 1949 may not be revocable at all, relating to purchaser of the property.

...

C [25] The law on agency which to some extent has nexus to the jurisprudence relating to power of attorney statutorily protects a donee who has an interest in the subject matter related to the power of attorney ...

[36] The donor MLGH effectively cannot deal with the land anymore D without the concurrence of the donee, the developer here. The case of *Liew Mok Poh & Anor v Balakrishnan Muthuthamby* [1990] 2 CLJ Rep 365, at p 367 is instructive where it held that once an irrevocable power for valuable consideration has been given, the donor cannot thereafter exercise any of the powers already given to the donee without the concurrence of the donee. It E reads as follows:

This power was given for valuable consideration and was made irrevocable. Accordingly, under s 6(1)(c) of the Ordinance the respondent being the donee of the power cannot at any time be prejudicially affected by notice of anything done by the owner of the land as the donor of the power without the concurrence of the F respondent. I agree with Mr Kanesalingam, counsel for the respondent that it must be implied from this provision that once an irrevocable power for valuable consideration has been given, the donor cannot thereafter exercise any of the powers already given to the donee without the concurrence of the donee.

G **[37]** As some of the Special Terms and Conditions of the letter of offer to alienate the land was not conducive for the financial assistance that the developer was looking forward to from MLGH, they had some meetings with the Director of Lands and Surveys with respect to removing some of the restrictions on the prohibition to charge or transfer.

H

[38] The Director of Lands and Surveys explained to MLGH and the developer in the meeting of 30 September 1998 that upon receipt of the RM1,000 nominal premium from MLGH and upon the submission of the title survey prepared by a licensed surveyor, a land title with full restriction for I the 350 acres of land at Likas Bay registered in the name of MLGH will be issued.

[39] This was not of much help to the developer because the full restrictions would include the prohibition on the transfer and charge of the land until the

land has been fully developed. To have the title to the land issued without the restrictions would require the payment of additional premium based on land use. The Director informed the meeting that the total premium for the 350 acres worked out by the department was RM211.32m. The additional premium for the 150 acre of commercial land would be RM160m.

[40] The Lands and Surveys Department also indicated that in the event MLGH can make early payment for the RM160m premium for the 150 acre land for commercial lots before the issuance of the master land title, the department would be willing to issue the 350 acres alienated in two titles, ie one title for the area of 200 acres (including Lot D designated for City Hall and Convention Centre use) with full restriction imposed upon full payment of the minimum premium of RM1,000 and the second title for the area of 150 acres which is free from encumbrances. In that case then MLGH would be able to transfer the 150 acre land to the developer in accordance with the terms and conditions stated in the JVA/SA.

[41] Being a project that would involve a massive reclamation of land from the sea in Likas Bay, the impact of the project on the environment and the ecosystem would be of prime concern and certainly cannot be discounted. One of the approvals to be obtained was the approval by the relevant authority of its Detailed Environmental Impact Assessment ('DEIA') Final Report.

[42] As it transpired the Federal Department of Environment ('DOE') had left it to the Sabah State EPD to make the final decision with respect to the acceptance or rejection of the DEIA final report. The State EPD was advised by the Federal DOE to consider the need for the project and the protest of the people against further development in the Likas Bay seafront area for fear of irreversible destruction to the environment and ecosystem there.

[43] There was some hiccup in the obtaining of the approval from the State EPD and after considering a host of factors, it rejected the DEIA final report. The result was that the project could not proceed. The State EPD communicated its decision in its long letter dated 21 October 2002 to the developer giving detailed reasons for rejecting the DEIA final report.

[44] There is no specific date set for the delivery of the 150 acre title. That is understandable in the context of the JVA/SA because the initial obligation of MLGH was to deliver the 150 acre title to the developer after it has completed and delivered possession of the vendor's entitlement to the vendor. The concept of the JVA/SA is that the developer would use its resources and financing to build the vendors' entitlement as provided in cl 3(a) of the JVA/SA where it is stated that the developer shall provide at its own expense and from its own resources all expertise for the turnkey finance, design, construction,

A completion, management of the project. That was still maintained as no amendment was made to it despite the SA that amended the various other clauses which basically was there for MLGH to assist the developer with the financing of the project.

B **[45]** Thus with the SA, the 150 acre title would be transferred to the developer at the appropriate time when all the approvals for the development would have been obtained from the various authorities. Whilst the developer could then use the 150 acre land to create a charge over it, the interest of MLGH must nevertheless be secured. Thus, the transfer of the land to the C developer is against the developer delivering to MLGH as vendor a banker's guarantee ('BG') for the sum of RM160m.

[46] This obligation of the developer to furnish the BG for RM160m is D captured in the proviso to cl 5(b) as follows:

> PROVIDED THAT the Power of Attorney shall not be granted unless the developer shall have furnished to the vendor a Corporate or banker's guarantee in the amount of Ringgit Malaysia One Hundred and Sixty Million (RM160,000,000.00) only (which amount shall represent the value of the 48.00 E acres (Lot D on Appendix 3) being the vendor's land, the cost of construction to completion the City Hall, the Convention Centre and the associated infrastructure costs, fees and other expenses) and the Corporate or banker's guarantee shall be made in favour of the vendor.

F **[47]** The focus then of the developer was on challenging the said decision to reject the DEIA report and a judicial review application was filed with Kota Kinabalu High Court soon thereafter in 2002. The High Court only gave its decision on 19 April 2013 dismissing the challenge of the developer to quash the decision of the State Director of the EPD.

G **[48]** The Court of Appeal, upon the appeal by the developer, set aside the order of the High Court. The Court of Appeal in its decision of 10 November 2014 also directed that the State EPD do hear the developer before coming to its decision of the DEIA final report.

H **[49]** One can understand why there was no letter from the developer to MLGH setting a deadline for the issuance of the title to the developer. There was nothing that could be done with the State EPD not approving the project on ground of environmental concerns and the danger of irreversible damage to I the environment and ecosystem around the Likas Bay area.

[50] In any event the title would not be delivered to the developer to allow it to charge the land as security for a loan to finance the project unless in exchange for that the vendor would be able to furnish a BG for RM160m to the vendor.

This is to ensure that if nothing is done by the developer in the constructing and delivering of the vendor's entitlement to the vendor, then the vendor can call on the BG for otherwise they would parted with the 150 acre land with nothing in return.

[51] Correspondingly it is provided in the SA that as and when the vendor's entitlement is progressively being completed in 10% stages, the BG would be reduced proportionately such that upon completion and handing of vacant possession the BG would have served its intended purchaser. There would of course be nothing preventing the developer from convincing its banker that is furnishing the BG on security of the 150 acre land that the said land would be good for financing either a bigger amount than the sum of RM160m secured by the BG facility or that at least the 10% reduction in the BG as work progresses may be used a financing for further capital to finance the next progress phase in its works as the total development cost is estimated around RM414m.

[52] There was no letter from the developer to the vendor to say that its bank was ready to furnish the BG for RM160m the moment the title to the 150 acre land is issued free from all restriction in interests.

[53] At any rate, the developer asked for an irrevocable PA from the vendor which is only to be given under the JVA/SA when the BG for RM160m have been given to the vendor. The vendor duly executed the said irrevocable PA which allows the developer to follow up with any application for approval of the project from the relevant authorities including charging the 150 acre land for the purpose of financing. There is merit in MLGH's argument that the developer's exercise of all the powers conferred by the irrevocable PA is not dependent on the procurement of the title to the 150 acre land. The irrevocable PA was never revoked by the vendor.

[54] There was thus a host of things that could be done and indeed was done even before any procurement of the titles. The developer's main witness, Mr Tan Teck Kong @ Mohammad Ibrahim ('PW1') testified as follows:

> Q11: Please provide details of these?
>
> A11: I will list the main works, fruits of which are shown by the design plans, other plans and reports, as follows:
>
> (1) Preparation of the landscape development for the proposed new City Hall and commercial development and I refer to the presentation at pp 630–641 of AB4;
>
> (2) Master Development Plan for the project (Drawing No EDP/9718/DP/101) was submitted in June 1997 and approved in June 1998. I refer to the Master Development Plan at p 642 of AB4;

(3) Preparation of the concept and design of the proposed Kota Kinabalu City Hall and Convention Centre and I refer to the work at pp 643–697 of AB4;

(4) Title survey for the said land carried out by land surveyor and I refer to it at p 698 of AB4 and dated 22 July 1997;

(5) Soil investigation for the design of seawall and reclamation works for the project in October 1997 and I refer to the report together with attached plan to show the borehole location at pp 699–775 and p 776 of AB4;

(6) Topographical and Hydrographical Survey of the project started in 1997 and I refer to this bearing Plan No JTSB-352-HT01 dated 30 July 1998 at p 777 of AB4;

(7) Licensed or registered Survey of the said land started on 17 June 1998 and I refer to it, which was dated 9 December 1998, at p 778 of AB4;

(8) The Detailed Environmental Impact Assessment Final Report ('DEIA final report') in September 1999 which I refer to starting at p 922 and so forth comprising of the whole of AB6. The DEIA process started in 1997.

(See Encl 7 p 127 Record of Appeal ('ROA'))

[55] As there was no time period within which the 150 acre title was to be delivered to the vendor, the law is that it must be delivered within a reasonable time having regard to the purpose to be served by the delivery of the said title which was to assist the developer to obtain financing for the project from the banks.

[56] If indeed the title to the 150 acre was so fundamental to the JVA/SA such that the vendor was holding back the development, the developer would have issued a notice to demand for the title and in default of which there would be a 90-day notice to rectify the breach and thereafter by notice to terminate the agreement. There was no material time in which the non-issuance of the title had posed an obstacle to the workflow pending the last approval which was the approval by the relevant authority of the DEIA final report.

[57] What is meant by a 'reasonable period' in cl 2(b) of the JVA/SA for the issuance of the 150 acre title which was what the developer was interested in, must surely be determined by the circumstances of the case and the conduct of the parties. Section 47 of the Contracts Act 1950 provides as follows:

> 47 *Time for performance of promise where no application is to be made and no time is specified*
>
> Where, by the contract, a promisor is to perform his promise without application by the promise, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation — *The question 'what is a reasonable time' is, in each particular case, a question of fact*. (Emphasis added.)

[58] The Federal Court in *Nyap Kui Fah v Len On Contractor* [1978] 1 MLJ 208 had also observed as follows:

> Where no time is set for the performance of the contract the law implies that performance must be completed within a reasonable time have regard to the circumstances.

[59] The circumstances of this case were that cl 2(c) of the JVA/SA enables the developer to take early possession of the land upon the procurement of the approval from the relevant land authorities of the title survey of the said land. There was thus nothing preventing the developer from carrying out and completing the said project on the said land upon title survey even without the procurement of the title deed(s), except that it would run the risk of the State EPD not approving the DEIA final report and not to mention possible penalties for so doing.

[60] As such it would make a lot of sense and indeed it would be prudent to wait for the approval of the State EPD before getting the title to the 150 acre land and to charge it to the bank for the facility of the BG in favour of MLGH for RM160m. After the State EPD had rejected the DEIA final report on 21 October 2002, the developer had challenged by way of a judicial review application and until the High Court had decided one way or another, it was equally prudent to wait. As the High Court only decided on 19 April 2013 and dismissed the developer's judicial review, it was prudent still to wait for the decision of the Court of Appeal as the developer had appealed to it.

[61] When the Court of Appeal rendered its decision on 10 November 2014 to set aside the decision of the State EPD, it also directed that the State EPD to hear the developer before coming to its decision of the DEIA report.

[62] By the time the developer wanted to declare MLGH as vendor to be in breach of the JVA/SA by its notice of termination dated 10 August 2015 for default in delivering the title, there had been an amendment to the Sarawak Land Ordinance (Cap 81) to prohibit any alienation of land in the designated area fronting Likas Bay which came into force on 9 August 2012. The vendor by its letter of 2 September 2015 replied to say that because of the enforcement of the law barring seafront development in Kota Kinabalu, the said land was affected. In line with the ethos of resolving disputes amicably that the courts have been promoting, the vendor offered to mutually terminate the JVA/SA. The developer was not agreeable and subsequently a suit was filed in the Kota Kinabalu High Court on 11 February 2016.

A **[63]** We paused here to observe that there was no necessity for the developer to issue a second 90-day notice under cl 8 of the JVA/SA to terminate the contract as the vendor had relied on frustration by supervening legislation in its reply to the developer's notice of termination.

B **[64]** Before the developer issued its notice of termination dated 10 August 2015, there was no letter requesting or for that matter, demanding to know when the title to the 150 acre land would be issued.

C **[65]** The developer had initially sued only MLGH as the defendant and subsequently on 6 April 2017 the developer as the plaintiff amended the writ and statement of claim to include the State Government of Sabah as D2.

[66] In the circumstances of this case from the chronology of events
D stretching from the date of the JVA on 7 April 1997 to the date of the notice of termination dated on 10 August 2015 as borne out by the documentary and oral evidence before the High Court, we cannot say that MLGH had breached a fundamental term of the JVA/SA in the latter's failure to issue the title to the 150 acre land to the developer when that issue was not at play throughout that
E period and the focus of the developer was in getting the State EPD's decision quashed.

[67] With respect, the learned High Court judge had not fully appreciated the significance of the flow of events and the focus of the parties during this
F hiatus especially from the State's EPD's decision in October 2002 to the notice of termination in October 2015. Nobody could have peered into a crystal ball to have known how the High Court would decide one way or the other until April 2013 and thereafter, how the Court of Appeal would decide in November 2014.

G

[68] In the in-between time the issue of the title to the 150 acre land no longer took centre-stage; indeed, it was shunted to the periphery — being put on hold until the problem of the State EPD's rejection of the DEIA final report was resolved.

H

[69] For the developer to harness and hinge on it as the ground to terminate the contract for a fundamental breach would be totally misplaced. There was plainly no breach on the part of MLGH to deliver the title to the 150 acre land to the developer for that had been overtaken by two key events: the EPD's
I rejection of the DEIA final report on 21 October 2002 and the amendment to the Sabah Land Ordinance prohibiting any alienation of land in the affected Likas Bay coastal area effective 9 August 2012.

Whether there was frustration of the jva/sa with the rejection of the deia final report

by the state EPD and also by supervening illegality with the coming into force of an amendment to the Sabah Land Ordinance where no title could be issued for the affected 150 acre land

[70] MLGH contended in its defence that the JVA/SA had been discharged by frustration through no fault on its part as there was rejection of the DEIA final report by the State EPD on 21 October 2002 and further with the coming into force of s 9A of the Sabah Land Ordinance on 9 August 2012 barring the alienation of land within a prescribed area of the Kota Kinabalu seafront which included the land.

[71] Any development which involves the reclamation of land from the sea and in this case in the Likas Bay area where the Kota Kinabalu seafront is would be subject to the DEIA final report being approved by the relevant authority. The parties cannot presume that this approval is a *fiat accompli* merely because MLGH is a company wholly-owned by the Chief Minister of Sabah (Incorporated). Thus, the JVA/SA was subject to the approval of the DEIA final report and the time for completion would only run from that approval as envisaged in cl 3(c) of the JVA/SA as follows:

> The developer shall deliver practical completion of the project within Seventy-Two (72) months from the date of receipt by the developer of all approvals of the development, layout, building, structural, engineering, infrastructural and other plans for the project (hereinafter called 'the Plans') granted by the relevant authorities *and from the Environmental Impact Authority for the reclamation, construction and completion of the project.* (Emphasis added.)

[72] This condition was also found in the letter of offer to alienate land to MLGH dated 27 May 1998 under Special Terms and Conditions 2(d) which provides as follows:

> 2(d) Take all necessary precautions against pollution and submit plans for the environmental protection and control of the area during and after the development of the said land for the approval by the relevant Authority in accordance with the ENVIRONMENTAL QUALITY ACT 1974.
>
> (See encl 10 pp 701–707 ROA)

[73] It was highlighted to us by learned counsel for MLGH that the requirement for the approval of the DEIA final report was also an express term under the Extract of Minutes of Meeting of the Town Planning Committee of MPKK dated 9 September 1997 and 10 September 1997 and also the planning approval of the MPKK dated 3 August 1998 which records respectively as follows:

(a) extract of Minutes of Meeting:

(1) EIA report must be submitted and approved. The EIA must be approved first before commencement of works.

(See encl 10 pp 766–770 ROA)

(b) planning approval:

2.1 The EIA must be approved first before commencement of works. All conditions stipulated in the approval shall be complied with.

(See encl 10 pp 830–836 ROA)

[74] It cannot be gainsaid that as the State EPD had on 21 October 2002 rejected the DEIA final report, the JVA/SA was frustrated as the project cannot proceed without an approved DEIA final report.

[75] It was open to the developer to challenge the decision of the State EPD which they did, by way of a judicial review application. By the time the High Court dismissed the judicial review application on 19 April 2013, there was another supervening event with the passing of an amendment to the Sabah Land Ordinance with the introduction of s 9A and Schedule IIA ('the amendment') effective 9 August 2012.

[76] The fact that there was a supervening legislation passed by the Sabah State Legislature that prohibited further development to the land fronting Likas Bay where some 3,830 acres of land were affected cannot be disputed. The amended legislation was duly passed by the Sabah State Legislative Assembly and duly *gazetted* and came into force on 9 August 2012.

[77] The Sabah State Legislature passed the amendment with the details of the affected lands being referred to in s 9A and Schedule IIA of the Sabah Land Ordinance. In fact, that amendment has already come into effect on 9 August 2012 even before the High Court delivered its decision on 19 April 2013. The affected area as set out in the said Schedule IIA covers a swath of land of approximately 3,830 acres (1,550 hectares) as contained in Plan No 01126813 (see encl 12 pp 1293–1301 ROA).

[78] The rejection of the DEIA final report by the State EPD and the subsequent enactment of s 9A of the Sabah Land Ordinance by the Sabah State Legislative Assembly had frustrated the JVA/SA as the JVA/SA has become impossible and unlawful to be performed.

[79] It goes without saying that it was a fundamental express term of the JVA/SA that the project on the said land would require the eventual alienation of the said land. With the alienation now being prohibited by s 9A of the Sabah Land Ordinance, the JVA/SA was frustrated and relevant compensation has to

be made to the affected party, the developer here, in accordance with the Civil Law Act 1956.

[80] A contract is frustrated when there is a change in circumstances which renders a contract physically or legally impossible of performance. The locus classicus of this proposition is found in the House of Lords case *Constantine (Joseph) Steamship Line Ltd v Imperial Smelting Corpn Ltd, The Kingswood* [1942] AC 154, where it was said that the doctrine 'is only a special case of the discharge of contracts by an impossibility of performance arising after the contract was made'.

[81] Our own case expounding and applying this doctrine of frustration is that of *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293 at p 303. His Lordship, Zaki Azmi CJ observed as follows:

> ... The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into ... A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed ...

[82] The common law doctrine of frustration had been given statutory force and recognition under s 57 of the Contracts Act 1950 and ss 15 and 16 of the Civil Law Act 1956. Most judgments on the subject would confine their discussion to s 57 of the Contracts Act 1950. Professor Visu Sinnadurai in his seminal work on the *Law of Contract* (4th Ed, LexisNexis) at para 10.58 observed as follows:

> In Malaysia, however, because of the existence of section 57(2) of the Contracts Act, the courts looked upon this section as the definition section, even though the term 'frustration' is not used in that section, or for that matter in any other provision of the Contracts Act. Furthermore, it should be noted that despite the fact that detailed relief provisions are now contained in the Civil Law Act, to safeguard the interest of both parties under a contract which is frustrated, the Malaysian courts have to a large extent continued to invoke the provisions of the Contracts Act in granting relief, rather than sections 15 and 16 of the Civil Law Act.

[83] Section 57(1) and (2) of the Contracts Act 1950 reads as follows:

> 57 Agreement to do impossible act
>
> (1) An agreement to do an act impossible in itself is void.
>
> *Contract to do act afterwards becoming impossible or unlawful*
>
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[84] Though the word 'frustration' is not used, it cannot be denied that the provision was referring to a case of the agreement being frustrated on account of impossibility of performance, whether it be physical or legal. However, s 57(3) appears to refer to a particular specie of frustrated contracts where the non-performance of the act in known to the promisor to be impossible or unlawful and not known to the promisee. It is as follows:

> Compensation for loss through non-performance of act known to be impossible or unlawful
>
> (3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.

[85] An example of frustration would be when there is a change of policies of the relevant authority as illustrated in the case of *Ng Kheng Yong @ Ng Tet Lai v Seng Hup Realty Co Sdn Bhd* [2004] 3 MLJ 477 where at paras 42–43, where the Court of Appeal held:

> ... There was to a certain extent *a change in policy* on the part of the authorities and this can be gleaned from the explanation forwarded by the respondent's solicitors in their letter to the appellant dated 7 November 2000 wherein in the former explained 'the change in the layout plan' annexed to the agreement was to conform with the Master Plan Layout for the area at the Town Planning and is subsequent to approval of the final 'PU Pelan'. What is clear is that the parties did not foresee this when they entered into the agreement, vis, they did not make such a provision for this in the agreement. In our view, the introduction of the Master Layout Plan for the area by the Town Planning authority, being tantamount to a change in Government policy, is a ground of discharge as it introduced new and unexpected conditions and restrictions which affected the original layout plan annexed to the agreement. Ordering the appellant to agree to a new layout plan as submitted by the respondent is tantamount to rewriting the agreement.
>
> The parties entered into the agreement which depended upon a possible approval for conversion and subdivision to be forthcoming from the PTG based upon the original layout plan. That application was rejected. Upon that happening, the agreement has to be regarded as dissolved by reason of circumstances beyond the control of the parties. The foundation upon what the parties have deemed to have had in contemplation had dissipated when the application for conversion and subdivision was rejected. This would be a ground on which to rest the doctrine of frustration. (Emphasis added.)

[86] In that case, the parties to a sale and purchase agreement had based their agreement on a layout plan. However, the introduction of the Master Layout Plan introduced by the Town Planning Authority had affected the layout plan annexed to the sales and purchase agreement. The Court of Appeal held that the introduction of the Master Layout Plan was tantamount to *a change in*

Government policy and is a ground of discharge as it introduced new and unexpected conditions which affected the original layout plan annexed to the agreement. The sales and purchase agreement has been frustrated.

[87] There is merit in the submission of learned counsel for MLGH that, in the instant case, the approval of the DEIA final report and the eventual alienation of the said land were fundamental terms of the JVA/SA without which the project would not be able to be performed.

[88] The Director of the State EPD ('DW2'), in exercising his jurisdiction to reject the DEIA final report via his letter dated 21 October 2002 (encl 12 pp 1149–1154 ROA) had explained in the High Court below as follows:

> Cross-Examination of Datuk Eric bin Juin ('DW2')
>
> Lines 10822–10845
>
> Q: You have also agreed before Federal DOE decide that they were the proper body to approve it as stated in your evidence before. Do you agree?
>
> A: I agree but by virtue of the restricted letter to the State Secretary where the Federal DOE recommended to the State Government to take into account the comments of the review panel and the public objection and these comments and public concern and objection are all related to crucial environmental issue that had not been fully addressed by the report, and DOE in their condition of approval left it to the State Government of Sabah to decide whether to approve or not approve this project based on the public objection and the need of the project. When we talked about the need of the project, we have to look at the all environment of the project, we have to evaluate the environment in totality and we refer to the environment, it actually refers to the physical factors surrounding of human beings which includes land, water, climate and so forth and also refers to the biological factors of flora and fauna and the social factors of aesthetics. I also want to state here that EIA is a planning tool to identify, to predict, to evaluate the impact of the particular development. In this particular project, although the plaintiff's consultant has conducted a thorough study on the environment but still there is a lot of uncertainties and likely irreversible impacts on the environment.
>
> (See encl 9 pp 588–589 ROA)
>
> Lines 10922–10934
>
> Q: You yourself have studied this report between August 2001 and October 2002?
>
> A: Actually what happened after we have received a copy of the restricted letter from Federal DOE to State Secretary, by virtue of paragraphs that states in which the Federal DOE recommend to the State Government to consider the public objections and also comments by the review panel on the need of the project, we assembled a task force in the State EPD comprising of Senior Officers of the department to review and look at the voluminous report. At the same time, I consulted the State AG to get his advice on the jurisdiction of State EPD pursuant to the Conservation of Environment Enactment 1996 and Conservation of Environment (Prescribed Activities) Order 1999.

(See encl 9 pp 593–594 ROA)

Lines 11099–11128

Q: But the DEIA final report had already done that and that was why the Federal DOE approved it. Do you accept that?

A: Yes, but ...

Roderic: I think the witness should be given a chance to explain his answer.

Court: I allow witness to answer.

A: Yes, but as pointed out by the Director of Federal DOE in paragraph 6 of the letter of Federal DOE to the State Secretary recommending that the public objections and the need of the project as raised by the review panel to be considered by the State Government. I want to state again that the fact that on the issue of need of the project, because this is involves evaluating the impact of the environment. When we talk about the need of the project we cannot look at the project in terms of it benefit only. We have to look at how is the impact to the environment. The need of the project may be sound and reasonable but the impacts of the project on the environment may be damaging both in short terms and long term. Like I said yesterday, environment refers to the physical factors affecting the surroundings of people or human beings, the biological factors of flora and fauna and the social factors of aesthetics. In any environmental impact assessment these are the 3 main crucial environmental issues that will be studied and if the mitigating measures cannot mitigate the uncertainties or irreversible impacts of the project on environment, then the environmental impact assessment report cannot be approved.

(See encl 9 pp 601–602 ROA)

Lines 11016–11021

Q: What is your understanding?

A: My understanding is that the Director of Federal DOE conditionally approved the DEIA final report but recommended to the State Government to consider the public objections and also the view of review panel on the need of the project which is related to the environment issues before approving the project.

(See encl 9 pp 597–598 ROA)

Lines 11130–11137

Q: Are you now saying that the Federal DOE is wrong in approving the DEIA final report?

A: Yes. Can I clarify when I say yes? Yes, but they left the decision or maybe I can re-word it, but they left the decision on the public objections and the need of the project to the State Government to decide. Meaning, they have not taken into account the public objections in conditionally approving the DEIA final report.

(See encl 9 pp 603 ROA)

[89] As civil servants of the State, their decision must take into consideration what is best for the people of the State, having regard to the need of the project and the concerns of the public raised in their public protests with regard to the

negative and possible irreparable damage to the environment that such a massive reclamation would bring in its wake.

[90] The Court of Appeal had quashed the decision of the State EPD purely on the ground of breach of natural justice in that the developer was not heard before the decision was made. Until that decision was set aside by the Court of Appeal, the position was that from 21 October 2002 onwards until the coming into force of the said amendment on 9 August 2012, the contract could not be performed.

[91] On 9 August 2012 there was the supervening legislation via the enactment of s 9A of the Sabah Land Ordinance which fundamentally affected the JVA/SA as it prohibited the alienation of the said land without which the said project under the JVA/SA could not be commenced, let alone completed.

[92] We agree with learned counsel for MLGH that in the light of the rejection of the DEIA final report and the enactment of s 9A of the Sabah Land Ordinance, the JVA/SA was frustrated as it had become impossible and unlawful to be performed and thus, both the developer and MLGH are discharged from performing their respective obligations under the JVA/SA.

[93] As title was not alienated to MLGH by the time the said amendment came into force, no alienation could be made on the affected land and with that no development project could be undertaken on the land. There was thus a supervening illegality preventing the project from taking off and effectively frustrating the contract and discharging the parties of their respective obligations under the JVA/SA.

Whether there was self-induced frustration when the Sabah State EPD rejected the DEIA final report and when the State Legislature passed the said amendment to the Sabah Land Ordinance prohibiting alienation of the said land

[94] It is trite that a party cannot take advantage of its own wrong and so a self-induced frustration is not frustration with the result that compensation payable for a discharge of contract by frustration under s 15 of the Civil Law Act 1956 is not applicable but instead an assessment of damages for breach and wrongful repudiation of the contract under s 74 of the Contracts Act 1950 would apply.

[95] The Court of Appeal in *Hong Leong Bank Bhd v Tan Siew Nam & Anor* [2014] 5 MLJ 34; [2014] 7 CLJ 293 observed as follows:

> [37] The doctrine of frustration does not protect a party whose own breach of the contract brings about the frustrating event. Thus, a charterer who in breach of the

contract, orders a ship into the war-zone, thereby causing the ship to be detained, cannot rely on the detention as a ground of frustration. It is in fact a self induced frustration (*Ocean Tramp Tankers Corporation v V/O Sovfracht, The Eugenia* [1964] 2 QB 226 (CA) and *Uni-Ocean Lines Pte Ltd v C-Trade SA (The 'Lucille')* [1984] 1 Lloyd's Rep 244 (CA). And according to *LP Thean JA in Lim Kim Som v Sheriffa Taibah Abdul Rahman* [1994] 1 SLR 393 (CA) at p 403, the doctrine of frustration is dependent on the facts of the case. Everything boils down to the facts of the case. The present appeal is not an exception.

[96] Whilst the submission for the approval of the DEIA final report had been to the DOE for approval, the DOE had by its letter of 13 February 2001 suggested to the Sabah State EPD that the latter is the right party to decide on the DEIA final report since the Federal Order ceased to apply to Sabah as at 20 January 2000. It was a case of each not encroaching into the other's turf and respecting the other's jurisdiction.

[97] Apparently, the jurisdiction over the DEIA final report for this project fell within the jurisdiction of the State EPD after the coming into force of the Conservation of Environment Enactment 1996 read together with the Conservation of Environment (Prescribed Activities) Order 1999. See para 5 of the said letter of 6 August 2001 at encl 12 p 1143 and a further reiteration of it by its letter of 9 May 2001.

[98] The Federal DOE in essence granted a conditional approval; conditional upon and subject to the State's EPD's final approval. The State was to decide after considering the need of the project and the protests by the public.

[99] It appeared that this matter of the approval by the Sabah State EPD was like a hot potato and it pushed it back to the Federal Government to decide. The State EPD by its letter of 13 July 2001 to the DOE suggested that the DOE should continue with the processing of the application until the full approval is issued.

[100] The Federal DOE was not going to budge and so by its letter to the State EPD dated 6 August 2001 it again granted a conditional approval (see encl 12 p 1142 of ROA). The DOE was again pushing it to the Sabah State to decide and it became obvious that unpleasant as it is to decide, one has to bite the bullet and decide. The Federal DOE advised that the State may give due attention to the need of the project and the public's objection before the decision is made to approve the project.

[101] The Sabah State EPD then on 21 October 2002, in its lengthy letter to the developer gave detailed reasons for rejecting the DEIA final report, citing

non-compliance with the State Government's policy on coastal reclamation and making reference to seven crucial environmental factors in the said letter.

[102] One can hardly say that it is a case of self-frustration where the rejection of the approval of the DEIA final report is concerned as the State EPD would have preferred not to have to decide on the application one way or the other and to leave it to the Federal DOE to decide. Had the State EPD wanted to make sure that the approval is rejected, it would not have written to the Federal DOE and urged the DOE to decide fully and finally on the said application for approval.

[103] There is no evidence of any self-inducement of a frustrating event or of the State orchestrating the rejection of the approval of the DEIA final report. The evidence before the High Court was one of the State EPD trying to wriggle its way out of having to decide on what could be a controversial matter in the light of the public objection and environmental concerns raised as seen in the public protests.

[104] Had the State EPD wanted to engineer the rejection of the DEIA final report, it would have jumped at the opportunity to decide when the Federal DOE stated in its letter of 13 February 2001 that the State EPD should be the right party to decide on the matter. See encl 12 pp 1109–1110. It makes no sense to run the risk that the Federal DOE may well decide to approve the DEIA final report as it had already approved it in principle subject to the ultimate decision of the State EPD who would have the determining say in the matter.

[105] We find merits in the submission of learned counsel for the State Government of Sabah in D2 that if it had a change of heart and was determined to sabotage the project, they could easily have done that by rejecting the developer's DEIA final report straightaway instead of persuading the Federal DOE to decide on the same. The Federal DOE was not persuaded and so the ball came back to the State's EPD's court and it does not make sense to kick the ball back again to the Federal DOE.

[106] It was further argued by learned counsel for the developer that MLGH is the alter ego of its holding company; as the Chief Minister of Sabah (Incorporated) is the sole shareholder of MLGH. However, under the law, a wholly owned subsidiary is a separate legal entity from its holding company in as much as a company is a separate legal entity from its shareholders.

[107] We hearken back to the dicta in the seminal case of the House of Lords in *Salomon v Salomon & Co Ltd* [1897] AC 22 at p 51, where it was declared as follows:

> ... The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act ...

[108] The only time when a holding company may be made liable for the action of its wholly-owned subsidiary is when there was fraud perpetrated or to abuse its separate entity by avoiding its contractual obligations. In *Tan Sri Dato' Tajudin bin Ramli v Rego Multi-Trades Sdn Bhd* [2018] MLJU 147; [2018] 7 CLJ 197; [2018] 2 AMR 912 (CA), Yeoh Wee Siam JCA in delivering the judgment of the Court of Appeal, held that:

> [65] *We are in full agreement with the judge who held that TRI, as a holding company, and its wholly-owned subsidiary company, the respondent, are separate legal entities. There is a plethora of cases which have decided that even in a group of companies, each company is a separate legal entity possessed of separate legal rights and liabilities. A board resolution of a parent or holding company cannot bind a subsidiary or wholly-owned company of that parent or holding company.*
>
> Thus, the directors must approach their duties as directors who recognise the separate legal personality of the two entities. Therefore, in our view, the TRI BOD Resolution does not bind the respondent (see para 2.36 of *Walter Woon on Company Law* (3rd Ed) p 51, *Adams v Cape Industries Plc* [1990] BCLC 479 at pp 508 and 519, *Thueringische Faser & Aktiengesellschaft Schwarza v bank Of Commerce (M) Berhad* [2008] MLJU 908; [2009] 4 CLJ 102, and *Lewis Holding Ltd v Steel & Tube Holdings Ltd* [2015] 2 NZLR 83).
>
> [66] The appellant submits that the judge overlooked that all the directors of the respondent were also directors of the TRI at the relevant time, and except for the appellant who had abstained from voting, they had resolved in favour of the Resolution of the TRI BOD.
>
> *In this regard, we are of the firm opinion that notwithstanding that fact, it is still trite law that a holding company (TRI) and its subsidiary (respondent) are separate legal entities. Hence, the TRI BOD Resolution cannot bind the respondent. Therefore TRI, as the holding company, cannot simply write off the debts of its subsidiary company, the respondent, ie, for the amount due to the respondent from Aras Capital.* (Emphasis added.)

[109] It is of course true that the Board of the wholly-owned subsidiary would be nominated by the holding company and in this case by the Chief Minister (Incorporated). Even sharing of premises and human resources and management and administrative resources are not uncommon for wholly-owned subsidiaries. Wholly-owned subsidiaries do that on a regular basis as part of costs-sharing and optimising and streamlining of resources. These factors taken together cannot make the holding company liable for the debt or obligations of its wholly-owned subsidiaries. Otherwise the concept of

limited liability with incorporation will be lost altogether and the whole concept of a company being a separate entity from its shareholders and directors would have to be completely overhauled.

[110] In *Albacruz (Cargo Owners) v Albazero (Owners)* [1977] AC 774 at p 807 (CA), Roskill LJ described it as a fundamental principle of English law 'long established and now unchallenged by judicial decision ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would ensure beneficially to the same person or corporate body'.

[111] Robert Golf LJ in *Bank of Tokyo Ltd v Karoon* [1987] AC 45 at p 64 cautioned as follows:

> Counsel suggested beguilingly that it would be technical for us to distinguish between parent company and subsidiary in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot be abridged.

[112] Likewise with respect to tortious liability in *Adams and others v Cape Industries plc and another* [1991] 1 All ER 929, the English Court of Appeal had debunked the concept of linking a single economic unit to liability of the parent company for the debt of its subsidiaries. Lord Slade LJ said at p 1016 as follows:

> The 'single economic unit' argument
>
> There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that 'each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities'.

[113] Further at pp 1019–1020 it was clarified as follows:

> Mr Morison described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As Sir Godfray Le Quesne submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22, [1895–9] All ER Rep 33 merely because it considers that justice so requires. *Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.*

A In deciding whether a company is present in a foreign country by a subsidiary, which is itself present in that country, the court is entitled, indeed bound, to investigate the relationship between the parent and the subsidiary. In particular, that relationship may be relevant in determining whether the subsidiary was acting as the parent's agent and, if so, on what terms. In *Firestone Tyre and Rubber Co Ltd* B *v Lewellin (Inspector of Taxes)* [1957] 1 All ER 561; [1957] 1 WLR 464 (which was referred to by Scott J) the House of Lords upheld an assessment to tax on the footing that, on the facts, the business both of the parent and subsidiary were carried on by the subsidiary as agent for the parent. However, there is no presumption of any such agency. *There is no presumption that the subsidiary is the parent company's alter ego.* C Scott J refused an invitation to infer that there existed an agency agreement between Cape and NAAC comparable to that which had previously existed between Cape and Capasco (see p 971, ante) and that refusal is not challenged on this appeal. *If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case* D *is it open to this court to disregard the principle of Salomon v A Salomon & Co Ltd merely because it considers it just so to do.* (Emphasis added.)

[114] Here it was argued that the legislative amendment was put in place E because the State Government of Sabah wanted to avoid its contractual obligation and so it started the process of preparing the Amendment Bill for discussion and debate in the State Legislative Assembly and as it controlled the State Legislative Assembly, it was able to ensure that the amendment was passed.

F

[115] The position of the law on an offer to alienate by the State had been clarified in the Court of Appeal's case of *The State Government of Sabah & Ors v Clarence Chiuh Ken Loong & Ors* [2017] 3 MLJ 127 where it held that the offer to alienate land cannot be looked at as a contract. The Court of Appeal G held as follows:

[24] Having said that, we agree with the submissions of the learned state counsel that there is no basis to apply the law of contract on the facts of the present appeal. The alienation of state land is regulated by the Sabah Land Ordinance which lays out clear provisions on the process of alienation of land in the state of Sabah. H

[25] It is plain and clear that s 12 of the Sabah Land Ordinance and r 2 of the Sabah Land Rules do not recognise mere application for land and any payment made pursuant thereto as an undertaking that, the application for land has been approved. Any land title can only be issued after the land has been properly surveyed (s 22) and I any use or occupation of land cannot be allowed before completion of survey unless so authorised by the collector upon issuance of a provisional lease. And under s 88, it is clearly provided that any interest in land shall be valid only upon registration of title. On top and above that any land under forest reserve as in this case, is governed by the Forest Enactment 1968 which prohibits alienation of, and cultivation on, such land.

[116] The State Legislature is a separate body from the State Executive in as much as at the Federal level, the Members of Parliament that constitute the Legislature are different from the members of the Executive branch of Government that would consist of the Prime Minister and his Cabinet, who may well be part of the Legislature.

[117] The lawmakers of the State Legislative Assembly would vote, having regard to whether the amendment in question would be for the benefit of the State and its people, having regard to the delicate ecosystem in the affected coastline. There is no evidence that the State Legislature was targeting this particular project to skirt it or to pull the rug from beneath it. It would be unfair to the defendants for the High Court to make an inference that the originator of the Amendment Bill must have the intention to scuttle and sabotage the project instead of safeguarding the environment for the future generations of Sabahans.

[118] The Executive of the State of Sabah is provided in PART I THE STATE GOVERNMENT and in Chapter 2 of the Constitution of the State of Sabah. Article 5 of the State Constitution states that the Executive authority of the State shall be vested in the Yang di-Pertua Negeri. Article 6(1) provides that there shall be a State Cabinet to advise the Yang di-Pertua Negeri. Under Article 6(2) the Cabinet shall consist of a Chief Minister, and not more than ten nor less than four members. Article 6(3) further provides that the Yang di-Pertua Negeri shall appoint as Chief Minister a member of the Legislative Assembly who is his judgment is likely to command the confidence of a majority of the members of the Assembly and the other members of the State Cabinet are appointed upon the advice of the Chief Minister from among members of the Assembly.

[119] THE LEGISLATURE of the State is covered under Part II of the State Constitution and under art 14(1) the Legislative Assembly shall consist of the Speaker and currently 73 members and not more than six nominated members.

[120] Whilst members of the State Cabinet are members of the State Legislative Assembly and that the Chief Minister is generally the one likely to command the confidence of a majority of the members of the Assembly, that does not mean that the two different organs of the State Government in the Executive and the Legislature can be conflated into one.

[121] There is no evidence that members of the State Legislature all belong to the same ruling party such that under party-whip they are bound to vote for a legislation introduced by the State Executive. They remain separate branches of

A the State Government and the members of the State Legislative Assembly are not beholden to vote in favour of the ruling party that has the confidence of a majority of the Assembly.

B **[122]** There is no evidence that members of the Legislative Assembly had conspired with the Executive that had introduced the Amendment Bill to use their legislative powers to veto the whole project. Whilst it is true that generally the Bill introduced by the Executive would be carried by the Legislature with or without amendments for otherwise it would be akin to a vote of no-confidence on the Chief Minister, the State Assemblymen are at liberty to speak up even against any Bills being tabled and to question the wisdom of it.

C

D **[123]** It would make little sense to preserve and protect from any development some 3,830 acres of land fronting the coastline of Kota Kinabalu at Likas Bay just to derail a 502 acre development in the project. It would be akin to using a mallet to kill a mosquito. Being a joint-venture, the State would similarly lose out as well for the non-development would from the pure utility point of view, confer no benefit on the State.

E **[124]** We were referred to the Canadian Supreme Court case of *Wells v Newfoundland* [1999] 3 SCR 199 where the respondent there had lost his job as a commissioner of the Public Utilities Board under the Public Utilities Act. The brief facts set out here are extracted from the headnotes of the reported judgment. He was entitled to hold office during good behaviour until the age

F of 70. The Executive Council of the Government of Newfoundland, following an assessment of the continuing need for the Board, recommended a newly constituted board with fewer commissioners and that the respondent's position be replaced by an office of Consumer Advocate in the Department of Consumer Affairs and Communications or the Department of Justice.

G

[125] A new Public Utilities Act was passed which restructured the Board, reduced the number of commissioners and abolished the respondent position. The respondent ceased to hold office on that date. Having served for four and a half years, the respondent was six months short of having his pension vest. He

H was not reappointed to the new Board and did not receive any compensation. The respondent was not interested in filling the office of Consumer Advocate. He decided to seek damages. His action was dismissed by the Newfoundland Supreme Court, Trial Division. He successfully appealed to the Court of Appeal which found the Crown to be in breach of statutory and contractual

I obligations. The Court of Appeal awarded damages equivalent to two and one-half years of salary plus pension benefits.

[126] The decision of the Supreme Court was influenced by the fact that any repeal of a statute does not take away an accrued right of an affected party as set

out below:

> 41. At the cost of repetition, there is no question that the Government of Newfoundland had the authority to restructure or eliminate the Board. *There is a crucial distinction, however, between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so.* While the legislature may have the extraordinary power of passing a law to specifically deny compensation to an aggrieved individual with whom it has broken an agreement, clear and explicit statutory language would be required to extinguish existing rights previously conferred on that party. This view is strengthened by s 29(1)(c) of the Interpretation Act which states that:
>
> > 29(1) Where an Act or enactment is repealed in whole or in part or a regulation is revoked in whole or in part the repeal or revocation shall not
> >
> > ...
> >
> > (c) affect a right, privilege, obligation, or liability acquired, accrued, accruing or incurred under the Act, enactment, or regulation repealed or revoked. (Emphasis added.)

[127] It may be pointed out here that we have the equivalent provision in s 77(c) of our Interpretation Acts 1948 and 1967 under 'Effect of repeal.' Had the facts appeared in our courts, the decision would likely to be the same.

[128] There was also some evidence there that the Government was trying to get rid of the respondent in repealing the Act as was observed by the Supreme Court as follows:

> 42. The respondent's contractual rights relating to his employment as a Commissioner were acquired under the Public Utilities Act, and its repeal did not, of itself, strip him of those rights. *It is eye-catching that the Vice-Chairman of the Resource Legislation Review Committee of the Newfoundland House of Assembly suggested that the new Act be entitled 'The Get Rid of Andy Wells Bill': Newfoundland: Proceedings of the Resource Legislation Review Committee, Issue No 8, December 14, 1989, at p L7.* The government was free to pass such a bill and they were equally free to pass a bill which would have explicitly denied the respondent compensation (see *Welch v New Brunswick* (1991) NBR 116 (2d) 262 (QB), for an explicit bar to compensation). However, since no such Act was passed, the respondent's basic contractual rights to severance pay remain.
>
> ...
>
> 54. The separation of powers is not a rigid and absolute structure. The court should not be blind to the reality of Canadian governance that, except in certain rare cases, the Executive frequently and de facto controls the Legislature. The new Public Utilities Act in Newfoundland was a government bill, introduced by a member, as directed by Cabinet Directive C 328–89. Therefore, the same 'directing minds', namely the Executive, were responsible for both the respondent's appointment and his termination. Moreover, *since a number of positions equivalent to that previously held by the respondent were created under the new Act, the Executive could have*

A *re-appointed him and remedied its breach of contract.* This continues to demonstrate the futility of the frustration argument in the circumstances of this case. (Emphasis added.)

B **[129]** The State Government's exercise of its sovereign power must remain unfettered and circumscribed only by the State Constitution and the Federal Constitution. Generally, the State cannot contract away its legislative authority or to contractually circumscribe it. King CJ of the Supreme Court of South Australia, in *West Lakes Ltd v South Australia* (1980) 25 SASR 389, at p 390 observed as follows:

C *Ministers of State cannot*, however, *by means of contractual obligations entered into on behalf of the State fetter their own freedom*, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, *vote for laws, even laws which are inconsistent with the contractual obligations*. (Emphasis added.)

D **[130]** Our own Federal Court had decided on the issue of whether the Government's executive powers may be restricted or circumscribed by contract with any contracting party. In *Ramli bin Zakaria & Ors v Government Of Malaysia* [1982] 2 MLJ 257, the Federal Court affirmed the decision of the

E High Court that there was no frustration with respect the contracts of teachers undergoing training who upon completion would be placed under the Unified Teachers Scheme ('UTS') scale when by the time they completed their course of training the UTS scale had been abolished and the Abdul Aziz scheme came

F into force.

[131] The appellants were offered salaries under the Abdul Aziz scheme. The appellants claimed that they should have been paid salaries and allowances under the UTS scheme. The respondent pleaded that as the recruitment of

G teachers into the UTS had been discontinued the offer to employ them under the UTS had become frustrated.

[132] The Federal Court held that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render

H a fundamental or radical change in the obligation originally undertaken to make the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

I **[133]** More importantly the Federal Court also observed as follows at pp 262–263:

Before we embark upon an inquiry whether, in view of the change of circumstances namely the substitution of a new salary scale under the Aziz Scheme and the abolition of the UTS, there was frustration of the contract, it is appropriate at this

point to consider the merit of the appellants' contention that the respondent should not be allowed to rely on frustration if it itself created the frustration, that is, if it was a self-induced frustration. *The appellants have alleged that the Government was the author of the Aziz Scheme and itself effected the abolition of the UTS.* We are unable to see substance in this argument because *in matters relating to qualifications for appointments and conditions of service the Government is the deciding authority and the power is provided by law. Such authority cannot be made subject to any agreement that may be entered into between the Government and another. Instead such agreement must be read subject to the authority by law conferred upon the Government. It is our view therefore that there was no question of any self-induced frustration.* Basically, the question remains whether in fact there was frustration of the contract. It is in this regard that the test laid down in *Davis Contractors* case seems relevant. The test is an objective one to determine whether there has been a radical change in the actual effect of the promises of the parties construed in the light of the new circumstances. (Emphasis added.)

[134] Here we are not dealing with the Executive action but with the Legislative action in passing the Amendment bill. The power of the State Legislature to pass laws is circumscribed only by its own constitutional jurisdiction and that it must not be inconsistent with the State and Federal Constitution. It may pass laws that are inconsistent with existing contractual rights of parties. The learned author Bruce Pardy in *Cancelling Contracts: The Power of Governments to Unilaterally Alter Agreements,* Fraser Institute (2014) at p 4 commented candidly as follows:

When statutes are clear, they can override contracts even where contractual provisions attempt to guarantee otherwise. Governments can swear on their grandmothers' graves that they will never abridge the terms of the agreements that they make, but such clauses are ineffective if a statute so declares, since clear statutory language trumps contractual provisions. Where a statute and a contract are in conflict, the statute prevails.

[135] After all we have s 80 of the Interpretation Acts 1948 and 1967 which preserves this Legislative power of amendment as follows:

80 Ordinance or Act of Parliament may be altered or repealed in same session

Any Ordinance or Act of Parliament may be altered, amended or repealed in the session of the Legislative Assembly or Parliament in which it was passed.

[136] We are only too familiar with statutes containing a provision to the effect that any terms which are inconsistent with the Act are void. In contracts where the Government is a party, for so long as the Legislature had made the law or passed an amendment in good faith and reasonably for a proper purpose, it cannot be said that it is a case of self-induced frustration for a Legislature must be free to form its views without any fetters as to what is best for the people where its policy of development affecting the environment and ecosystem is concerned.

[137] Interestingly, from April 1997 when the JVA was signed to the passage and passing of the amendment and its coming into force on 9 August 2012, there were at least five Chief Ministers of Sabah as follows: Yong Teck Lee (1996–1998), Bernard Giluk Dompok (1998–1999), Osu Sukam (1999–2001), Chong Kah Kiat (2001–2003) and Musa Aman (2003–2018). Policies of the State may be reviewed, recalibrated or even repealed by each succeeding State Government.

[138] There is no evidence that the developer was targeted for discrimination and the project was then sabotaged and given to another party. Learned counsel for the developer also sought to argue that the State could have carved out an exception to prohibition of alienation of the affected land so that the development of the project of the land is not affected.

[139] That is a matter for the State Legislature in all its wisdom. Whether or not such a carving out of an exception or exemption would enhance or erode the policy of conservation and preservation of the rich ecosystem in the affected land is a matter for the State Legislature to decide. At the time of the amendment there was no live project on the ground. No evidence was led that there had been exceptions given for other projects in the affected area.

[140] Each branch of the Government must respect the independence of the other branches of Government. The court would only intervene to strike down a legislation if it is unconstitutional. The wisdom and need for any legislation and amending legislation is for the State Legislature to decide having regard to the interests and welfare of the people of the State.

[141] Section 16(2) of the Civil Law Act 1956 provides that s 15 shall apply to contracts to which the Government is a party in like manner as to contracts between subjects. Therefore, Parliament would have in mind that the Government may pass a law or an amendment to an existing law such that because of supervening illegality, a contract could no longer be performed and indeed has become frustrated. Parliament would have in mind too that the Government is also a party to many contracts especially construction and development contracts.

[142] The fact that the requisite compensation under s 15 of the Civil Law Act 1956 applies against the Government would mean that though the Government may be seen as the originator of the Bill, that by itself does not mean that it is a case of self-induced frustration which is no frustration. If it were so, then in all cases of supervening legislation involving the State as a party to the contract, there can never be a frustration but a breach of and wrongful repudiation of the contract that would result in a claim for damages under s 74 of the Contracts Act 1950.

[143] In the absence of any evidence to show bad faith on the part of the Executive and the Legislature, they must be taken to have acted in the best interest of the people of the State and if they have not then the people's remedy would be in the ballot box to vote them out at the next State election.

[144] We find no evidence of a self-induced frustration where the rejection of the DEIA final report by the State EPD is concerned nor the passing of the amendment to the Sabah Land Ordinance that prohibits the alienation of the land for the project.

[145] MLGH would remain liable to pay the developer all costs and expenses incurred until the ultimate frustrating event in the coming into force of the amendment in line with the method of assessing compensation under s 15 of the Civil Law Act 1956 when a contract has become frustrated as in this case where it has become legally impossible to perform.

Whether the state government of Sabah had induced its wholly-owned subsidiary to breach the JVA/SA

[146] As we have held that there was no breach of the contract in the JVA/SA but that it is a case of the contract having been frustrated by a supervening legislation, the question of a third party inducing a breach of its wholly-owned subsidiary does not arise.

[147] Learned counsel for the developer had earlier pleaded that MLGH is the alter-ego of the State Government but for the reasons given above, there being no fraud pleaded and no evidence of abuse of the separate legal entity doctrine for the purpose of avoiding contractual obligation, we had rejected that argument. There is also no plea of lifting or piercing the corporate veil.

[148] For the tort of inducement of breach of contract there must be inducement from a complete stranger to the contract alleged to have been broken. A shareholder is not a 'stranger' to the subsidiary and so cannot be liable for the tort of inducement for breach of contract. In *Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors* [2013] 8 MLJ 157 it was held that a shareholder cannot be held liable for the tort of inducement of breach of contract because a shareholder is not a stranger. For the tort of inducement of breach of contract there has to be three parties ie, A has to induce B to breach his contract with C. The High Court held as follows:

> [88] By the plaintiff's own pleaded case, the third defendant as the alleged inducer, is not a third party to the contract between the plaintiff and the first defendant. Instead, the plaintiff says the third defendant is the controlling mind of the first

A defendant ie the third defendant is the first defendant. Mr Conrad Young respectfully submitted that this flaw in the plaintiff's pleaded case is fatal. With that I agree.

...

B [92] May I say here that in as much as the servant is not a stranger, a shareholder is also not a stranger even if it be the alter ego of the first defendant and here in our present case the third defendant is not a shareholder let alone the alter ego of the first defendant.

...

C [94] I agree with Mr Conrad Young that the cases of *Said* and *Imperial Oil* clearly put paid to the plaintiff's case against the third defendant. As is clear from those cases, for the tort of inducing a breach of contract to bite, the alleged inducer must necessarily be a 'stranger' to the contract alleged to have been broken as such.

...

D [104] As I have said before, so I say here again, that would be taking the argument too far. Merely because both the first defendant and the third defendant are subsidiaries of the second defendant, that by itself (and here there is no evidence of anything more than that) cannot be equated to a stranger outsider third party interference with the decision of the first defendant. The first defendant is a separate E legal entity from its shareholders. At the risk of repeating what has already been said, unless there is fraud, and here there is none, the first defendant's decision with respect to the pre-contract engineering claims and the calling off of the negotiations with the plaintiff must be respected and regarded as its own decision consistent with the concept of separate legal entity within a corporate structure which may well subsume the separate subsidiaries to the bidding of the ultimate holding company F in the second defendant. Prior consultation by the first defendant with the parent company (the second defendant) or even another subsidiary (whether wholly owned or otherwise) (the third defendant) does not derogate or diffuse the concept of separate legal entity so as to transform the decision of the first defendant to also become that of the third defendant under the tort of inducing a breach of contract.

G

[149] Learned counsel for the developer, having taken the stand that MLGH is the alter ego of the State Government, cannot subsequently resile from that stand for the purpose of making the State liable for inducement of breach of contract, to now say that the State Government is a stranger and a separate H entity from its wholly-owned subsidiary. It is tantamount to saying that MLGH is effectively the alter ego of the State Government and at the same time a complete stranger to the State Government! That, would respect, be to approbate and reprobate.

I **[150]** Thus, liability of D2 the State Government of Sabah for the tort of inducement of breach of contract by MLGH cannot be upheld and has to be dismissed.

Whether the developer had proved the various heads of damages claimed

[151] Section 66 of the Contracts Act 1950 is not relevant for our consideration because no one is suggesting that MLGH had received any benefit from what had been carried out by the developer prior to the event of discharge in the passing of the amendment to the Sabah Land Ordinance. Section 66 of the Contracts Act 1950 provides as follows:

> 66 Obligation of person who has received advantage under void agreement, or contract that becomes void
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[152] Neither would s 57(3) of the Contracts Act 1950 be relevant as it is not a case where the act that makes the contract impossible to be performed was known or with reasonable diligence might have known to MLGH. Section 57(3) reads as follows:

> Compensation for loss through non-performance of act known to be impossible or unlawful
>
> (3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.

[153] In the context of the loss or damages that the developer is claiming, we take the view that s 15 of the Civil Law Act 1956 would be the relevant provision. In fact, Part VI of the Civil Law Act specifically refers to 'Frustrated Contracts'. Section 15 reads as follows:

> PART VI FRUSTRATED CONTRACTS
>
> 15 Adjustment of rights and liabilities of parties to frustrated contracts
>
> (1) Where a contract has become *impossible of performance or been otherwise frustrated,* and the parties thereto have for that reason been discharged from the further performance of the contract, subsections (2) to (6) shall, subject to section 16, have effect in relation thereto.
>
> (2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:
>
> Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court may, if it considers it just to do so having regard to all the

circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which subsection (2) applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the Court considers just, having regard to all the circumstances of the case and, in particular —

(a) *the amount of any expenses incurred before the time of discharge* by the party benefited in, or *for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract* and retained or recoverable by that party under subsection (2); and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

(4) In estimating, for the purposes of subsections (1) to (3), the *amount of any expenses incurred by any party to the contract, the Court may, without prejudice to the generality of the said subsections, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.*

(5) In considering whether any sum ought to be recovered or retained under subsections (1) to (4) by any party to the contract the Court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the Court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid. (Emphasis added.)

[154] Whilst the language of s 15 above may be rather convoluted, the essence is that any reasonable expense incurred by a party before the discharge of the contract, may be claimed against the other party in circumstances where it is fair and reasonable to do so as the justice of the case may demand. In this case the developer is claiming for valid costs and expenses incurred from MLGH for it was MLGH who had requested for a deferment of the contract from three to five years and at the same time had allowed the developer to do all the preliminary works of doing the survey, prepare and file the relevant reports for the various applications for approvals of the authorities until the discharge of the contract.

[155] Under s 15 of the Civil Law Act 1956 the developer is not entitled to claim for damages arising out of what the developer said is a loss of bargain under Part A of the claim.

[156] The developer had claimed a sum of RM1,153,155,371 or to be assessed and the High Court had allowed RM387,752,493. The defendants had adduced evidence of a loss of RM325,398,840 or RM467,350,000. As at the date of the discharge by frustration, no physical construction works on the project had begun. Thus, there is no basis to assess damages based on a loss of bargain.

[157] For Part B of the claim we agree with the High Court and find that the plaintiff developer had proved on the balance of probabilities the amount expended by it before the contract was frustrated, both under s 15 of the Civil Law Act 1956 as well as under the principle of estoppel. The developer is entitled to claim for that amount which was produced as evidence before the High Court and which the High Court allowed in the sum of RM6,355,371 as reflected in the audited accounts for the year of 1998–2003 which ledger and source documents were not seriously challenged by MLGH.

[158] We find no merits in the argument that as the auditors of the developer had not been called as a witness, then the audited accounts for the years 1998 to 2003 are not admissible. It must be remembered that the accounts are prepared by the developer and must be signed off by the Director having charge of the financial affairs of the developer besides being signed by the auditors after their audit. It is the company that prepares its accounts and the auditors that audit.

[159] On top of that the developer had also referred to their own ledgers and accounting records which showed a further breakdown of those figures. All the evidence is contained in PW1's evidence-in-chief and as he was not challenged by MLGH during cross-examination, the same is considered accepted as evidence. See the case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639. As the defendants are not seeking leave of the Federal Court to appeal against the award of this head of damages under Part B of the claim, we do not think we need to labour more on this, other than saying that we are in agreement with the analysis of the High Court as set out in paras [153] to [161] of the High Court's grounds of judgment.

[160] As for Part C of the developer's claim, we find that the claim of RM1,588,654,246 for consequential loss of profits is rather spurious and speculative. The whole concept of the funding of the project assuming that it had been built to completion is that MLGH would have received the Town

Hall, Convention Centre, the promenade with landscaping and related infrastructure for RM160m. The 150 acre land would then have been transferred to the developer free from all encumbrances.

[161] As no construction works whatsoever could be done because of supervening impossibility with the passing of the amendment, there cannot be any damages to that tune of RM1.5 billion when if the project were to be completed, the developer would have expended RM414m in return for a 150 acre land that it has to reclaim from the sea. The High Court judge found Part C of the claim to be highly remote and uncertain in his analysis from paras [162] to]169] of his GOJ. We agree.

DECISION

[162] We had therefore allowed the appeal in part in Appeal 163 by the defendants and set aside the order of the High Court as stated below.

[163] We had affirmed Part B of the claim for the award of damages by the High Court of RM6,355,371 only against D1 MLGH which are the expenses incurred from 1998–2003 which were produced before the High Court as evidence. Interest shall be at the rate of 5%pa from 10 October 2015 till full payment as ordered by the High Court. The judgment entered against D2 the State Government of Sabah was set aside.

[164] As for costs in the High Court, we affirmed the order of RM100,000 on cost subject to allocator and as for costs here we made each party bear their own costs.

[165] Consequent on the above, Appeal 164 by the developer was dismissed with each party bearing its own costs.

Appeal 163 allowed in part and judgment entered against second appellant set aside; Appeal 164 dismissed with each party bearing its own costs.

Reported by Dzulqarnain Ab Fatar