# ADM Ventures (M) Sdn Bhd & Ors v Renew Capital Sdn Bhd & Ors and other cases [2021] MLJU 1466

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

LAU BEE LAN J

GUAMAN NO WA-22NCC-245-06/2016, WA-24NCC-47-02/2016, WA22NCC-425-12/2016, 24NCC-360-10/2015, WA-22NCC-19-01/2016, WA-22NCC-28-01/2016, WA-22NCC-34-01/2016, 22NCC-355-11/2015, WA-22NCC-272-08/2016, WA-22NCC-284-08/2016 & PENGGULUNGAN SYARIKAT NO: 28NCC-886-10/2015

30 July 2021

*Dhanaraj (James Ee Kah Fuk, Kalai Selvi, Muhammad Ariff and Malik Imtiaz with him) (KF Ee & Co) for the plaintiffs in Tranche 1 Actions and D1 to D6 and D9 in Tranche 2 Actions.*
*Prem Ramachandran (Puvvana Muthuvelu with him) (Kumar Partnership) for the defendants in Tranche 1 Actions and the plaintiffs in Tranche 2 Actions.*
*R Rishi (Daljit Singh Gill and Rachel Tham Xi Wen with him) (Rishi & Partners) for D7 and D8 in Suits 47 and 425.*

## Lau Bee Lan J:

JUDGMENTIntroduction

**[1]**At the outset I wish to state vide an Order dated 13/7/2017, the Court ordered amongst others for the trial of 14 Suits mentioned in the said Order be conducted in 3 tranches of Tranche 1 Actions, Tranche 2 Actions and Tranche 3 Actions.

**[2]Tranche 1 Actions** comprised 8 Suits-

(i) Kuala Lumpur High Court Originating Summons No: 24NCC-360-10/2015 **('Suit 360');**

(ii) Kuala Lumpur High Court Winding-up Petition No: 28NCC-886-10/2015 **('Suit 886');**

(iii) Kuala Lumpur High Court Suit No: WA-22NCC-28- 01/2016 **('Suit 28');**

(iv) Kuala Lumpur High Court Suit No: 22NCC-355-11/2015 **(Suit 355');**

(v) Kuala Lumpur High Court Suit No: WA-22NCC-1901/2016 **(Suit 19);**

(vi) Kuala Lumpur High Court Suit No: WA-22NCC-3401/2016 **(Suit 34);**

(vii) Kuala Lumpur High Court Suit No: WA-22NCC-272- 08/2016 **('Suit 272');** and

(viii) Kuala Lumpur High Court No: WA-22NCC-284-08/2016 **(Suit 284).**

**[3]Tranche 2 Actions** comprised 4 Suits-

(i) Kuala Lumpur High Court Suit No: WA-22NCC-245- 06/2016 ('Suit 245')

(ii) Kuala Lumpur High Court Winding-up Petition No: 28NCC-857-10/2015 **('Suit 857');**

(iii) Kuala Lumpur High Court Originating Summons No: WA- 24NCC-47-02/2016 **('Suit 47');** and

(iv) Kuala Lumpur High Court Suit No: WA-22NCC-425- 12/2016 **('Suit 425').**

**[4]Tranche 3 Actions** comprised 2 Suits-

(i) Kuala Lumpur High Court Suit No: WA-22NCC-410- 12/2016; and

(ii) Kuala Lumpur High Court Suit No: WA-22NCC-350- 10/2016. Both are defamation actions brought by Tunku Naquiyuddin and Marcus respectively against ADM.

**[5]**On the day of trial of the Tranche 1 Actions, the Plaintiffs therein withdrew all the suits and indicated through their solicitors that the withdrawal was without liberty to file afresh. However, in the Plaintiffs' application for discontinuance, they sought for leave to discontinue with liberty to file afresh. On 16/11/2017 I allowed the Plaintffs' said application but without liberty to file afresh. However, on appeal by the Plaintiffs, the Court of Appeal took the position that the Tranche 1 Actions ought to be heard and as a result Tranche 1 Actions were tried on 10/12/2018.

**[6]**The Petitioner, ADM Ventures (M) Sdn Bhd **('ADM')** in Suit 857 withdrew the Petition on 3/1/2018 with leave of the Court and with an express order that no concessions are made by ADM with respect to the issues therein. Thus, the proceedings in the Tranche 2 Actions only involve the remaining 3 Suits, namely, Suit 245, Suit 47 and Suit 425.

**[7]**In Suit 425, the 1st to 6th and 9th Defendants are respectively Renew Capital Sdn Bhd **('Renew Capital'),** Tunku Naquiyuddin Ibni Tuanku Ja'afar **('TN'),** Tunku Khairul Zaim Tunku Naquiyuddin **('TK'),** Marcus a/l Francis **('Marcus'),** Dr. Ranaweera Neil Prasad **('Neil'),** Dilantha Ranjula Bandara Malagamuwa **('Dilantha')** and GT Global Race (M) Sdn Bhd **('GTG').** However, the 1st to 6th and 9th Defendants i.e Defendants in Suit 47 are not involved in Suit 425 as the Plaintiff's claim against the 1st to 6th and 9th Defendants was struck out by the High Court on 4/8/2017 and the Court of Appeal dismissed the Plaintiff's appeal on 2/5/2019. Suit 425 presently only involves the 7th and 8th Defendants i.e. Faizal and City Motorsports' Counterclaim against the Plaintiff.

**[8]**In respect of the Tranche 1 Actions, **Dilantha** was the Plaintiff in Suit 360, Suit 886, Suit 28 and Suit 355 (collectively called **'Dilantha Suits').** The Plaintiffs in the remaining 4 Suits were **Renew Capital** and **TN** in Suit 19, whilst Suit 34, Suit 272 and Suit 284 were initiated by GTG (for convenience collectively called **'RC Suits')**

**[9]**Dilantha was initially represented by Messrs. KF EE & Co. in the Dilantha Suits which firm represented the Plaintiffs in the RC Suits. However, they discharged themselves as Dilantha's solicitors on 22/11/2018. This was just prior to the trial of the Tranche 1 Actions on 10/12/2018 wherein Dilantha was not represented by Counsel, and neither did he attend Court to testify at the trial of the Tranche 1 and Tranche 2 Actions. I shall address the effect and implication of his absence at the appropriate stage in this Judgment.

**[10]**The focus in this Judgment is on Tranche 2 and Tranche 1 Actions only in the form that they have evolved to now. In light of the foregoing sequence of events, the trial for Tranche 2 Actions was heard followed by the Tranche 1 Actions. It was agreed between the parties that the testimony tendered during the Tranche 2 Actions will be adopted in the Tranche 1 Actions where applicable. Dato' Prem Ramachandran is the lead Counsel for the Plaintiffs in Tranche 2 Actions and the Defendants in Tranche 1 Actions, Dato' Dhanaraj is the lead Counsel together with co- Counsel, Mr. KF Ee for the 1st to 6th Defendants in Tranche 2 Actions and the Plaintiffs in Tranche 1 Actions save for the Dilantha Suits

(Tranche 1 Actions) with Mr. R. Rishikessingam as lead counsel for the 7th and 8th Defendants in Suit 425.
Parties

**[11] ADM**

a private company limited by shares whose principal business activity is investment holding.
legal and beneficial owner of 50% of the issued and paid up capital of GTG.

incorporated to replace AM Associates and acquired 50% shares in GTG.

**[12]**Thrinakarasi @ Arasu a/l Munisamy **('Arasu') (SP14)** & Thirumaren a/l Munisamy **('Thirumaren') (SP8).**

Arrasu, Maren and Dilantha are the shareholders and directors of ADM.
Maren owns 34% while Arrasu and Dilantha own 33% respectively of the issued and paid up capital of ADM.

Arrasu, Maren and Dilantha were the subscriber shareholders and directors of GTG.

**[13]Renew Capital**

a private limited company whose shareholders are Marcus, Neil, H.N. Holdings Sdn Bhd (TN's family company).

TN, Marcus, Neil and Tunku Mohamed Alauddin (TN's son) were the directors at the material time.

**[14]TN/Tunku (SD2)**

Director of GTG
One of the authorised cheque signatories representing Renew Capital in Group A.

TN was later allegedly wrongfully moved to Group B via directors resolution dated 5/10/2015 (P34).

**[15] TK (SD6)**

TN's son
Allegedly wrongfully appointed as director of GTG on 8/9/2015.

Subsequently appointed as one of the authorised cheque signatories in Group A via a Directors' Resolution dated 5/10/2015 (P34).

**[16]Marcus (SD5)**

Director of GTG.
One of the authorised cheque signatories representing Renew Capital in Group A.

Allegedly wrongfully moved later to Group B via a Directors' Resolution dated 5/10/2015 (P34).

**[17]Neil (SD8)**

Director and shareholder of Renew Capital.
Voluntarily resigned from GTG Board of Directors on 19/11/2014.

Purportedly reappointed a director of GTG on 8/9/2015.

**[18]Dilantha**

Sri Lankan national with an address at 12-8-20, Hartamas Regency, Persiaran Dutamas, Off Jalan Duta, 5040 Kuala Lumpur.
Introduced to Arrasu and Maren by Nihal Ratnayake.

Director of GTG since its incorporation on 7/12/2012 until his removal on 25/9/2015.

**[19]Faizal Maulauna bin Hasan Kutti ('Faizal') (SD10)**

Director and 60% shareholder of City Motorsports.

Purportedly appointed a COO of GTG via a Directors' Resolution dated 5/10/2015 (P34).

**[20]GTG**

A private company limited company incorporated under the Companies Act 1965.
On 7/12/2012 Arrasu, Maren and Dilantha incorporated GTG as subscriber shareholders of 1 share each and directors of GTG.
Objects for which GTG was established include the following:

"

(i) to organize promote and conduct domestic and international motor races and events and any other sports and entertainment events both locally and overseas;

(ii) to deal in all kinds of commercial activities including marketing, promotion, carrying out and managing all kinds of business whether together or separately with operators or motor sports activities;

(iii) to carry on any other business deemed by the Company to directly or indirectly enhance the value of the Company."

Background Facts

**[21]**Before going into the merits of the various Suits, it is pertinent to understand the background which gave rise to the Suits herein. The crux of the dispute between the parties concern a joint venture between ADM and RC to organise and run the Kuala Lumpur Street Car called the GT City Race-KL Race. The idea to run the street race in Malaysia was conceptualised by Arrasu, Maren and Dilantha. GTG was incorporated by them for this purpose. As GTG did not have the necessary funds at that time, it set out to look for funders. Arrasu, Maren and Dilantha then met Marcus who together with his partners in RC, namely TN and Neil, decided to participate in the venture with GTG as the joint venture vehicle.

**[22]**The Plaintiffs submitted that after several discussions by TN, Marcus and Neil representing RC on one part and Arrasu and Maren on the other part, it was agreed that the following terms of the Joint Venture Agreement are as follows:

(i) GTG will operate as the incorporated joint benture partnership company with both parties (i.e. TN, Marcus and Neil on one part and Arrasu and Maren on the other) holding an equal share of 50% each through their nominated companies;

(ii) the management and operations of GTG would be left in the hand of Arrasu;

(iii) TN and his partners would participate mainly as funders by either providing funding themselves or arranging for funding through government grants;

(iv) both parties will have equal representation on the Board of GTG; and

(v) both parties will have joint control of GTG's finances.

**[23]**The Defendants' pleaded case in para 17 of the Defence and Amended Counterclaim is that there was no joint venture and that all parties (RC and ADM) were to inject monies equally.

**[24]**I have examined the pleadings and the evidence. Terms (iv) and (v) were part of the Agreed Facts (Tranche 2) but terms (i), (ii) and (iii) above were disputed. With regard to term (i), I find there was a Joint Venture Agreement albeit not reduced in writing which I gather from the following evidence:

(a) in cross-examination of Marcus (NE 8/8/2018 p.3081/1- p.3084/15, the following is gleaned i.e. (i) RC came into GTG as a joint venture partner, (ii) the joint venture project was to run the 2015 KL City Street Race and to the question, "Yes, *2015 and thereon lah",* Marcus replied, " *Thereafter, yes"* and he agreed in the affirmative *"Yes"* to the Counsel for Plaintiffs' subsequent question of *"And thereon"* and confirmed in the affirmative to the Court's query, *"Is the answer yes?"* (iii)

agreed that the joint venture would operate through GTG, the joint venture vehicle between RC on one part and Arrasu, Dilantha and Maren on the other part, each holding 50 (% shares, (iv) one of the terms of the joint venture was that both parties were to have equal representation of the Board (equal directorship), (v) another term of the joint venture was for both parties to have joint control of the bank accounts, and (vi) 2 signatories each, TN and Marcus (Group A-RC) and Arrasu and Maren (Group B- ADM);

(b) in cross-examination of TN (NE 11/7/2018 p.2637/9- p.2639/6) when he identified GTG as a joint venture company;

(c) in cross-examination of TN (NE 11/7/2018 p.2679/9) when he confirmed that GTG was a joint venture company with participation of the following parties:

> "PR And the parties to the joint venture were initially AM Associates and RC Capital subsequently AM Associates shares were transferred to ADM. You remember that we went through all the company documents on the last occasion?
>
> TUNKU Yes";

(d) in re-examination of TN (NE 11/7/2018 p.2679/9) that "*in all essence we took it as a joint venture...";* and

(e) in cross-examination of Neil, shareholder and director of RC (NE 14/8/2018 p.3619/27) when he agreed that when RC came into GTG, it came in to undertake a joint venture project.

**[25]**In light of the aforesaid evidence, in my judgment the Defendant's contention that the arrangement between the parties is not a joint venture has no leg to stand on and undermines the whole substratum of their case (per Abdul Rahman Sebli JCA (now FCJ) in *Suruhanjaya Pilihan Raya & Ors. v. Kerajaan Negeri Selangor & Another Appeal* [2018] 1 CLJ 258 at 265[12] - [13] and 268[25]). On the other hand, the Plaintiffs have successfully proved their case of the existence of a joint venture arrangement between the parties as the Court is permitted to rely on the evidence of TN, Marcus and Neil obtained through cross-examination. This course of action has been approved in *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445 that "...In a civil case, one party's evidence is the other's as well. So, a plaintiff may rely on defendant' evidence to prove his or her case. The converse is also true (see the observations of Hashim Yeop A Sani SCJ in *M Mahadevan v. S Lourdenadin* [1988] 2 MLJ 371." (per Gopal Sri Ram JCA (as he then was) (delivering judgment of the Court of Appeal) at 450- 451[3].

**[26]**On the disputed term (ii) of the Joint Venture Agreement, my finding is that the management and operations of GTG were to be left in Arrasu's hands based on the evidence of TN who in re-examination admitted the following:

> "DD ... Besides the fact that Tunku is not sure the fact whether there was a JV Agreement or not, to the best of Tunku's knowledge, are there any terms between RC and ADM in GTG basically explaining what are the role that the respective shareholders meaning ADM and RC are supposed to be doing in GTG?
>
> TUNKU Yes, that is quite exclusive that ADM would. the management and Arrasu would be the CEO, President and manage the whole thing because we respect to the fact that he was with the Lloyd's which is a very famous company and on RC side, I think our connections are with government with sponsors and a little bit of, I wouldn't call it funding but advances."

**[27]**On the disputed term (iii) of the Joint Venture Agreement, premised on oral evidence supported by contemporaneous documentary evidence which is explained below, I find the Plaintiffs have proved that TN and his partners would participate mainly as funders by either providing funding themselves or arranging for funding through government grants was a term of the joint venture.

**[28]**In support of my aforementioned finding, I rely on the following evidence:

(a) Arrasu's evidence in chief is that the understanding and arrangement is TN and RC's role was to obtain funding through sponsorships and government grants or by providing funding themselves until the external funding fell in; and at all material times TN was aware of RC's role and had agreed to provide funding to GTG so long as he was paid 8% interest on the funds advanced.

(b) Arrasu's testimony is evidenced by the conduct of the parties wherein TN had injected approximately RM10.5 million in separate tranches; when the monies from DBKL grant subsequently fell in, TN was repaid RM 1 million. P84, TN's statement of accounts admitted by him as accurate is corroborative of these advances made by TN to GTG (payee).

(c) Arrasu's testimony that the ADM team were confident that government grants could be secured with TN on board as Marcus had had convinced them that TN had the expertise and experience to secure government grants for the venture as TN and his partners had successfully secured several grants in the past from various government agencies for their company Entogenex. Further he had made it clear that there was never any agreement or understanding that the injections of funds by TN or RC must be equally matched by the ADM team. This is supported by P68, a WhatsApp message whereby Marcus was informing Arrasu that TN would be passing Arrasu a cheque on 22/4/2015. P69 further supports that on 22/4/2015 TN was informing Arrasu that he would be bringing a cheque for RM500,000.00 and asked Arrasu to ensure 8% interest on it and on past advances made by him including his daughter.

(d) Neil's evidence in cross-examination by Counsel for Faizal and City Motorsports that when he said TN put in his money and lent his name, it was in relation to GTG.

**[29]**Hence, in this regard I am unable to accept TN's contention that the monies advanced by TN were to be capitalized and the Plaintiffs was to reciprocate and to put in money as well as reflected in his answers as follows:

(a) "PR From 2013 right through to 2015, you injected monies into GT Global and funded it as and when it required money. TUNKU Never as and when. It was where I put money into. I think they put in RM650,000 also. I think I am not the sole funder."

(during cross-examination)

(b) "TUNKU I want to explain that you put in monies but not as a funder, as an investor. That's really what I wanted to say. And that the expectation, of an investor is, I put in money, you put in money but you could put your money in a little bit later I understand, you know, but I was looking at it not as a funder but as an investment."

(c) "Because like any company in the world you have to start with someone putting in a little bit of money, you know, and then from there you go forward. So, that was the role. But in all essence, we took it as a joint venture where as a capital you know sometimes a company, you advance, advance then eventually after a year also, then decide ok, let capitalise let's decide then you put in what to match what we have, you know....So, to me it was always a joint venture where they should reciprocate." (in re-examination)

**[30]**In my considered view, TN's contention on reciprocity is a tenuous argument which is unsustainable when weighed against the contemporaneous evidence and is but an afterthought. My reasons are these-

(i) it does not gel with item (5) of the impugned Agreement as it does not reflect the bargain between parties who are purportedly funding the joint venture equally; and

(ii) it does not make commercial sense and it is improbable for the ADM team to fund the project given the fact that the ADM team was already heading the management and organisation of the Race.

**[31]**Further, the issue of capitalisation of the advances made as contended by the Defendants is negated and is unsustainable for the following reasons:

(i) this issue was not pleaded by the Defendants;

(ii) in any event, P84 (TN's Statement of Accounts) indicates only RM100,000.00 was capitalised on 1/12/2014. Proof of the same lies in the GTG's Directors' Circular Resolution dated 1/12/2014, Form 24 and Form 25 lodged with the Companies Commission of Malaysia;

(iii) since 1/12/2014, a total of RM8.5 million was advanced by TN. There is no documentary evidence to indicate that there was a demand or a Board of Directors' Meeting requisitioned for the further allotment of shares to match any of the advances made by TN;

(iv) these documentary evidence coupled with the fact that advances made by TN were subject to 8% interest indicate that there was no agreement for the monies advanced to be capitalised.

**[32]**For the purpose of the implementation of the Joint Venture Agreement and the participation of RC, the shareholding of GTG was restructured resulting in RC and ADM both having equal shareholding of 50% each and having equal representation on the BOD of GTG. The shareholding structure of GTG is best illustrated in Appendix A of the Post Trial Written Submissions of Plaintiffs in Tranche 2 and Defendants in Tranche 1 **(Plaintiffs' Written Submission).**
Dilantha Suits

**[33]**It is best that the Court deal with the Dilantha Suits (Tranche 1 Actions) i.e the implications arising from Dilantha's absence at the trial of the Tranche 1 and Tranche 2 Actions at this juncture. The Dilantha Suits comprised the following Suits as described in the Plaintiffs' Written Submission which I gratefully adopt:

"

(i) Suit 360 is an oppression petition filed by Dilantha against ADM, Arrasu and Maren pursuant to Section 181 of the CA 1965. In Suit 360 Dilantha alleges that-

(a) in obtaining funding for the KL City Race, Arrasu and Maren ignored Dilantha and made their own decisions without consulting him;

(b) Arrasu and Maren refused to transfer Dilantha's shares in ADM to his own company Dilango Racing;

(c) Arrasu and Maren did not consult him when they executed the 24.6.2015 Agreement;

(d) Arrasu and Maren did not notify Dilantha that he was supposed to resign as director of GTG pursuant to the 24.6.2015 Agreement. In fact, Dilantha never agreed to resign;

(e) Dilantha has no say in GTG and ADM as director;

(f) on 2.9.2015 Arrasu and Maren called for an EGM to remove Dilantha as director of GTG.

As a result of the alleged oppressive acts cited above, Dilantha sought (i) an order to invalidate Clause 1 of the 24.6.2015 Agreement that called for his resignation from GTG; (ii) a declaration that any act or transaction by Arrasu and Maren within ADM is prohibited without prior consent or agreement of Dilantha; and (ii) that ADM be wound up.

(ii) Suit 886 is a winding up petition filed by Dilantha against ADM on grounds that the substratum and/or main objective of ADM no longer exists and because there was a deadlock in management.

(iii) In Suit 28, Dilantha sought a declaration that the 24.6.2015 Agreement is illegal as well as general damages. The basis of Dilantha's claim was inter alia, that Arrasu and Maren conspired to deceive him by-

(a) making their own decisions without prior discussion with him;

(b) denying his request to transfer his shares in GTG to Dilango Racing Sdn Bhd; and

(c) signing the 24.6.2015 Agreement and not informing him that he had to resign;

(iv) In Suit 355, Dilantha alleged that he was entitled to 60% of the shares in ADM and sought for specific performance of a purported oral promise by Arrasu and Maren to reflect his entitlement. In the alternative, he has sought for damages in liew of specific performance."

It is to be noted that I have referred the "24/6/2015 Agreement" mentioned in the Dilantha Suits as the "impugned Agreement" hereafter.

**[34]**Following from what I had said in para 9 above, I had directed the trial to proceed in the absence of Dilantha pursuant to O.35 r. 1(2) Rules of Court 2012. Since Dilantha has failed to provide any evidence to support his allegations as claimed in Tranche 1 Actions, I agree with the Plaintiffs' submission that the Dilantha Suits ought to be dismissed and the evidence tendered by Arrasu, Maren and ADM pertaining to the said Suits will have to be accepted as true since no evidence to the contrary has been tendered. In this regard I agree with the views expressed by the learned JC in *Anne Lim Keng See (trading as Golden Kintex-Sole-proprietorship) v Malayan Banking Bhd* [2009] 9 MLJ 502 at p.503 Held 2 and *Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam* [2020] 4 MLJ 842 at p.843 Held (1).

**[35]**Due to Dilantha's absence, in my considered view, the issues to be tried **('G'),** in respect of the Dilantha Suits can only be determined in favour of the Defendants (ADM, Arrasu and Maren) in the following manner as per the Plaintiffs' Written Submission:

"

(i) ADM's affairs were NOT carried out without taking into consideration Dilantha's interest as a shareholder of ADM;

(ii) Arrasu and Maren did NOT exercise their powers as directors of ADM without taking into account Dilantha's interest as a shareholder of ADM;

(iii) the 24.6.2015 Agreement is NOT null and void;

(iv) Arrasu and Maren did NOT discriminate and neglect Dilantha's interest in ADM;

(v) Dilantha is NOT entitled to 60% shares in ADM;

(vi) the substratum of ADM has NOT disappeared;

(vii) there is NO deadlock in the management of ADM;

(viii) ADM should NOT be wound up; and

(ix) Dilantha is NOT entitled to damages."

**[36]**The absence of Dilantha during the trial of Tranche 1 Actions and the Defendants' failure to call Dilantha as a witness in Tranche 2 Actions results in the Defendants' failure to provide evidence to refute, among others, the following which have been proven by the Plaintiffs through oral and/or documentary evidence:

"

(i) Dilantha only approached Arrasu and Maren for an interest in the Joint Venture in the last quarter of 2014;

(ii) ADM was incorporated to reflect Dilantha, Maren and Arrasu's interest in order to avoid diluting their interest or alter the structure of the Joint Venture;

(iii) Arrasu and/or Maren never promised Dilantha that his interest would be transferred to his company Dilango Racing Sdn Bhd; and

(iv) from January to August 2015, Dilantha withdrew his participation and was not involved in any way in the preparation or the affairs of ADM and GTG during this period."

**[37]**In light of the above, in my considered view the Plaintiffs' reliance in the RC Suits on the purported assertion that there was oppression on Dilantha or that he was entitled to 60% shares in ADM cannot be sustained. Further, since Tranche 1 Actions and Tranche 2 Actions were heard together, in my

considered view, this Court can make the same findings of facts in Tranche 2 Actions that there was no oppression on Dilantha by the majority shareholders of ADM, i.e Arrasu and Maren and that Dilantha was not entitled to 60% shares in ADM. This is coupled with TN's evidence in cross-examination in Tranche 2 Actions confirming that (i) Dilantha at all material times only had 33% of ADM and nothing more at any particular point in time;

(ii) Dilantha had voluntarily signed away his one share in GTG when it was transferred to AM Associates; and

(iii) thereafter when ADM was formed, he had 33% shares again.

**[38]**In view of the foregoing, I conclude that the Dilantha Suits ought to be dismissed and all allegations made therein ought to be deemed as disproved in light of the unrebutted evidence tendered by ADM, Arrasu and Maren.
Suit 245

**[39]**In Suit 245, the 1st, 2nd and 3rd Plaintiffs are ADM, Arrasu and Thirumaren (collectively referred to as 'Plaintiffs' or ADM, Arrasu and Thirumaren as the case maybe); whilst the 1st, 2nd, 3rd, 4th and 5th Defendants are RC, TN, Marcus, Dilantha and GTG (collectively referred to as 'Defendants' or RC, TN, Marcus, Dilantha and GTG as the case maybe).
Whether it was agreed that the 1st Plaintiff (ADM) and 1st Defendant (RC) will have, inter alia, equal representation on the Board of the 5th Defendant (GTG) pursuant to an agreement reached on 24.6.2015?

**[40]**The preliminary issue to be addressed is the status of the Agreement dated 24/6/2015 (P24) **('the impugned Agreement').** The Defendants submit that the impugned Agreement is points of understanding subject to contract. The Defendants rely on the testimony of Maren and Arrasu in cross-examination that the impugned Agreement was never reduced to a formal contract (NE 11/4/2018 p.983-984 & NE 4/6/2018 p.1812 respectively) and testimony of TN in re-examination that there was no contract (NE 26/7/2018 p.2936). In support of their contention the Defendants cited *Ayer Hitam Tin Dredging Malaysia Bhd v. Y.C. Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 Held 1, 2, & 3.

**[41]**The Plaintiffs' position is that the impugned Agreement is a binding contract between the shareholders of GTG.

**[42]**P24, B6/910 is the impugned Agreement in handwriting. For convenience the typewritten copy of the impugned Agreement (P25) at B6/911 is reproduced in verbatim as follows:

"Points of Understanding (Subject to Contract)

In the spirit of goodwill to go forward with the KL City Grand Prix 2015 RC and ADM agree as follows:

(1) Two Board Members for each party in GT Global Race and agree for the resignation of Mr Dilantha.

(2) Tunku has to date advanced RM3 million to GT Global Race to date.

(3) Tunku on 24th June 2015 will advance an additional or RM5.5 million to GT Global making Tunku's advance to a total of RM8.5 million.

(4) In the event, the 2015 KL City Grand Prix is cancelled or aborted for any reason whatsoever, ADM will guarantee and commit to settle half of the total advanced by Tunku i.e. RM4.25 million to Tunku within 6 months.

(5) ADM agrees to a profit share arrangement in GT Global of 60% to RC and 40% to ADM.

(Signed) (Signed) (Signed) (Signed)

M Arrasu Tunku Naquiyuddin Marren Marcus Francis"

**[43]**The approach and construction to be accorded to the expression "subject to contract" or similar expressions in an agreement has been elucidated by the superior Courts. Of assistance are-

(a) the passages relied on by the Defendants in **Ayer Hitam** (supra), wherein the Federal Court at p.133 held-

"[1] It is well settled that when an arrangement is made "subject to contract" or "subject to the preparation and approval of a formal contract" and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged. **On the other hand, it is also true that, merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed.**

[2] **It is a matter of construction whether the execution of the further contract is a condition or term of the bargain** in which case there is no enforceable contract as the law does not recognise a contract to enter into a contract, or **whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In which case there is a binding contract and reference to the more formal document may be ignored.** In this respect, the Court, in its task to ascertain the intention of the parties will, generally speaking, apply an objective test. In other words, it will ask itself what would the intention of reasonable men be if they were in the shoes of the parties of the alleged contract."

(Emphasis added)

(b) *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327**,** (FC) where one of the issues was whether there was a valid and enforceable agreement between the vendor and the purchaser given that the purchaser's offer to purchase the property was "subject to the sale and purchase agreement" appearing in the estate agent's letter. Counsel for the appellant relied on **Ayer Hitam** in support of his argument that there was no contract concluded between parties. Gopal Sri Ram JCA (as he then was) (delivering the judgment of the Court) at p.336 E opined- "The phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. **Rather, it is, when read in the context of the correspondence and the objective aim of the transaction - and this is how we read them -** indicative of an intention to merely formalize the agreement already concluded between the parties. **We therefore entertain no difficulty whatsoever in rejecting the argument advanced by Mr Abraham upon the first issue."**

(Emphasis added)

Of pertinence is the following passage in the joint judgment of Dixon CJ, MTiernan and Kitto JJ in *Masters v Cameron* (1954) 91 CLR 353 quoted by the Federal Court:

**"Where parties who have been negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.** Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one of more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

**In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document;** and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution."

(Emphasis added)

**[44]**Having considered the law and the evidence adduced, I am of the view that the Defendants' submission that the impugned Agreement is not binding because it was not reduced into a contract is

misplaced. Firstly, I find that the position taken by the Defendants was not pleaded: in their pleadings they did not dispute the Plaintiffs' pleaded case that an agreement was entered into on 26/4/2015, including *"the terms of the [24/6/2015] Agreement was reduced into writing and signed by the said attendees."* It cannot be denied that the attendees present at the 24/ 6/2015 meeting at TN's house were TN and Marcus besides Maren and Arrasu. The Defendants' only contention was with respect to the interpretation of the following terms of the impugned Agreement:

(a) that Dilantha was to resign voluntarily as a director of GTG and if Dilantha does not accede to voluntarily resign as director, he will remain as director of GTG;

(b) that the impugned Agreement was valid for the KL City Grand Prix 2015 only; and

(c) that ADM was to advance a sum of RM5.5 million to reciprocate the advance made by TN.

Neither did RC at any point in time contested the validity of the impugned Agreement.

**[45]**Secondly, the common thread that runs through the cross- examination evidence of Maren and Arrasu which the Defendants are harping on is that it was not reduced into a formal contract. The Defendants also submitted that TN in re-examination confirmed there was no contract. However, I noticed that Arrasu had in cross- examination proffered the answer *"We are supposed to type it out properly. Lawyers have to sign it. But the terms are clearly agreed by parties. This is the agreement, Yang Arif* to the question posed by Datuk Dhanaraj *"So what do you mean by "points of understanding subject to contract."* Further in re-examination, Arrasu confirmed the same point that the impugned Agreement was the agreement agreed by the parties when asked to clarify the following:

> "DPR No, what was put to you is that this was just points of understanding subject to contract and it was ever reduced into a contract.
>
> Arrasu Yang Arif, what we meant we were supposed to put it nicely into a nice document and sign it but that's form only, Yang Arif. This is the agreement. That's what I mean."

**[46]**Similarly, Maren in re-examination stated the impugned Agreement was binding when he clarified-

> "DPR .it was suggested to you that this is not the contract, it's not binding. And you disagree. Can you please explain why?
>
> Maren This is definitely a binding contract. The four parties there signed it knowingly and willingly. No one was pressured to sigh, all signed. The reason it ways 'subject to contract', if you look at page 910, it's handwritten, it was done on the day immediately after the meeting at Tunku's house. He said this is the agreement, you all signed it but 'subject to contract' here refers to getting a lawyer to type it out. This is handwritten. To type it out, get a lawyer to prepare a proper document but at all material times, we agreed this as a binding contract. It is a binding contract, binding agreement."

**[47]**Mindful of the principles espoused in **Ayer Hitam** and **Charles Grenier** (supra), in my judgment on the evidence before the Court, this is a case which falls within the 1st category of the 3 classes stated in **Masters v Cameron** as emboldened in para 43(b) above. I conclude that the impugned Agreement is a binding contract.

**[48]**Thirdly, the position taken by the Defendants that the impugned Agreement does not create any obligation and is not binding, is not a tenable argument but rather even if the impugned Agreement is viewed as an informal understanding, it will still give rise to a legitimate expectation which warrants equitable protection. I rest on the case of *Ho Yew Kong v Sakae Holdings Ltd and other appeals and matters* [2018] SGCA 3**,** which is of persuasive authority, wherein the Court of Appeal in Singapore held-

> "172. Second, **it is trite** that any understanding between the shareholders of a company, whether contained in a formal agreement or merely in the form of **an informal understanding,** can and generally will form the backdrop against which **the court determines whether there has been commercial unfairness:** see corporate Law at para 11052 and Minority Shareholders' Rights and Remedies at para 4.043."

(Emphasis added)

Whether the Defendants breached the agreed term of equal representation by voting in the manner which they did in reconstituting the Board of Directors of thereof 5th Defendant (GTG)?

**[49]**Since it is my finding that the impugned Agreement is a binding agreement, I shall now turn to the alternative argument of the Defendants that *"the purported agreement dated 24.6.2015 was only for the 2015 race and not binding on the parties after the 2015 race."* I find there is no merit in the Defendants' contention as it is a mere bare assertion based only on pleadings unsubstantiated by evidence. The evidence of Marcus, a director of GTG at para 24(a) above that the joint venture project was to run the 2015 KL City Street Race in 2015 and thereon.

**[50]**The Defendants submitted that (i) Dilantha is not a party to the impugned Agreement and is therefore not bound by it citing *Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 CLJ 123,

and (ii) the impugned Agreement called for Dilantha's resignation and not removal as stated in the witness statements of Maren and Arrasu and their pleaded case. In support of their contention, the Defendants hinge on the evidence given during cross-examination of-

(a) Maren (NE 11/4/2018 pp.979-983) submitting that Maren who was a party to the impugned Agreement admitted that the said Agreement was for Dilantha to resign and it is not for the parties to procure the removal of Dilantha from the GTG Board of Directors;

(b) Arrasu (NE 4/6/2018 pp.1797-1801 & pp.1817-1818) submitting that (i) Arrasu testified that the impugned Agreement was for Dilantha to resign and not for parties to procure the removal of Dilantha from the GTG Board of Directors; and (ii) that the term of the impugned Agreement only states parties agree to the resignation of Dilantha; and

(c) TN (NE 26/7/2018 p.2854) that it was never agreed that ADM and RC would procure the resignation of Dilantha but RC only agree for the resignation of Dilantha.

**[51]**In my judgment there is no merit in the arguments of the RC team for the following reasons:

(a) Firstly, having perused the cross-examination evidence on this point, I note that the opening words of the impugned Agreement "In the spirt of goodwill to go forward with the KL City Grand Prix 2015 **RC and ADM agree as follows"** and followed with, among others, the 1st term which both Maren and Arrasu agreed states-

> "(1) Two Board Members for each party in GT Global Race and agree for the resignation of Mr Dilantha."

And the absence of the word "removal" in the 1st term; however, both of them did not agree that the removal of Dilantha was not discussed at the 24/6/2015 Meeting or that it was not the parties to procure the removal of Dilantha from GTG Board of Directors.

(b) Secondly, taking the 1st term as it is worded in that if the agreement between the parties is that Dilantha resigns, I agree with the Plaintiffs' submission that (i) the net effect is that he would ultimately be removed if he refuses to resign, (ii) Dilantha cannot be used by the Defendants to resile from the impugned Agreement. There is an understanding that Dilantha would not be part of the joint venture from 24/6/2015 onwards and in any event this fact has not been refuted as alluded in para 36 (iv) above given that Dilantha was absent at the trial of the Dilantha Suits and the Defendants' failure to call Dilantha as a witness in Tranche 2 Actions.

(c) Thirdly, the Plaintiffs are not seeking to impose any obligation on Dilantha and I am incline to agree with the Plaintiffs' submission that the issue of Dilantha not being bound by the agreement is clearly a red herring and an afterthought because at the time when the impugned Agreement was executed this issue was not raised but raised for the 1st time when the dispute over GTG arose some 2 months later. In addition, as the Plaintiffs correctly submit, having agreed that there

shall be 2 directors representing each shareholder, the Plaintiffs have a legitimate expectation that RC comply with the agreement. The testimony of Marcus who in cross-examination said that *"(iv) one of the terms of the joint venture was that both parties were to have equal representation of the Board (equal directorship)."* lends credence and is consistent with the aforesaid interpretation of the 1st term of the impugned Agreement as opposed to the interpretation suggested by the RC team that the Plaintiffs have failed to secure the resignation of Dilantha as per the impugned Agreement in the event this Court finds that the impugned Agreement is valid and binding.

Whether the Board of Directors Meeting on 8/9/2015 and the resolutions passed are invalid, null, void and of no effect?

**[52]**RC team's submission is that Dilantha was still a director of GTG and therefore he had a right to requisition a Board of Directors Meeting on 8/9/2015 to appoint additional directors. The Plaintiffs' submission is that Dilantha did not act on his own but acted together with RC in breach of the impugned Agreement

**[53]**An examination of the evidence below and the contemporaneous documents pertaining to the 8/9/2015 Board of Directors Meeting has led me to conclude that the RC team through Dilantha wrongfully and unlawfully requisitioned the said 8/9/2015 Meeting to pass resolutions that contravened the Joint Venture Agreement and the impugned Agreement. My reasons are as follows:

(a) Dilantha had no reason whatsoever to independently requisition the GTG Board of Director Meeting to be held on 8/9/2015 vide a Notice of Board of Directors Meeting dated 24/8/2015 (P27, B17 p.188). This is because it has been confirmed by TN that Dilantha had voluntarily signed away his one share in GTG to AM Associates and that he never actually owned anything more than 33% of the total issued capital of ADM.

(b) The Plaintiffs' pleaded case is that the RC team had approached Dilantha to requisition the 8/9/2015 Board of Directors Meeting for the purpose of taking control of GTG. In this regard, TN said it was possible that Marcus may have spoken to Dilantha regarding the issuance of the notice of the Board of Directors Meeting dated 24/8/2015 and that it was fair to say that Dilantha could not have acted on his own (NE 26/7/18 p.2815/10-p.2816/6).

In contrast, Marcus' testimony on the Notice of Board of Directors Meeting dated 24/8/2015 issued by Dilantha is contradictory in that-

(i) he was unaware of the proposed appointments of TK and Dr Neil prior to the said Notice. I have examined the evidence of Marcus when he was referred to the Statutory Declarations (Form 48A both dated 7/8/2015 filed by TK and Dr Neil (B16 p.3204 and p.3207 respectively) that they were fit to be appointed as directors of GTG (NE 9/8/2018 p.3272/30-p.2374/11). I find that Marcus has been evasive when he said that he was not aware of the said SD(s) and it is illogical that he being a Director of RC which is holding 50% shares in GTG claim that there were no discussions prior to 7/8/2015 on the intended additional directors of GTG.

The improbability of Marcus' evidence is borne out when Neil, who signed the said SD, during cross-examination on the resolutions to appoint him and TK as additional directors to GTG, testified that *"Obviously I would have discussed with my own directors"* and answered in the affirmative to the question, *"Ok, and these discussions all happened prior to the race day."* (NE 14/8/2018 p.3639/21-25);

(ii) he was aware that the proposed company secretaries had agreed to accept the appointment because he was the one who recommended them;

(iii) however, the recommendation was made to the RC directors and not Dilantha; and

(iv) neither he nor the other RC directors spoke to Dilantha prior to the issuance of the said Notice.

(c) Critically Dilantha's failure to attend Court and explain why he had requisitioned for the 8/9/2015 Meeting warrants this Court to draw the an adverse inference that the testimony given by Dilantha would not be favourable to him and consequently not favourable to the other Defendants. To reiterate, Dilantha did not testify in Court and no explanation was given to the Court regarding his absence until the very last day of trial when his Counsel informed the Court that he had not been in touch with Dilantha since March 2018 (exhibit D88). I adopt what I have stated in para 9, paras 33 to 38 above. In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751**,** the Federal Court opined 2 consequences result when the respondent who is fully conversant with the facts refrained from giving evidence:

> (i) "In the first place, the evidence given by the appellant ought to have been presumed to be true" and (ii) "The first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference."

(d) In my considered view the Defendants' reliance on clause 44 of the Memorandum & Articles of Association of GTG to support the requisitioning of the 8/9/2015 Meeting is misplaced as clause 44 is with regard to the requisitioning of General Meetings which involve shareholders whereas in this instance, Dilantha's requisition was a board of directors meeting. Hence, clause 44 is not applicable.

**[54]**To conclude, I find that the resolutions passed at the 8/9/2015 Board of Directors Meeting were in in breach of the impugned Agreement and the Joint Venture Agreement by the Defendants voting to change the constitution of the Board of Directors of GTG.
Whether the resolutions passed and acts carried out thereafter (8/9/2015) by the illegitimately constituted Board of the 5th Defendant (GTG) are also invalid, null and void and of no effect?EGM on 18/9/2015 (Reconvened on 25/9/2015)

**[55]**The Defendants have filed a Counterclaim in Suit 245 against ADM, Maren and Arrasu claiming for the following reliefs:

"

(a) A declaration that the Extraordinary General meeting scheduled on 18th Sept 2015 and the minutes of meeting, resolution passed thereof (if any) is illegal, invalid, null and void and of no effect; and

(b) All the Plaintiffs to severally and/or jointly to pay the sum of RM8.5 Million to the 5th Defendant within 14 days of this Court Order; and

(c) The 2nd and 3rd Plaintiffs to pay the sum of RM15.85 million to the Fifth Defendant;

(d) The 2nd and 3rd Plaintiffs to pay the sum of RM431,886.47 to the Fifth Defendant;

(e) (c) General damages: and

(f) (d) Interest 0f 5% per annum on paragraph (a), (b) and (c) above commencing from the date hereof till the date of settlement;

(g) (e) Cost;"

**[56]**With regard to the EGM reconvened on 25/9/2015, the RC team contends that (i) the notice should have been given to the additional directors of GTG (TK and Neil) and that the impugned Agreement was for the Plaintiffs to secure Dilantha's resignation and not for him to be removed, and (ii) the EGM was only convened following the requisition of the Notice of Board of Directors Meeting dated 24/8/2015 by Dilantha.

**[57]**The issues concerning the EGM held on 25/9/2015 will be addressed under Suit 47. For the purposes of the issue relevant to Suit 245, I find there is no merit in the aforesaid contention of the RC team for the reasons which follow. Firstly, for reasons proffered earlier, the Plaintiffs did not recognise TK and Neil as valid and properly appointed directors of GTG. Secondly, Dilantha had been removed as director of GTG on 25/9/2015 is an agreed fact which need not be proved and to which the parties are bound by their admissions contained in the statement of agreed facts. The case of *CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin* [2010] 9 MLJ 176 at 186 [11] endorses his point and I agree with the view expressed by the learned Judge therein.

**[58]**Apart from the above reasons, I also take into account the following matters:

(a) It is to be noted that the in their Defence to Suit 245, the Defendants pleaded that RC did not attend the EGM on 18/9/2015 because the meeting was redundant following the notice for a Board of Directors meeting dated 25/9/2015 which had been issued by Marcus. However, I find the position taken by the Defendants is erroneous given that the requisition by Marcus is for a Directors meeting as opposed to the EGM on 18/9/2015 which is a general meeting.

(b) The Defendants' position with respect to the EGM is also inconsistent in that at the material time, TN, Marcus and Dilantha's position in their letter dated 8/9/2015 is that there was no requisition received by them regarding the EGM. However subsequently, the Defendants' position is that TK and Neil ought to be given notice as they had been appointed as directors on 8/9/2015.

(c) I find there is no merit in the Defendants' submission that TK and Neil ought to have been given notice given the Meeting convened was an EGM whereby only notice need be given to the members of the company i.e RC and ADM (P32) as conceded by Marcus in cross-examination (NE 9/9/2018 p.3295/23-p.3296/15).

(d) Lastly, the Defendants' proposition is ridiculous given that the notice of the EGM was issued on 2/9/2015 while the purported appointment of TK and Neil was on 8/9/2015 which In any event, I have found is unlawful/illegal.

**[59]**The EGM was only convened following the requisition of the Notice of Board of Directors Meeting dated 24/8/2015 by Dilantha because, among others, (i) Dilantha had not been involved in GTG since January 2015, (ii) the impugned Agreement was in place between the shareholders regarding the constitution of GTG's Board of Directors, (iii) Arrasu and Maren were concentrating their efforts into making the KL City Grand Prix 2015 a success.
Board of Directors Meeting held on 5/10/2015

**[60]**The Defendants submit that Marcus had the right to requisition on 25/9/2015 (P33) the Board of Directors' Meeting held on 5/10/2015 primarily for the following purpose:

> "2. To appoint Y.A.M Tunku Naquiyuddin Ibni Tuanku Ja'afar as the Chaiman of the Company.
>
> 3. To appoint Mr. Marcus a/l Francis as the Managing Director of the Company.
>
> 4. To appoint Encik Faizal Moulana Bin Hasan Kutti (NRIC No: 791102-12-5001) as the Chief Operating Officer ("COO") of the Company.
>
> 5. To appoint YM Tunku Khairul Zaim bin Tunku Naquiyudin as the additional Bank signatory in Group A of the Company's Bank Current Account maintained with Alliance Bank Malaysia Berhad,..."

Relying on the Minutes of the Board of Directors' Meeting (P34), the Defendants submit that there was the requisite quorum on 5/10/2015 and the said meeting was therefore valid and the resolutions passed are valid and effective.

**[61]**With respect, in my considered view the Defendants' contention is misconceived. Firstly, P34 showed

that despite being removed Dilantha as director on 28/9/2015 (it is an Agreed Fact in Suit 47 that *"Dilantha was a director of GTG since its incorporation on 07.12.2012 until his removal on 25.09.2015')* unlawfully took part in the GTG meeting on 5/10/2015 by (i) seconding and voting the motion that TN be appointed as the Chairman of the meeting, (ii) by proposing and voting for the motion that TN be appointed as the Chairman of GTG, (iii) by voting for the motion that Marcus be appointed as Managing Director of GTG, (iv) by seconding and voting the motion that Faizal be appointed as Chief Operating Officer of GTG, and (v) by seconding and voting for the motion that TK be appointed as an additional signatory in the same group as Arrasu and Maren.

**[62]**Regarding item 5 of the Notice for the 5/10/2015 Meeting requisitioned by Marcus, the Defendants submit there has been a clerical error made by the company secretary based on the testimony of Marcus and the evidence of SP11 (Christina Lim) from Indah Secretarial that *"Page 164 and page 209, the signatory of Group A and Group B have (sic) seems to be mixed up".*

**[63]**On the contention that there was a clerical error in relation to the issue of Arrasu and Maren being moved to Group A with TK whereas TN and Marcus were in Group B, I have perused the evidence given in cross-examination of Neil (NE 14/8/2018 p.3632/13-p.3633/18), Marcus (NE 9/8/2018 p.3299/6-p.3301/25) and TK (NE 13/8/2018 p.3478/30-p.3479/19). It is my considered view that there is no clerical error as the Defendants suggest because TK admitted that he had in fact signed a GTG cheque, Bundle B7/1214 after the resolution was passed. It certainly defies logic, for surely, if there was an error, TK would not have signed the GTG cheque but it would have been signed by either Arrasu or Maren.

**[64]**Further, in light of the unambiguous resolution and the fact that the resolution was acted upon in that the cheque was signed by TK in accordance with the resolution, I agree with the Plaintiffs' submission that s. 94 of the Evidence Act is triggered and excludes the evidence of SP11 relied on by the Defendants to fortify their suggestion that there was a "mix-up". I draw support from the case of *Telekom Cellular Sdn Bhd formerly known as MRCB Telecommunications Sdn Bhd v Kabelect Sdn Bhd* [2000] 3 MLJ 254 where the Court of Appeal at p.258 endorsed the case of *Kamala Devi v Takhatmal AIR* 1964 Vol 51 where the Supreme Court of India, (per Subba Rao J) at p.386 held, among others-section 94 of the Evidence Act lays down a rule of interpretation of the language of a document when it is plain and applies accurately to existing facts. It says that the evidence may not be given to show that it was not meant to apply to such facts. When a court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions."

**[65]**Furthermore, I find there is no evidence tendered to suggest that the Defendants had instructed the alleged company secretary to amend the resolution as testified by Marcus. In fact, SP11 appeared to have reached the conclusion of "mix-up" based on the documents [Bundle B1/164, Directors' Circular Resolution dated 4/3/2013 on the signatories of GTG's current account: Group A, (TN and Marcus) and Group B (Arrasu and Maren) and item 4, Minutes of the 5/10/2015 Board of Directors' Meeting] that were specifically referred to her on the day of trial. In these circumstances it is reasonable for me to infer that the Defendants' contention that there was a "mix-up" was more of an afterthought.

**[66]**For the foregoing reasons, I find that the involvement of Dilantha in the voting process in the Board Meeting of 5/10/2015 despite that he was no longer a director of GTG as of 25/9/2015 and the resolution was passed which differs from the agenda in the Notice results in both the 5/10/2015 Meeting and the resolution passed therein being wrong in law and invalid.
Whether the Plaintiffs are liable severally and/or jointly to pay RM8.5 million to the 5th Defendant (GTG)?

**[67]**With reference to the pleaded case of the Defendants' Counterclaim in Suit 245 (see para 55 above), one cannot escape that there is a contradictory and inconsistent nature in the Defendants' pleadings which is submitted by the Plaintiffs as follows:

(a) In their Defence and Amended Counterclaim in Suit 245, the Defendants allege that RM8.5 million is to be paid back to GTG on the alleged ground that ADM and/or Arrasu and/or Maren are yet to reciprocate the injection of RM8.5 million (paras 60-62);

(b) In Suit 19 (Tranche 1 Actions), the Plaintiffs (RC and TN)'s claim for damage in the sum of RM8.5 million. The basis of the said claim in para 41 (d) of the Statement of Claim reads that TN would not have advanced the said RM8.5 million if not for the benefit of GTG, had TN known about the replacement of GTG's name with Global City Grand Prix Sdn Bhd in the Sanction Agreement. In addition, it is observed the party seeking the said relief of RM8.5 million in Suit 245 is GTG whilst in in Suit 19, the parties are RC and TN.

**[68]**On the effect of self-contradictory statement of claim, the following passage was quoted by the Plaintiffs as cited by the High Court in the case of *Lada Anak Sungkoi & Ors. v Sarawak Plantation Agriculture Development Sdn Bhd & Ors* [2018] MLJU 850 which I find is instructive:

> "[43] The difficulties posed by inconsistent pleas are addressed by Mogha's laws of Pleadings in India (17th ed, 2006), page 89, thus:- There can be no objection to preferring alternative and inconsistent claims or raising inconsistent pleas, **provided they are based on facts which are not inconsistent.** Even pleading of inconsistent fact is not prohibited as a matter of law, **but alternative claims or pleas which are based on facts are so inconsistent that the evidence required to prove one fact is destructive of the plea of the other fact should be discouraged,** except when the facts are not within the personal knowledge of the party pleading them."
>
> (Emphasis added)

**[69]**Having regard to the emboldened passage in **Mogha's Laws on Pleadings,** I am persuaded by the Plaintiffs' submission that Counterclaim in Suit 245 and the claim in Suit 19 are based on facts which are so inconsistent that the evidence required to prove one fact is destructive of the plea of the other fact. These are facts which are within the personal knowledge of the parties pleading them. This is illustrated in the answers of TN with respect to the remedy sought in the claims in the respective Suits:

(a) Defendants' Counterclaim in Suit 245-

> "A36: All the Plaintiffs particularly ADM Ventures (M) Sdn Bhd being 50% shareholder in GT Global are under legal obligation to reciprocate to pay their share of RM8.5 million to GT Global which I had also advanced RM8.5 million mentioned earlier on behalf of Renew Capital Sdn Bhd."

(b) RC and TN's claim in Suit 19-

> "A4: There was a Sanction agreement between GT Global and V8 Supercars Australia Pty Limited dated 29th May 2015 but Arrasu and/or Maren had manually scribbled, deleted and replaced GT Global name in the said Sanction Agreement with another company known as Global City Grand Prix Sdn Bhd (belonging to both Arrasu and Maren) which has no connection at all with GT Global by making fraudulent, false representative to James Richard Warbuton (Chief Executive Officer of V8 Supercars Australia Pty Limited) that Global City Grand Prix Sdn Bhd is a company closely connected to GT Global. Had James Richard Warburton known that Global City Grand Prix Sdn Bhd has no connection with GT Global, he would not have signed the said sanction Agreement and most importantly if I was aware of such fraudulent act I would not have advanced the sum of RM8.5 million to GT Global."

Bearing in mind that the learned author opined that these sort of alternative claims or pleas *"should be discouraged",* I will not go so far as to dismiss the Defendants' Counterclaim in Suit 245 and the Plaintiffs' claim in Suit 19 "on this score alone" as the Plaintiffs have urged upon the Court. However, I shall take this as a factor in the determination of the parties' claims.

**[70]**The issue above is an issue to be tried under the Defendants' Counterclaim in Suit 245. The Defendants submit that the Plaintiffs are liable severally and/or jointly to pay RM8.5 million to the GTG

because ADM is a 50% shareholder of GTG and there is an obligation to reciprocate. I find there was no such agreement or understanding to reciprocate as this was not a term of the Joint Venture Agreement or the impugned Agreement. I adopt my reasons for this finding at paras 21 to 31 of this Judgment.

**[71]**In addition, ADM was only required to guarantee and pay half the sum i.e RM4.25 million within 6 months if the KL City Grand Prix was cancelled or aborted; however, the said race proceeded as scheduled.
Unpleaded issues

**[72]**The Defendants submit that Arrasu, Maren and ADM are jointly and severally liable to pay RM8.5 million to GTG due to the act of misrepresentation and /or fraud committed by Arrasu and Maren against GTG. Since the issue of the Sanction Agreement was never pleaded in Suit 245 as the Plaintiffs' have correctly submitted, I shall disregard the submissions and testimony pertaining to the same when deciding Suit 245. The law is trite that the Court shall determine a case based on the pleadings of parties.

**[73]**The Defendants raised the following 2 issues of **"Whether the action of ADM in filing Suit 857 against GTG and RC has caused the Dewan Bandaraya Kuala Lumpur ('DBKL') to issue the Termination Notice dated 11/1/2016?"** and **"Whether the action of ADM in filing Suit 857 against GTG and RC has caused GTG to lose its right to organize the GT City Race- KL?"** as issues to be tried in their Counterclaim in Suit 245.

With respect, both these issues are not issues which have been pleaded in Suit 245 and I shall disregard the submission on these issues. It is trite law that a party is bound by its pleadings and the Court determines a case based on the pleadings of parties.
Whether there is breach of fiduciary duties against the 5th Defendant (GTG) by Arrasu and Maren?

**[74]**The Defendants submit that Arrasu and Maren breached their fiduciary duty owed to GTG-

(i) by appointing third party contractors without a resolution;

(ii) by making payment of RMRM15.85 million to third parties without any document, invoice or payment voucher; and

(iii) in that a sum totalling RM 431,886.47 has been deposited into Arrasu's and Maren's accounts.

**[75]**The Plaintiffs submit that breach of fiduciary duties does not form part of the Defendants' pleaded case in Suit 245 and the alleged breach of appointing third party contractors without a resolution does not form part of the Defendants' pleaded case in any of the suits in Tranche 1 or Tranche 2. With respect, I do not agree with this statement because I find the Defendants have pleaded regarding the issues of appointment of Third Party contractors without a resolution in the following paras 63 and 64 of the Defence and Amended Counterclaim in Suit 245:

> "63 Furthermore, it has been discovered that lately Arrasu and Maren have approached third parties on allegedly representing the Fifth Defendant, intends to execute contracts with third parties using the Fifth Defendant's name which would bind the Fifth Defendant without any mandate, consent, resolutions and/or knowledge of the Fifth Defendant's board of Directors.
>
> 64 The contracts with third parties without mandate consent and/or knowledge of the Fifth Defendant's Board of directors is not valid and void in law."

In light of the abovesaid pleadings, I am not persuaded to disregard the entire submission in paras 118 to 128 of RC's Submission as urged upon the Court by the Plaintiffs.

**[76]**Regarding para 74(i), the Defendants submit the decisions of the appointments of third party contractors were never made by the Board of GTG which had no knowledge whether a tender process

was implemented in the appointment of any of the third party contractors that participated in the KL City Grand Prix 2015. The Defendants referred to the cross-examination evidence of Simon Gardini (SP10) (NE 9/4/2018 p.676/27 to p.677/27) and Arrasu's cross-examination evidence (NE 19/6/2018 p.2200/31 to p.2202/7) in regard to the tender process basically arguing that no documentary evidence was adduced by the Plaintiffs to substantiate their claim. In the case of Arrasu's evidence, the Defendants submit Arrasu referred to the KL City Grand Prix 2015 Tender Recommendations-P002-05 Major Event Facilities prepared by Apex Circuit Design Ltd (B6/1174- 1182) which is a recommendation report which did not include bids from the tenderers.

**[77]**With respect, I am of the considered view that the Defendants' contentions are debunked when viewed in the light of the following evidence.

(a) TN and Marcus had been involved in the meetings with the contractors/consultants appointed for the KL City Grand Prix 2015 prior to the staging of the race. At this material time none of the directors insisted that the resolutions ought to be passed prior to confirming their appointment as it is evident from an email dated 17/5/2015 (B3/411-412) to Marcus and Neil which reads-

> "Hi Marcus and Neil,
>
> We had a status meeting on Thursday attended by our various partners.
>
> The purpose of the meeting was to get a snapshot of our preparations for our event, which is not less than 80 days away and to get all our partners on the same page to deliver our event.
>
> The following partners attended.
>
> 1. Our Tract Designers and consultants - Apes/KBR (Mr Simon Gardini and Ms Dorothy)
> 2. Our Motorsports Operations consultants - Sepang International Circuit (Ms Sharmila)
> 3. Our Racing Series Coordinator - Topspeed Shanghai (Mr Matthijs)
> 4. Our Sponsorship Management consultants - Total Sports Asia (Mr Marcus Luer and Mr Al Chandran)
> 5. Our Events and Media Consultants - Trapper Havas (Mr. Siva and Mr Yamin)
>
> The meeting was chaired by TN and besides me, Marren, Maarof and Ms Juza, our office administer also attended the meeting.".

(b) All emails exchanged between Arrasu and Simon Gardini regarding the appointment of the contractors/consultants were forwarded to Marcus and TN. (B3/350-352, 43-432, 433-443 and 454-455). At the material time, neither TN nor Marcus had insisted that a tender process be carried out or demanded for the documents pertaining to the tender process.

(c) From the inception of the Joint Venture till the carrying out of the KL City Grand Prix 2015, there were no objections by the Defendants whatsoever on how GTG was being managed by the Plaintiffs in relation to the appointment of third party contractors and payments made to them.

(d) Further, every cheque issued by GTG to third party contractors were signed by TN or Marcus together with Arassu or Maren.

**[78]**For the Defendants to now harp on the contention that the appointment of the contractors is made without resolutions, I agree as the Plaintiffs submit, is nothing more than an afterthought.

**[79]**The Defendants submit that the breach of fiduciary by Arrasu and Maren has led to 4 Third Party contractors to initiate civil proceedings against GTG. Based on the status of the 4 Suits as outlined below, I find the Defendants' contention are without any merit as the said Suits were filed due to non-

payment for services rendered to GTG and not as a result of Arrasu's and Maren's breach of fiduciary duties:

(i) DRB-Hicom Sdn Bhd vide Kuala Lumpur Sessions Court Suit No. WA-A52NCVC-709-11/2016 claiming a sum of RM278,515.00 has been withdrawn pending the winding up against GTG.

(ii) Hetat Engineering & Construction Sdn Bhd vide Kuala Lumpur High Court Suit No. WA-22NCVC-690-11/2016 claiming a balance sum of RM2,651,077.44.

(iii) Pakatan Trafik Sdn Bhd vide Kuala Lumpur Sessions Court Suit No. WA-A52NCV-8-01-2017 claiming RM138,558.96. Both Suits (ii) and (iii) which were claims for breach of fiduciary duties and secret profits made by GTG via Third Party Proceedings were dismissed. However, GTG and RC did not file an appeal against the said decisions.

(iv) City Neon Contracts Sdn Bhd, vide Kuala Lumpur High Court Suit No. WA-22NCVC-691-11/2016 claiming the balance sum of RM2,457,535.80 wherein summary judgment was granted against GTG. The High Court on 27/7/2018 found that there was a breach of fiduciary duty and fraud by Arrasu and Maren and allowed GTG's Third Party claim against Arrasu, Maren and ADM. However, Arrasu, Maren and ADM have filed an appeal against the High Court decision, which is pending at the Court of Appeal. Execution of the monetary judgment of the High Court order was stayed unconditionally by the Court of Appeal.

**[80]**The Defendants submit that Arrasu and Maren had breached their fiduciary duty owed to GTG because-

(i) payment of RM RM15,854,524.49 was made to third parties without documents; and

(ii) payment of RM431,886.47 was deposited into Arrasu's and Maren's accounts.

**[81]**In support of their submission, the Defendants rely on the following which I shall refer collectively as the "UHY Forensic Reports Account" comprising-

(a) Forensic Reports Account from UHY dated 17/7/2017 (B18/3564-3584);

(b) Appendix 1-7 of Forensic Reports account from UHY dated 17.7.2017 (B18/3585-3693);

(c) Additional Forensic Reports Account from UHY dated 27.7.2017 (B19/3694-3707);

(d) Appendix 1-7 of Additional Forensic Reports Account from UHY dated 27.7.2017) (B19/3708-3746); and

(e) Forensic Review Report on Unusual Bank Transactions from UHY dated 3.10.2017 (B19/3747-3815).

At trial, items (a) and (b) are called the 1st Report, items (c) and (d), the 2nd Report and item (e), the 3rd Report.

**[82]**Before deliberating on the merits of the 2 issues in para 80 above, the question of the admissibility of the UHY Forensic Reports Account will first have to be determined. The Plaintiffs submit that the UHY Forensic Reports Account is not admissible for non-compliance with O. 40A r.3(1) of the Rules of Court 2012 **('ROC 2012')** in that the reports were not exhibited in a sworn affidavit.

**[83]**O. 40A r.3(1) ROC 2012 provides-

> "(1) Unless the Court otherwise directs, expert evidence to be given at the trial of any action, is to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him testifying that the report exhibited is his and that he accepts full responsibility for the report."

**[84]**In *DYMM Tunku Ibrahim Ismail Ibni Sultan Iskandar Al Haj v Datuk Captain Hamzah bin Mohd Noor & Another Appeal* [2009] 4 CLJ 329, the Federal Court had answered the 1st question of law in the

positive when the Court held, among others, that the requirements of O.6 r. 7(2)(A) RHC are mandatory prerequisites. The Federal Court moved on to address the 2nd question of law of *"In the event of such a failure to comply with the prerequisites of* O.6 r. 7(2A), whether O.1A *can be invoked in order to cure that failure".*

**[85]**In answering the 2nd question, the Federal Court opined the following at p.345 which the Defendants rely on:

> "[46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O. 1A RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. O. 1A RHC cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O. 1A RHC does not apply as the respondents had intentionally disregarded O. 6 r. 7(2A) RHC for their own reasons."

**[86]**The Federal Court at p.346 held that-

> "[48] In the context of the Rules of High Court 1980 the phrase "... technical non-compliance ..." is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature."

**[87]**Having found that the requirements of O.6 r. 7(2)(A) RHC are mandatory prerequisites, the Federal Court logically held that O.1A RHC cannot be invoked to cure the failure to comply with the prerequisites of O.6 r. 7(2A) RHC.

**[88]**By virtue of the opening words *"Unless the Court otherwise directs,..."* being present in O. 40A r.3(1) ROC 2012, I am of the respectful view that is not mandatory for the written report of the expert to be exhibited in an affidavit form sworn or affirmed by him. Consequentially premised on the authority of **Datuk Captain Hamzah** (supra), since the non-compliance is not mandatory in nature, in the interest of justice I invoke O.1A ROC 2012 to overcome the technical non-compliance.

**[89]**With regard to the payment of RM15,854,524.49, I find that the 1st and 2nd Reports made a finding that the said sum forms unknown payments and these payments could not be identified due to lack of documents or that UHY did not have complete information. I deduced the inconclusiveness of the unknown payments from the following evidence.

(a) The 2nd bullet of B18 /3580 (1st Report) reads-

> "We are unable to complete our review on the unknown payments made of RM15,854,524.49 by GT Global **due to lack of supporting documents and/or information to indicate the nature or purpose of these payments and/or to whom the payments were made".**
>
> (Emphasis added)

(b) Every payment made by GTG had to be approved by TN or Marcus which includes the cheques issued to Arrasu and Maren. There was a procedure followed by GTG's staff when payments were made out as testified by Juzaziri (SP1), the Administrator of GTG (NE 19/3/2018 p.14/22-36) & (NE 19/3/2018 p.20 /16-33).

(c) Then there was the testimony from Arrasu that there were no "unknown payments"; rather there were insufficient documents furnished to UHY by RC; that RC cannot claim that these were "unknown payments" as RC representatives had authorised each of these payments by signing the relevant cheques; and UHY did not carry out a proper forensic review to verify the "unknown payments" by obtaining copies of all cheques listed in the bank statement from the Bank and to identify the payees (WSPW14 p.95).

(d) Dato' Alvin Tee who prepared the UHY Forensic Reports Account testified that he did not seek for further documents from independent third parties or from the Plaintiffs (NE 13/8/2018 p.3540/29 to p.3542/4).

**[90]**With regard to the claim for RM 431,886.47, it is noteworthy that the Defendants have not identified how the amount is derived. The Defendants merely scantily pleaded as follows:

> "Thereafter, the appointed expert of Forensic Accountants have prepared respective reports wherein it was discovered that (b) a sum of RM431,886.47 has already been deposited into the 2nd and 3rd Plaintiffs' accounts which is believed to belong to the 5th Defendant which have been misused and/or the secret profits obtained from suppliers, contractors and third parties without the 5th Defendant's Boards approval."

**[91]**The Defendants submit that RM431,886.47 comprised of cash deposited into Maren's and Arrasu's accounts and the burden is on both of them to prove the reason for these cash deposits. With respect, the Defendants' submission is misconceived. Since the Defendants are asserting that these cash deposits were from GTG or secret profits from third parties, the burden is in them to prove the same.

**[92]**The Defendants submit that the 3rd Report has clearly demonstrated the proximity of timing between the payments made to the third party contractors and the cash deposits into Arrasu's and Maren's accounts. 2 examples were cited, namely, (i) Hetat Engineering was paid RM1,484,933.07 on 16/7/2015 and Maren received cash deposit RM10,001.06 on 23/7/2019; and (ii) City Neon was paid RM4,100,080.00 by GTG on 20/7/2015 and Arrasu received cash deposit of RM50,00.00 on 22/7/2019.

**[93]**I find it is illogical for the Defendants to submit *"an irresistible inference can be drawn that Arrasu and Maren had received kickbacks from the third party contracts".* It is to be noted that the finding in the 3rd Report was that the payments to certain third party contractors were relatively close to some receipts deposited into Arrasu and Maren's accounts. However, the deposits identified in RC's submissions are cheque deposits (B19/3781 for RM50,000.00 on 22/7/2015 and B19/3803 for RM10,000.00 on 23/7/2015) and not cash deposits as suggested (see para 92 above). Further no attempts were made by the Defendants to obtain the cheque images to determine who the drawer of the cheques were.

**[94]**In any event, the claim for RM431,886.47 is based entirely on the 3rd Report. I find the inconclusive nature of the 3rd Report is so apparent from the following statements made therein:

(a) "However, we are unable to determine whether there are any relationship between the payments made by GT Global to the relevant main contractors and the receipts deposited into Arrasu and Maren's accounts from the bundle of bank statements which were provided to us for our review, due to insufficient information".

(2nd bullet B19/3763); and

(b) "The cheques deposited into Arrasu and Maren's accounts that were issued by GT Global totaling to RM283,606.47 were part of GT Global's unknown payments or RM15,854,524.49, where the nature or purpose of payment or to whom the payments were made were unknown due to lack of documents as highlighted in Forensic Review Report and Supplemental Report to Forensic Review Report, which were dated 17 July 2017 and 27 July 2017 respectively".

(B19 /3764)

**[95]**It is not disputed that the Plaintiffs filed the Parker Randall Report dated 25/9/2017 titled "Review Report on the "Forensic Review Report on GT Global (M) Sdn. Bhd. For Renew Capital Sdn.Bhd." **('Parker Randall Report')** (B8/1372-1587). The Defendants took issue, submitting that the Plaintiffs did not file any "rebuttal/or review report" for the 3rd Report. I find this submission is misconceived because there was a rebuttal to the 3rd Report of the Defendants because under the heading "Background" para 11 p1378 3rd bullet from bottom, states, "Our Scope of Work included but not limited to a review of the

following documents by ADM", among others, *"To identify and restate the unknown/unidentifiable receipt of payments that are as stated in the report"* and "Report on the review and conclude" on, among others, *"To identify the apparent unknown/unidentifiable receipt and payment based on the availability of documents".*

**[96]**Next the Defendants submit that the Parker Randall report was not independent because it was produced based on the oral representations of Arrasu and Maren by relying on the testimony of Mohd Afrizan bin Husain (SP6), the Managing Partner of Parker Randall, licensed auditor, licensed Liquidator and licensed tax agent who dealt with primarily with statutory audit (NE 21/3/2018 p.260/32- p.262/34) and para 9 p.1383 of the Parker Randall Report. With respect, I disagree with the Defendants' submission as whilst the Report acknowledges *"However this information at this stage is based on the recollection of ADM of the receipt received by GT Global',* it qualified itself by stating ***"Clarity towards the balance unknown receipt of RM 1,856,451.42 could be done if a discovery of the documents are authorized through a court order or mutual consent of parties."*** (see para 9 and 10 of the Parker Randall Report). I find there is nothing untoward, rather a cautious approach was maintained to preserve the independence of the Report. The balance unknown receipt of RM1,856,451.42 was restated in comparison to the unknown receipt of RM7,538,313,46 after identifying that the UHY Forensic Reports Account has wrongly classified a sum of RM5,736,862.04 as unknown receipt, when in fact it related to 2 cheques: 000457 banked into Alliance Bank on 3/8/2015 for RM2,315,182.04 and 000441 banked in on same date for RM3,421,680.00, both were returned on 4/8/2015 due to insufficient funds (see Appendices 8 & 9 of the Parker Randall Report).

**[97]**Further, the Defendants attempted to discredit Afrizan by suggesting that he was unable to substantiate the Parker Randall Report which states that Parker Randall was able to trace RM7,710,796.00 of the RM15.85 million by conducting a simple desktop review and analysis by relying on the testimony of Afrizan in cross-examination (NE 21/3/2021 p.278/1-p.283/26). The issue here is that there is difference of opinion between the UHY Forensic Reports Account which stated that RM15,854,524.49 were unknown payments but the Parker Randall Report stated that RM7,749,210.96 is the total payment identified from the GTG Bank statement which reduces the unknown payments amount substantially. Contrary to the Defendants' submission that Afrizan was not a credible witness, I find Afrizan had credibly explained the finding made by Parker Randall by reference to the example of Apex Circuit Design in the aforesaid testimony in the following manner:

(a) Based on Appendix 13 (B8/1587), Afrizan testified on 4 payments to Apex Circuit Design of (i) 13/10/2014 (RM79,912.04), (ii) 31/10/2014 (RM239,547.24) (iii) 12/12/2014 (RM167,289.57) & (iv) 1/9/2015 (RM231,928.01). These payments were identified by reviewing the bank statements that they were made by telegraphic transfers.

(b) Afrizan was referred to the UHY Forensic Reports Account (B18/3576) wherein it was pointed out that RM969,036.35 which formed part of the "identifiable payments with supporting documents" was made to Apex Circuit Design. Afrizan disagreed when Counsel for the Defendants questioned him whether he agreed or disagreed that the Parker Randall's analysis was wrong.

(c) However, the amount of RM231,928.01 (B8/1456) which was identified through the bank statements did not form part of the identifiable payments in the UHY Forensic Reports Account when a perusal is made of the list of identifiable payments with supporting documents in Appendix 2 (B19/3662-3664) and the list of identifiable payments with unclear or unidentifiable supporting documents in Appendix 4 (B19/3672).

**[98]**Based on all the foregoing, I find on a balance of probabilities-

(a) the Plaintiffs in Suit 245 have proved their claim. In the circumstances, I allow the Plaintiffs' claim as prayed for in the Amended Statement of Claim as follows:

(1) A declaration that the Defendants are bound by the terms of the 24.6.2015 Agreement;

(2) A declaration that the GTG Board of Directors Meeting held on 8.9.2015 and the resolutions passed thereat are invalid, null and void and of no effect;

(3) All and any resolutions passed and carried at subsequent meetings of the illegitimately constituted board of GTG after 8.9.2015 are similarly invalid, null and void and of no effect;

(4) A prohibitory injunction to restrain the Defendants, whether by themselves or through their servants, agents, employees and/or otherwise howsoever from acting on the resolutions passed and carried at the GTG Board Directors Meeting on 8.9.2015 and at any subsequent meetings; and

(5) cost.

The prayer for damages is put on hold pending the submission on "Relief and Costs"

(b) the Defendants have not proved their Amended Counterclaim and I dismiss the said claim with costs.

Suit 47

**[99]**Suit 47 was filed pursuant to s.181 Companies Act 1965 (**CA1965** ) for minority oppression. In Suit 47, the Plaintiff is ADM whilst the Defendants are: the 1st to 6th and 9th Defendants, namely, RC, TN, TK, Marcus, Neil, Dilantha and GTG respectively and the 7th and 8th Defendants, namely, Faizal and City Motorsports Sdn Bhd **(CMS).**
Question of law

**[100]**During the oral submissions of the Tranche 1 and Tranche 2 Actions on 13/7/2020, Counsel for the 1st to 6th and 9th Defendants **('Defendants')** raised for the first time the following question of law: " *Whether a 50% shareholder can file a petition and seek relief under* s.181 CA 1965?". Upon the Court's direction, the Plaintiff and the Defendant respectively filed the Further Submissions of the 1st to 6th and 9 Defendants **('Further Submissions')** and Reply to the Further Submissions of the 1st to 6th and 9 Defendants.

**[101]**In the Further Submissions, the Defendants submitted ADM's positon as equal shareholder ought to be distinguished from the cases referred to in Plaintiffs' Written Submissions on the basis that ADM is an equal shareholder whilst the cases involve minority shareholders. The cases are-

(a) *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 1 LNS 170 (oppression suit filed by minority shareholder holding 2.43% share);

(b) *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu- Kee Corp (M) Bhd & Anor* [2010] 6 CLJ 721; [2010] MLJU 269 (oppression suit filed by minority shareholder holding 30% share);

(c) *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 (oppression suit filed by minority shareholder holding 15 % share);

(d) *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC (oppression suit filed by minority shareholder holding about 8% share);

(e) *O'Neill v Phillips* [1999] 2 All ER 961 (petition filed by minority shareholder holding about 25% share);

(f) *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 (winding up petition filed by minority shareholder holding 40% share).

Other cases are- *Norvabron Pty Ltd (No 2) Re* (1986) 11 ACLR 279; *Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors* [1994] 1 MLJ 520; *Morgan v 45 Flers Avenue Pty Ltd* [1996] 10 ACLR 692; *Coombs v Dynasty Pty Ltd* [1994] 12 ACLS 915; *Wayde v New South Wales Rugby League Ltd* [1985] 3 ACLC 799; *Re Bagot Well Pastoral Co* [1993] 11 ACLC; *Lim King Kow v Indra Kemajuan Sdn*

*Bhd & Ors* [2010] 8 MLK 831; [1969] VR 1002; *Re Postage & Denby (Agencies) Ltd* [1987] BCLC 8; *Re Bright Pine Mills Pty Ltd* [1969] VR 1002; *Re Postage & Denby (Agencies) Ltd* [1987] BCLC 8; *Kumagai Gumi Co Ltd v Zenecon- Kumagal Sdn* [1994] 2 MLJ 789; and *Ho Yew Kong v Sakae Holdings Ltd* [2018] SGCA 33.

**[102]**With respect, I am unable to agree with the Defendants' submission. In **Owen Sim** (supra), Gopal Sri Ram JCA (as he then was) (delivering the judgment of the Federal Court) held as follows:

> **"Now, it cannot be gainsaid that one who reads the advice of Lord Wilberforce in** *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 **may be led to assume that only minority shareholders may apply for relief under** s 181**. We categorically state that this is certainly not the case.** It must not be forgotten that s 210 of United Kingdom Companies Act 1948 was placed under the heading 'Minorities', clearly indicating that those [1996] 1 MLJ 113 at 133 who could seek relief must be in the minority. There is no such classification in the Act. Consequently, relief must be in the minority. There is no such classification in the Act Consequently, relief under s 181 may be had by a majority of shareholders in circumstances where they are unable for any reason to exert their will at a general meeting of their company. We therefore accept as correct the statement of the law b Anuar J (now CJ (Malaya)) in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors* [1994] 2 MLJ 789 when he held (at p 808 of the report) that:
>
> > Relief under s 181 is available to majority shareholders who are not in control of the management of the company and who, for any given reason, are unable to control the board, e g because they have agreed to a management power-sharing formula in a separate agreement among the shareholders."
>
> (Emphasis added)

**[103]**The Defendants have attempted to distinguish the facts of this present case by suggesting that in **Owen Sim,** the Federal Court has imposed an obligation on a majority shareholder to call for a general meeting to express their grievances. With respect, I am unable to agree with the submission canvassed by the Defendants. As the Counsel for ADM correctly pointed out, the principles in **Owen Sim** and **Kumagai Gumi** (supra) are in line with the principle that the oppression remedy pursuant to s.181 CA 1965 is residual in nature in that it is available only where a shareholder is unable to cure oppression through the means of self-help remedy, for instance where voting power is insufficient, neutralised, entirely circumvented or irrelevant. (See **Zhong Xing,TAN-Reverse Oppression And The Residual Nature Of The Shareholder's Commercial Unfairness Remedy [online] Singapore Academy of Law Journal, Vol. 27, No. 1, Mar 2015; 122-147** and *Ng Kek Wee v Sim City Technology Ltd* [2014] SGCA 47).

**[104]**In the context of the present case, I have made findings that (i) Dilantha who was a shareholder and director representing ADM on the Board of GTG had grievances with the other shareholders of ADM and had not been active in the management of ADM and GTG since January 2015; and (ii) in the impugned Agreement, ADM and RC had come to an agreement that to have equal representation on the Board of GTG, Dilantha shall no longer be a director of GTG. I have also ruled that the s.114(g) presumption ought to be invoked against Dilantha for non-attendence at the trial.

In other words, an adverse inference can be drawn that any testimony by Dilantha would support ADM's contention that RC was working together with Dilantha to take over control of GTG. Despite being aware of the fall out with Dilantha, the directors of RC had acted together with Dilantha to take control over of GTG and therefore neutralising any voting power that ADM had on the Board of GTG. As to whether this act in itself is self-serving in favour of RC and against the legitimate expectations of ADM and therefore oppressive as Counsel for ADM submits, shall be dealt with when considering the oppressive acts alleged by ADM.

**[105]**With respect, it is my considered view that the Defendants' suggestion that ADM cannot seek relief under s. 181 CA 1965 since it had not attempted to remedy the oppression via a general meeting is misconceived. In this regard, I accept the submission of Counsel for ADM that-

(i) ADM is an equal shareholder with 50% shareholding and not a majority shareholder with any form of voting control and therefore any attempt to call for a general meeting to resolve the oppressive act pleaded in Suit 47 would have been futile. In this sense there is no self-help remedy available to ADM.

I have made findings that Arrasu and Maren who represented ADM during the Board of Directors Meeting on 8/8/2015 had called for the EGM to remove Dilantha but RC refused to attend the meeting. The evidence showed that despite the removal of Dilantha as a director via the adjourned EGM on 25/9/2015, RC continued to allow Dilantha to attend and vote at GTG's Board of Directors Meeting on 5/10/2015. Hence it is not a case of lack of trying on the Defendants' part and RC's submission lacks foundation.

(ii) The suggestion there were no business activities after the Board of Directors' Meeting on 5/10/2015, i.e. after the presentation of the ADM winding up petition is misleading given that it is ADM's pleaded case that the Defendants were working with Faizal to divert the Concession to City Motorsports after the ADM winding up petition was presented. Whether such act constitute oppressive conduct of the Defendants will be examined hereafter.

**[106]**In the premises I conclude that notwithstanding that the cases referred in the Plaintiffs' Main Submission may have been initiated by minority shareholders, I hold that the principles of law therein are applicable to determine, among others, what constitutes oppression which I shall refer to shortly. Hence, it is my respectful view that the question of *"Whether a 50% shareholder can file a petition and seek relief under* s.181 CA 1965?" is to be answered in the affirmative. I decline to address the Defendants' submission made on the Grounds of Judgment in respect of the derivative action i.e. the striking out decision in Suit 425 as the direction of the Court was that the additional submissions are to be confined to the above question of law.

Applicable law in oppression

**[107]**Returning to the mainstream, s.181 CA 1965 provides as follows:

"181. Remedy in cases of an oppression

(1) Any member of holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground-

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may-

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other member or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up."

**[108]**Subsection (1) of s.181 requires findings by the Court as to whether "acts of oppression" or "discriminatory acts" have taken place; and subsection (2) of s.181 deal with the remedies available to the Court when oppression or discrimination has been found. The acts of oppression described in subsection (1) (a) and (b) are-

(i) the affairs are being conducted in a manner oppressive to one or more members;

(ii) the affairs are being conducted in disregard of a member's interest as a shareholder;

(iii) acts have been done or threatened which unfairly discriminate against or are prejudicial to one or more members.

**[109]**Some principles governing oppressive conduct are-

(a) "*The conduct must be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so...; and it is not sufficient if the conduct satisfies only one of the* tests." **(Re Saul D. Harrision** (supra));

(b) Although a single act of oppression may be sufficient, the events ought not to be considered in isolation but as part of a continuous story **(Owen Sim);**

(c) the impugned conduct is to be judged by an objective standard **Jaya Medical Consultants** (supra), **Coombs** (supra);

(d) the inaction of the controllers or omission could amount to oppressive conduct (*Ling King Kow v Indra Kemajuan Sdn Bhd* [2010] 9 MLJ 831); *Re Bright Pine Mills Pty Ltd* [1969] VR 1002;

(e) the concept of unfair prejudice enables the Court to consider the legitimate expectation of members of a company arising from agreements or understandings of members inter se **(Re Posgate & Denby (Agencies) Ltd** (supra), **Kumagai Gumi), Ho Yew Kong** (supra)).

**[110]**The alleged oppressive acts of the Defendants which led to the filing of Suit 47 as summarised by ADM are as follows:

(i) attempts by the RC team to undermine the Joint Venture Agreement and the 24/6/2015 Agreement;

(ii) the wrestling of board control by the RC team and the exclusion of ADM from the management of GTG;

(iii) the wrongful requisitioning of the GTG board of directors meeting on 24/8/2015 and the passing of the resolutions on 8/9/2015;

(iv) interfering with due administration of justice in view of the impending interlocutory injunction application;

(v) the refusal by the RC team to attend the EGM on 18/9/2015 called by Maren on 2/9/2015 to remove Dilantha as a director of GTG;

(vi) the passing of the resolutions to appoint managing director, chief operating officer and additional signatories of GTG in favour of the RC team;

(vii) the removal of cheque books, agreements, records and other documents from the offices of GTG by the Defendants;

(viii) attempts to divert the Concession granted by DBKL to City Motorsports vide Faizal; and

(ix) the passing of the resolutions during the GTG Board of Directors meeting on 4/2/2016 to stop Arrasu and Maren from dealing with DBKL on the Concession which was terminated on 11/1/2016.

1st oppressive act

**[111]**ADM alleges that Marcus was using the credit cash faced by GTG crunch to exert pressure on ADM to give up equal shareholding and when attempts were met with Arrasu's outright refusal and agreed to have the 2015 race being postponed, Marcus resorted to pressuring ADM by suggesting that Arrasu match the advance of RM5.5 million by RC with a bank and personal guarantee.

**[112]**However, the Defendants submit there was never an attempt by Marcus to put undue pressure on Arrasu, Maren and/or ADM as (i) Marcus was acting in the best interest of GTG as the company was in cash crunch and ADM had failed to reciprocate by advancing the same amount that TN and or RC advanced, and (ii) if it was oppressive act, Arrasu and Maren would not have called for a meeting on 14/6/2015 at TN's house and signed the impugned Agreement on 24/6/2015.

**[113]**With respect, I disagree with the Defendants' submission. There was a cash crunch faced by GTG in June 2015, where over and above the RM3 million advanced by TN to GTG, another RM5.5 million was urgently needed. I find there were contemporaneous documents of exchange of emails between Marcus and Arrasu as follows:

(a) From exhibit 72, in the afternoon of 18/6/2015, Marcus suggested to Arrasu via Whatsap that if the ADM team gives up 10% of their share in GTG, then TN would consider advancing another RM5 million which was rejected by Arrasu.

(b) On the same day Arrasu wrote an email referencing a meeting held to discuss the financial status of Gtg and also said that he was inclined to accept TN's suggestion that all parties swallow their pride and cancel the event for the year 2015.

(c) On the same day at 11.37 pm, Marcus replied to Arrasu's email and attempts to fundamentally change and undermine the Joint Venture Agreement by stating that (i) if ADM wishes to own 50% of GTG then ADM must be prepared to advance 50% of the funding requirements, and (ii) if ADM gives up 10% of their share of GTG then another RM5 million is to be advanced by TN.

(d) Vide email dated 20/6/2015, Arrasu made it very clear to TN and Marcus that ADM will not give up equal shareholding and control of GTG but is prepared to give a higher profit share to RC and that if all fails, the event ought to be postponed to the following year.

(e) Vide an email dated 24/6/2015 at 8.51 am from Marcus to Arrasu, the content of which was to be issued on the letterhead of ADM, to the effect that ADM and its directors would give an undertaking to match the RM5.5 million advanced by RC by providing a bank guarantee and Arrasu's personal guarantee. Arrasu did not respond to the same.

(f) Later in the morning of 24/6/2015, Arrasu, Maren and Marcus met at TN's house and all four signed the impugned Agreement which I find to be a binding contract.

(g) Further, it is to be observed that the impugned Agreement makes no mention of the ADM team having to advance any money which by irresistible inference imply that all previous proposals or suggestions by Marcus that the ADM team match any funds or that ADM gives up any equity in the shareholding of GTG was not pursued.

(h) I have made a finding that the Plaintiffs have proved that TN and his partners would participate mainly as funders was a term of the joint venture. In fact, shortly after the impugned Agreement, where RC manage to secure an agreement to receive a higher percentage of profits, the then Prime Minister/Finance Minister approved GTG's request for funding. The said request is the letter issued by TN on behalf of GTG on 24/6/2015 and the approval was minuted by the said Minister on 26/6/2015.

2nd oppressive act

**[114]**In a nutshell the Defendants contend there was nothing wrong with RC assuming management, secretarial and financial control of GTG as these acts do not amount to oppression. On the other hand,

ADM submits that the 1st to 6th Defendants' disregard to the legitimate expectation of ADM as RC's joint venture partner and shareholder of GTG amounts to minority oppression.

**[115]**I find based on the following reasons that the RC team in total disregard to the legitimate expectations of ADM had breached a fundamental term of the impugned Agreement and in doing so directly breached the Joint Venture Agreement between the ADM team and the RC team. These are my reasons-

(a) The KL Grand Prix 2015 took place from 7/8/2015 till 9/8/2015. Based on the success of the said race as is evident from the numerous media publications adduced (exhibits P50, P51, P65 and P66) and the testimony that the 2016 event was scheduled from 12/8/2016 to 14/8/2016, there was a legitimate expectation on the part of the ADM team to be involved in the management of the 2016 race pursuant to the Memorandum of Agreement ('MOA') which gave GTG a concession to further organize the same event for a period of 5 years from 2015 with an option to GTG to extend the exclusive right for a further 5 years.

(b) The first part of the 1st term of the impugned Agreement (exhibit P25) expressly states "Two Board Members for each party in GT Global race". Based on the cross-examination evidence which ADM submits, I find that TN was not upfront on whether the decision to appoint Neil and TK as additional directors was done before 7/8/2015 or after 7/8/2015: TN said he was not aware of Neil's intended appointment on 7/8/2015 but by 24/8/2015 he had knowledge of the said intended appointment of Neil and TK. I find TN is being evasive on this important issue. Marcus' answer to this issue in cross- examination was simply "disagree" and he had no explanation to the glaring fact that Neil's Form 48A (SD By A Person Before Appointment As Director) executed on 7/8/2015. It is hard to believe that Marcus and TN were not aware of the Forms 48 A filed by Neil and TK given that they were directors of RC holding 50% shares in GTG. However, Neil's testimony in cross-examination revealed that the RC team had in fact prior to the race day, 7/8/2015 discussed a "protective or defensive action" against the ADM team without the knowledge of the latter, which is to wrestle control of GTG from the ADM team and to directly exclude the ADM team from the management of GTG. Arrasu testified that on 7/8/2015 (1st day of the race) at the gala dinner when he was seated at the main table with TN and had on many occasions spoken to Neil, Marcus and TN; yet none of them ever mentioned that they had decided to appoint additional directors unbeknown to Arrasu and Maren.

3rd' 5th and 6th oppressive acts

**[116]**The Defendants in summary contend that the Board of Directors meetings on 8/9/2015 and 5/10/2015 were not carried out in an oppressive manner and the Plaintiff (ADM) ought to abide by the decision made by the majority of the Board of Directors. Basically, ADM's complaint is not regarding the manner in which the meetings were held but the resolutions passed at the said meetings.

**[117]**These matters overlap with the relevant issues raised in Suit 245. I find the 3nd, 5th and 6th oppressive acts have been proved by the ADM team and in this regard, I adopt what I have alluded to and my findings thereto in paras 52 to 66 of this Judgment. I find from the events that occurred and the conduct of RC and its directors, that they had wrestled control not only of the management but the GTG's finances so as to enable payments to be made without reference or consent from ADM and its directors and in breach of the spirit of the Joint Venture Agreement and constitutes an act of oppression against ADM.

4th oppressive act

**[118]**Counsel for ADM submits that Suit 245 was initiated by the Plaintiffs therein to, among others, injunct RC and Dilantha from proceeding with the Board Meeting on 8/9/2015. Despite the notification of the pending interlocutory injunction application before the Court and the possible contempt of Court, the GTG Board of Directors proceeded on 8/9/2015 which showed a clear intention on the Defendants' part to interfere with due administration of justice.

**[119]**With respect to the ADM's argument, I agree with the Defendants' submission that ADM's submission holds no water. This is because ADM has not obtained any order and/or interim order from the Court to injunct the Board Meeting on 8/9/2015. Further, the Federal Court case of *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401 is not relevant as the said case deals with mareva injunction whereas in the present case, it concerns a prohibitory injunction. In any event, in **Monatech** (supra), when the mareva injunction was granted, the appellant chose to remain silent and let the order be made knowing it would be a futile order. The Court found the intention of the appellant was to interfere with due administration of justice. However, in the present case, ADM had filed an injunction application but failed to obtain an interim order and which in any event was withdrawn by ADM.
7th oppressive act

**[120]**Arrasu testified in examination in chief that on 9/10/2015, TN, Marcus, TK, Neil and Faizal had unlawfully removed cheque books, agreements, records and other documentation from GTG's office including contracts with V8, Lamborghini Super Trofeo and China Formula Masters. I have examined the evidence of Juzaziri Isamri (SP1), the office administrator of GTG from which it can be gathered that the abovementioned persons came unannounced and demanded of the documents stated by Arrasu. To the suggestion that Juzaziri did not make a list of the documents given to Marcus and therefore the documents mentioned by Arrasu is still at the GTG office, Juzaziri explained that "mereka datang on the spot on that time, and bila jadi perkara macam ini, saya dan rakan sekerja saya macam agak terkejut. So bila jadi macam itu, kitaorang macam kelam kabut. Apa yang diaorang nak, kita just bagi. So on that time, saya tak terfikir langsung untuk sediakan senarai itu. Dan apa yang saya senaraikan dalam emel itu pun apa yang sekadar yang saya ingat. Mungkin ada juga dokumen lain yang saya bagi tapi saya tak ingat." *Be that as it may, on a balance of probabilities, I find that the documents had not been unlawfully removed from the GTG's office as there is evidence that TN had requested Juzaziri to call and ask Arrasu to come to the office and to discuss with Arrasu regarding the taking of documents when Juzaziri testified that* "saya rasa saya telefon Mr Arrasu masa saya cari-cari dokumen itu. Sambil-sambil saya cari dokumen, sambal tu saya call Mr Arrasu. Sebab saya minta izin juga, boleh ke saya bagikan all these documents?"

**[121]**In so far as Faizal is concerned, it is clear that although he was present at the GTG office on 9/10/2015, on the totality of the evidence based on Faizal's testimony, he did not partake in the request or removal of any document nor did he have any idea of the documents being removed. Maren acknowledged that he was not present at the GTG office on 9/10/2015 and nothing much can be attached to his evidence. Arrasu agreed that he was not present on 9/10/2015 and he relied solely on what Juzaziri told him regarding the removal of the documents and on the email (Bundle B4/634) she sent to him. The said email does not suggest Faizal as actively taking in anything pertaining to the removal of cheque books, documents and records.

**[122]**On a balance of probabilities, I find ADM has not proved the alleged 7th oppressive act against the Defendants and Faizal.
8th oppressive act

**[123]**In *Cubic Electronic Sdn Bhd (In Liquidation v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676**,** the Court of Appeal opined that for a conspiracy claim, the elements to be proved are-

"

(i) a combination or agreement between two or more individuals;

(ii) an intent to injure;

(iii) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and

(iv) resulting loss and damage to the claimant."

At p.686 the Court of Appeal also held as follows:

> "[20] Lest we be accused of an oversight, we must say that we are mindful of the fact that in conspiracy cases of this type, it **would be difficult to prove by direct evidence. The plaintiff is never required to show the existence of the arrangements between the conspirators in the nature of an express agreement, whether formal or informal. Therefore, as is often the case, the agreement of combination is to be inferred from the evidence."**
>
> (Emphasis added)

(See also *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 where at 407 [34], the Court of appeal held *"It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement."*

**[124]**The core issue here is whether the 1st the 5th Defendants (RC, TN, TK, Marcus and Dr. Neil) conspired with the 7th and 8th Defendants (Faizal and City Motorsports) to wrongfully divert the 9th Defendant's (GTG) profit centre or hive of the 10 year DBKL concession to a third party associated with one or more of the Defendants.

**[125]**Counsel for ADM submits that the following sequence of events clearly show the participation of Faizal together with the RC directors and Dilantha in their efforts to divert the Concession from GTG to City Motorsports. These events are reproduced as follows:

"

(i) By Notice dated 25.9.2015, Marcus called for a Board of Directors' Meeting of GTG to be held on 5.10.2015 to appoint Faizal as the COO of GTG;

(ii) On 5.10.2015, Faizal was appointed the COO of GTG, as evidenced in the minutes of the 5.10.2015 GODM of GTG;

(iii) 4 days after his appointment on Friday, 9.10.2015, Faizal accompanied TN, TK, Marcus and Neil to the GTG office where TN introduced Faizal to the staff present as their new COO and asked them to prepare a room for Faizal at the GTG office beginning 16.11.2015;

(iv) on the same day, Faizal together with TN, TK, Marcus and Neil unlawfully removed cheque books, agreements and other documentation of GTG, including contracts with V8, Lamborghini Super Trofeo and China Formula Masters;

(v) 3 days later, on Monday, 12.10.2015, Faizal gave 3 months' notice of his resignation from AIM. However, he left AIM after 1 month ie. On 11.11.205 in time to join GTG on 16.11.2015;

(vi) While still employed with AIM, on 22.10.2015, Faizal and Marcus travelled to Gold Coast, Australia and Faizal met the representatives of V8 including James Warburton for the first time. At that time, City Motorsports was not in existence. Faizal was introduced to James Warburton and his team as the COO of GTG and V8 still refers to Faizal as the COO of GTG, as borne out by various media reports; in particular articles from Copies of articles from speedcafe.com and roar.com dated 28.4.2016. **(IDP-74 and IDP-75);**

(vii) TN, Marcus, Neil and Faizal had originally intended to run the GT Race-KL™ through GTG. However, with the filing of ADM's Winding-up Petition against GTG, they changed their plans and on 25.11.2015, Faizal incorporated City Motorsports and became its substantial shareholder and controlling director. City Motorsports subsequently submitted a proposal to the Minister of Federal Territories, Tengku Adnan bin Mansor ("TA") and DBKL for City Motorsports to run the GT Race-KL™ as stated below;

(viii) The assertion that Faizal was never appointed and/or involved with GTG is a blatant falsehood and a convenient afterthought, to distance Faizal from GTG and in an attempt to deny all connection between City Motorsports and GTG. The fact of the matter is that the COO of GTG became the 60% shareholder, director and COO of City Motorsports when the 1st to 7th Defendants decided to take steps to cause the termination of the MOA with a view to diverting the Concession to City Motorsports.

(ix) City Motorsports and GTG have the same Company Secretaries, namely Tiew Sze Hann and Tan Thiam Lee of Indah Secretarial;

(x) The relationship between Faizal and TN, Marcus and Neil started well before his involvement in GTG and City Motorsports and is much closer than they would admit. As a civil servant, employed in Agensi Inovasi Malaysia ("AIM"), Faial facilitated grants to Entogenex from the Malaysian Government namely about RM3 million Techno Fund grand from MOSTI; about RM2 million form Bio Tech Fund; about RM37 million in 2015 from MOSTI; and about RM1 million from AIM;

(xi) Simon Gardini (SP-10), the Technical Consultant who oversaw the building of the track for GTG in 2015 was engaged by City Motorsports for similar services with respect to the 2016 GT Race- KL™ or KL City 400. Simon Gardini's calling card bore the business address at 3, Jalan 19/1, 46300 Petaling Jaya, Selangor. This is also the address of Antah Healthcare Group at which TN is the Executive Chairman and his son, Tunku Mohamed Alauddin is a director. Like Faizal, Simon Gardini's contact number is also the Entogenex office number;

(xii) After the 2015 GT Race-KL™ GTG announced that the subsequent race would be held from 12.8.2016 to 14.8.2016. This date was fixed by GTG and not DBKL or any other party;

(xiii) City Motorsports, led by Faizal who attended the 2015 GT race - KL™ as a guest of TN and Marcus, assumed the very same dates for the 2016 GT Race-KL™ or the KL City 400 Supercar Extravaganza;

(xiv) City Motorsports also proposes to use the same 3.2 km circuit and track layout featuring 17 corners with many elevation changes and fast sweeping turns that cut through and passes many of the city's most iconic landmarks, including the Petronas Twin Towers, Menara KL and Suria KLCC. Further, the visual representations in the landing page of City Motorsports website for the KL City 400 Supercar Extravaganza and the Fan Packages are almost identical with those produced by GTG for the 2015 GT Race-KL™;

(xv) City Motorsports has entered into a 4 year contract with V8 and paid a deposit of US$1 million which is believed to have been funded by TN;

(xvi) On or around 21.10.2015, the 2nd and 4th and/or 7th Defendants i.e. TN and Marcus and/or Faizal met the Mayor of Kuala Lumpur/DBKL to discuss and/or submit a proposal requesting the rights to organize the GT City Race-KL™ in place of GT Global;

(xvii) The following day, 22.10.2015, Marcus and Faizal travelled to Gold Coast to meet with James Warburton and his team from V8. This was before the formation of City Motorsports and, while the contract between Global City Sdn Bhd on behalf of GTG and V8 as well as DBKL was still subsisting;

(xviii) In November 2015, the Defendants, including the 2nd, 4th and 7th Defendants i.e. TN, Marcus and Faizal, had several meetings with the made representations to senior officers of DBKL for their nominee to procure the rights to the Concession to organize the GT City Race-KL™ 2016;

(xix) Sometime in November or December 2015, TN, Marcus and/or Faizal met with TA and the officials of the FT Ministry and submitted a proposal for City Motorsports to run the GT City Race-KL™ 2016 in place of GTG;

(xx) Thereafter, TA instructed DBKL to award the rights to run the GT City Race-KL™ 2016 to City Motorsports, in place of GTG;

(xxi) Pursuant thereto, on or around 13.12.2015, TN, Marcus and Datuk Najib Mohd of DBKL and Faizal, travelled to Sydney, Australia to meet with James Warburton and his team of V8 to race in the GT City Race-KL™ 2916. TN, Marcus and Faizal also approached other international racing series such as Lamborghini Super Trofeo Race and Formula Masters Series to participate at the event promoted by City Motorsports;

(xxii) In December 2015, City Motorsports submitted a formal proposal to DBKL to run the GT City Race-KL™ 2016 and Marcus and Faial held a presentation to DBKL on behalf of City Motorsports in relation thereto;

(xxiii) On 14.1.2016, premised on the emboldened by the aforesaid instruction from TA, DBKL served a notice dated 11.1.2016 on GTGG purporting to terminate the MOA allegedly based on the 218 Petition against GTG;

(xxiv) Pursuant thereto, ADM and Arrasu, as the President and CEO of GTG, through solicitor's letters dated 14.1.2016 and 19.1.2016 and 3.2.2016, challenged and requested an unequivocal revocation of the termination and for GTG's rights under the Concession to be preserved pending disposal of the 218 Petition;

(xxv) TN, Marcus and Neil as directors in control of GTG took no steps to challenge DBKL's purported termination in view of their collusive meetings with DBKL to transfer the contract to City Motorsports as instructed by TA;

(xxvi) Arrasu also caused his solicitors to notify DBKL not to part with possession and control of intellectual property, advertising and other rights relating to the GT City Race-KL™ and inquired if DBKL intended to grant the Concession to any other party. DBKL continued to engage with inter alia TN, Marcus, Faizal and City Motorsports on the GT City Race-KL™ 2016;

(xxvii) In furtherance of the conspiracy, Marcus requisitioned a BODM of GTG which was held on 4.2.2016 and it was resolved that Arassu and Maren have no authority to represent GTG to deal with DBKL in relation to the MOA and related matters;

(xxviii) Pursuant thereto, the very next day, by letter dated 5.2.2016 to ADM's solicitors, and in accordance with what was resolved at the 4.2.2016 BODM, DBKL challenged ADM's right to question inter alia the wrongful termination of the MOA as the rights under the MOA belonged to GTG, DBKL also took the position that GTG in incapable of preparing and securing funding for the GT City Race- KL™ 2016 to be held from 12.8.2016 to 14.8.2016. DBKL affirmed the termination of the MOA and stated categorically that it intended to contract with third parties to organize the GT City Race-KL™. DBKL also refuted GTG's claim to IP rights, as being baseless and threatened to file suit for alleged losses suffered by DBKL; By solicitor's letter dated 25.2.2016, ADM refuted DBKL's allegations, asserting that the GT City Race-KL™ was conceptualized, developed and successfully delivered by GTG to whom the rights belonged whereas DBKL merely provided the venue and a partial grant to fund the GT City Race-KL™ and was therefore not vested with the right to award the contract for the implementation of the GT City Race-KL™ to another party; Pursuant thereto, DBKL on 2.3.2016 issued a conditional acceptance letter to City Motorsports, presumably in acceptance of an application received by DBKL just the previous day on 1.3.2016. The hasty approval bears out the contention that there were prior discussions and hidden hands at work in awarding the rights to the Concession to City Motorsports; In February or March 2016, DBKL officers travelled to Australia with TN and Marcus, as City Motorsports representatives despite being the directors and Chairman and MD respectively of GTG;

(xxix) DBKL thereafter continued to have meetings with the representatives of City Motorsports even on 23.3.2016 regarding the organization of 2016 Race;

(xxx) Pursuant thereto, it appears that DBKL has for all intents and purposes awarded the Concession for the GT City Race-KL™ to City Motorsports. It is reported in the media that City Motorsports has taken sole and exclusive control of the GT City Race-KL™ 2016 to be held from 12.8.2016 to 14.8.2016;

(xxxi) Despite denying all connection between GTG and City Motorsports and Faizal, the fact of the matter is that TN, the Chairman, director and shareholder of 50% of GTG through Renew Capital, is the Royal Patron of KL City 400 Supercars Extravaganza, which is the 2016 GT Race-KL™ proposed to be run by City Motorsports to the exclusion of GTG;

(xxxii) Subsequent to the filing of Kuala Lumpur High Court Suit No. WA- 22NCC-425-12-2016 (previously Suit No. WA-22NCVC-173- 03/2016), DBKL has purported to cancel the approval to City Motorsports by its letter dated 11.4.2016 despite previously taking the position that they were free to contract with third parties on the Concession.

**[126]**Counsel for Faizal and City Motorsports, Mr. Rishi, submits the evidence shows that Arrasu and Maren take an absolute resolute that there was in fact an appointment of the 7th Defendant as COO of GTG; ADM do not seem to suggest that there may have been a mere initial intention/plan to appoint the 7th Defendant as the COO of GTG but it may not have materialised owing to the Winding-Up Petition that the Plaintiff had filed but yet the conspiracy was nonetheless afoot. Instead, ADM's position is that the fact of the appointment of the 7th Defendant as COO of GTG was conclusive as at 5/10/2015. It is by this that ADM alleges that the 7th Defendant owes fiduciary duties to GTG.

**[127]**Based on the evidence adduced I find the Plaintiff has failed to establish when the purported appointment had crystallised. The minutes of the Board of Directors' meeting of GTG, Bundle B1/209, item No.3 para 3 specifically states, *"subject to the terms and conditions as will be stipulated in the documents relevant to the employment and appointment of the COO for and behalf of the Company".*

In this regard, I agree with the submission of the Counsel for the Faizal and City Motorsports that if the appointment was concluded or crystallised, such wordings would not have been used.

**[128]**It is an undisputable fact that the said Minutes was an internal document of GTG at the material time, a position held by the Defendants too.

**[129]**Faizal had no knowledge of what transpired during the said 5/10/2015 meeting called by Marcus. Arrasu and Maren even testified that while they had filed for a discovery and while they could have sought for documents pertaining to the purported appointment of Faizal as COO of GTG, they chose not to do so.

**[130]**Both Arrasu and Maren had confirmed at trial that there is no documentary evidence to establish the appointment of Faizal as COO of GTG and neither was there documentary evidence to show that Faizal performed any task or role as COO of GTG or received any remuneration from GTG as its COO.

**[131]**I agree with the submission of Counsel for Faizal and City Motorsports that by the usage of the words "the series of events and the conduct of the parties will show otherwise" by ADM in its submission, ADM has affirmed that the entire assertion of Faizal being appointed as COO rests on speculation or assumptions or conjecture.

**[132]**In so far as the 1st to 5th Defendants are concerned although there was an agenda in the meeting on 5/10.2015 for Faizal to be appointed as COO of GT, the Board of GTG did not proceed to appoint Faizal as the COO of GTG. This was confirmed by TN that the Board of GTG had the intention of appointing Faizal as COO of GTG whom he viewed as a potential COO of GTG but the Board of GTG has not appointed Faizal as COO.

**[133]**Faizal (SD10) confirms that he has never received any formal letter of offer from the Board of GTG to become the COO of GTG.

**[134]**Juzaziri confirms that Faizal was never paid a salary as a COO of GTG, that Faizal had been to the GTG office only once on 9/10/2015 and as a staff of GTG, she had never received any instruction from Faizal in his capacity as COO of GTG and neither was there a contract of employment signed by Faizal. With respect to Faizal's visit to GTG office on 9/10/2015, nothing turns on the sole visit to the GTG office and I have made a finding that ADM has not proved the alleged 7th oppressive act against the Defendants and Faizal.

**[135]**Counsel for ADM has urged the Court to refer to the observations of the learned JC in paras 52 to 55 of an unreported case of *ADM Ventures (M) Sdn Bhd v. Renew Capital Sdn Bhd* [2017] MLJU 74, a judgment in relation to Faizal and City Motorsports' application to strike out the OS in Suit 47. I decline to refer to the same as the following dicta of the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Anor* [1995] 1 MLJ 193 at p.208, among others, is instructive:

> "Any findings made by the judge on this aspect of the case would not have been final. It would have been a preliminary view which is subject to change at the trial after he has heard all the evidence, including any evidence given by the defendants, displacing the prima facie view formed at the interlocutory stage."

(See also *Hock Hua (Sabah) Berhad v. Yong Liuk Thin & 7 Ors* [1995] 2 CLJ 900 (CA) at p.904 h).

**[136]**I find the Plaintiff has failed to discharge its burden in proving the plank of its claim against Faizal and City Motorsports which is, the entire conspiracy is rooted on the purported appointment of Faizal as COO of GTG. Hence, on this ground, I agree with M. Rishi's submission that ADM's claim against Faizal and City Motorsports falls ipso facto. Since this is a conspiracy claim, I also find that the conspiracy claim against the 1st to 5th Defendants also falls.

9th oppressive act

**[137]**GTG submits that (i) it was ADM's Winding-Up Petition that caused DBKL to issue the termination

notice of the Concession and it would be unreasonable for Arrasu and Maren (representative of ADM) to deal with DBKL to reinstate the Concession; (ii) that the meeting on 04/02/2016 was called after giving proper notice to all GTG's directors including, Arrasu and Maren; and (iii) that TN during cross-examination stated that the resolution was passed to stop Arrasu and Maren from dealing with DBKL so as to protect GTG.

**[138]**With respect I find that there is no merit in GTG's submission. ADM, Arrasu and Maren had taken all necessary steps to challenge the termination of the MOA between GTG and DBKL for the benefit of GTG including sending to DBKL via their solicitors, Messrs. Kumar Partnership, the letters dated 11/1/2016, 14/1/2016, 19/1/2016 and 04/02/2016 (B4/645-646,647-648,649-650 and 668-669 respectively).

**[139]**However, I find without any due and proper notice as reflected in ADM's solicitors, Messrs. Kumar Partnership letter dated 3/2/2016 to the Board of Directors of GTG (B4/655-656), the RC team had called for a Board of Directors' meeting on 04/02/2016 and passed, among others, the following unlawful and oppressive resolutions as reflected in the Minutes of Meeting (B1/214-220):

(a) Arrasu and Maren shall have no authority or mandate to represent GTG to deal with DBKL in relation to the MOA and matters related thereof;

(b) only Marcus is authorised to represent GTG in dealing with all matters related to GTG; and (c) Arrasu and Maren are not authorised not they have the power to represent GTG to deal with whoever and whatsoever matters unless expressly authorised by the board of directors of GTG.

**[140]**It is an undisputed fact that neither Marcus (as the elected representative of GTG) nor the directors of GTG named as Defendants in Suit 47 took any steps to challenge the termination of the MOA. Such inaction of those in control in my view could amount to oppression as referred in para 109 (d) above.
Whether the minority protection proceedings (Suit 47) is an abuse of Court process because ADM purportedly caused termination of the Concession

**[141]**Defendants' submission is that (i) the filing of Suit 47 by the Plaintiff, ADM is an abuse of process and an attempt to oppress the Defendants; and (ii) Defendants contended that one cannot exercise statutory right to wind company and at same time exercise the statutory right to seek minority protection. The case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 CLJ 340 was cited for the proposition " *When ... the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process."*

**[142]**ADM has withdrawn the Winding-Up Petition on 3/1/2018 and hence at this point in time (trial of Tranche 2 heard together with Tranche 1), there is no winding up petition filed against GTG before the Court, (does not include the s. 218 Petition (Suit 857)).

**[143]**It is undisputed that RC were even prepared to consent for GTG to be wound up. I am of the view that there is no element of abuse of process involved in the presentation of winding-up (which I shall elaborate further when dealing with Suit 34). Having taken the position of agreeing to consent to the winding-up of GTG, GTG now through the RC team is seeking for loss of profits which purportedly arose as a result of the same winding-up petition. Indeed, the Court will not allow approbation and reprobation of any kind.

**[144]**I agree with Counsel for Plaintiff that the Defendants' reliance on **Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed** (supra) is misplaced because the Defendants have failed to plead or prove that the Plaintiff had initiated Suit 47 not for a genuine purpose but for a collateral one.
Counterclaim by Faizal and City Motorsports in Suit 47 and Suit 425

**[145]**The Counterclaim by Faizal and City Motorsports against ADM team in Suit 47 and Suit 425 are

identical. Based on the evidence of DBKL given by Datuk Hj. Mohd Najib bin Hj. Mohd (SP4), the Timbalan Ketua Pengarah Pengurusan Projek and thereafter Pengarah Eksekutif (Perancangan) at the material time, who admitted that these Suits against City Motorsports was not the reason for the termination of the conditional agreement between City Motorsports and DBKL. Datuk Najib (SP4) said that DBKL would consider giving not only City Motorsports to do the race (2016) but to other people. I find this is consistent with the last para of 11/4/2016 from DBKL to City Motorsports (B18/3537-3539) that unequivocally states *"...DBKL tidak mahu terlibat di dalam pertikaian dalaman pemegang- pemegang saham GT Global dan membuat keputusan untuk tidak mempertimbangkan permohonan pihak tuan...".* It is observed that this was the position taken by DBKL after the initiation of the derivative action (Suit 425) naming it as a party. Whereas prior to that, the position taken by DBKL was that it had the right to award the Concession to any third party. This is reflected in the letter dated 05/02/2016 from DBKL to Messrs. Kumar Partnership (B4/670-674), where for reasons stated therein, DBKL held the position that *"...pihak DBKL akam memasuki perjanjian yang baru dengan pihak ketiga untuk menganjurkan perlumbaan KL street race.".* Further, Faizal (DW10) testified in cross-examination that the award from DBKL was a conditional approval (NE16/8/2018 p.3890/8). In the circumstances Faizal and_City Motorsports are not entitled to any of the reliefs sought in their Counterclaim and the said Counterclaim is dismissed with costs.

Counterclaim by RC, GTG, TN, Marcus and Dilantha in Suit 245

**[146]**To reiterate, RC, GTG, TN, Marcus and Dilantha have filed a Counterclaim in Suit 245 against ADM, Maran and Arrasu claiming: (i) that GTG's EGM held on 18/9/2015 to be declared as void; (ii) payment of RM8.5 million to GTG; (iii) Arrasu and Maren to pay RM15.85 million to GTG, (iv) Arrasu and Maren to pay RM431,886 .47 to GTG; and (v) general damages (see para 55 above).

**[147]**In this regard, as to the (i) and (ii) claims (see para 146 above), I have addressed the relevant submissions of the parties at paras 55 to 59 and paras 67 to 73 of this Judgment and adopt my findings therein and the related findings at paras 21 to 31 of this Judgment too. For reasons stated therein, I find the EGM on 18/9/2015 was lawful and despite having notice of the EGM on 18/9/2015, neither TN, Marcus nor Dilantha was present to record their vote and or objection to the EGM. To reiterate, on the payment of RM8.5 million to GTG, I find there was no such agreement or understanding to reciprocate as this was not a term of the Joint Venture Agreement or the impugned Agreement ("24/6/2015 Agreement'').

**[148]**As to the claims (iii) and (iv) (see para 146 above), I have dealt with these claims and I adopt my findings in paras 74 to 97 of this Judgment. For the reasons stated therein, I find on a balance of probabilities that the Defendants have not proved their Amended Counterclaim and I dismiss the said claim with costs.

Suit 19

**[149]**On a preliminary note, I have addressed the issue of the inconsistency of the basis of the claim for payment of RM8.5 million made by GTG in its Counterclaim in Suit 245 and by RC and TN in Suit 19 raised by Counsel for Arrasu and Maren at paras 67 to 71 of this Judgment. To reiterate, I have said that I shall take the factor of the effect of self-contradictory statement of claim into account in the determination of the parties' claim and not dismiss both GTG's Counterclaim and RC and TN's claim in Suit 19 on the score of the pleadings alone.

**[150]**Suit 19 is a claim initiated by RC and TN (Plaintiffs) against Arrasu and Maren (Defendants) for the payment of RM8.5 million and general damages. In this Suit, RC and TN allege that TN would not have advanced the said RM8.5 million for the benefit of GTG had he known about the replacement of GTG's name with Global City Grand Prix Sdn Bhd in the Sanction Agreement dated 29/5/2015 between V8 Super cars Australia Pty Limited and Global City Grand Prix Sdn Bhd **('Global City')** (B11/2246-2299A)

**[151]**The 24/6/2015 Agreement is the only contemporaneous document which imposes an obligation on ADM for 50% of the RM8.5 million if and only if the KL City Grand Prix 2015 is cancelled or aborted (see

para 4 of the 24/6/2015 Agreement). I have stated that since the said race proceeded as scheduled, there is no obligation on ADM to pay back the 4.25 million, what more RM 8.5 million.

**[152]**Counsel for Arrasu and Maren submits that the allegation of the Plaintiffs in Suit 19 that TN would not have advanced the said RM8.5 million if he was aware of the change of name in the Sanction Agreement and that there was fraud in the process of replacing the name of GTG to Global City is clearly an afterthought. I find there is merit in the Defendants' contention because there is evidence derived from the cross-examination of TN to support the same as follows:

(a) the advancement of RM8.5 million by TN to GTG had nothing to with the Sanction Agreement which relates to races from 2016 onwards, not the 2015 Race; and

(b) TN had advanced RM8.5 million to GTG for the KL City Grand Prix 2015 from as early as 2013 after the joint venture was first incepted. In 2015 TN had signed the 24/6/2016 Agreement making it abundantly clear that the he would only be paid back 50% of his advancement if the 2015 race was cancelled or aborted for whatever reason. It is clear what TN's intentions were and it had nothing to do with any purported misrepresentation or Sanction Agreement which was for the 2016-2019 races.

**[153]**RC and TN have sought to rely on the Statutory Declaration dated 10/12/2015 by James Warburton (B11/2352-2353). Paras 6 and 7 are contentious and they read as follows:

> "6. During November 2015, I was informed that Global City was not the correct entity to enter the Sanction Agreement and that GT Global should have been used as the correct entity to enter the Sanction Agreement.
>
> 7. To the extent that Global City is not the correct entity to have executed the Sanction Agreement, I was misled at the Meeting when the Sanction Agreement was amended to delete GT Global's name and I reserve the full legal rights of myself and V8 Supercars Australia Pty Limited in respect of this matter."

I agree with the submission of the Defendants' Counsel that (i) para 6 merely states James Warburton was informed without stating the source of information that GTG was the correct entity to enter into the Sanction Agreement and not Global City; (ii) that the information has to be proven to be true before para 7 of the Statutory Declaration have any effect to suggest that James Warburton was misled. Further, James Warburton did not testify in Court and since the truth of the contents of the said SD, I shall not give any weight to it.

**[154]**I find the Defendants' submission that the defence that Global City was named as party to the Sanction Agreement to protect GTG from any exposure was not pleaded is a non-starter as it has been pleaded at para 34 of the Affidavit in Reply affirmed by Maren on 25/4/2017 and at para 24 to 27 of the Defence in Suit 19.

**[155]**I accept the explanation from Arrasu that the purpose of replacing the name of GTG with Global City was to protect and insulate GTG from potential penalties was within the full knowledge of the RC directors for these added reasons. The case of *Krishnan Singh a/l Inder Singh v Muniandy a/l Manikkam & Anor* [2010] 7 MLJ 173, cited by GTG, quoting para 6 of the said case can be distinguished.

There is evidence that (i) prior racing series contracts with Topspeed Shanghai (Lamborghini Super Trofeo) (exh. P13) and China Formula Masters (exh. P12) were entered into with Global City on behalf of GTG with the RC Team's full knowledge and consent as evident by the email sent to Marcus on 10/4/2015 (B3/389-402); and (ii) the Initial Agreement dated 29/5/2015 with V8 Supercars was entered with Global City for the 2015 race. In the Initial Agreement, the necessary hand written changes were made at the same time the Sanction Agreement with V8 Supercars was also executed. Hence, the need to make the necessary hand written changes in the Sanction Agreement for the 2016-2019 races. In fact, there is evidence that Marcus was at the restaurant "The Office" when the execution and replacement took place. I find such conduct of the RC Team casts doubt on the truthfulness of the SD because both the Initial Agreement and Sanction Agreement were signed at the same time by James Warburton and to

both agreements there were hand written changes made to the name GTG by Arrasu and yet there was no mention of this fact in the SD of James Warburton.

**[156]**I find there is no merit in the Plaintiffs' submission that no resolution was passed authorising Global City to enter into any agreement. This is because based on the documents tendered in Court, GTG was not in the practice of passing resolutions for every transaction made. The Directors representing RC were aware of this as they did not pass resolutions with respect to the KL City Grand Prix 2015 Race except for a few resolutions e.g. the appointment of PriceWaterhouseCoopers to carry out the economic survey.

**[157]**I find the Defendants' allegation that Simon Gardini did not have the knowledge of Global City is misplaced given that Simon Gardini was a technical director contracted by GTG and the details pertaining to the execution of contracts including Global City were not within his knowledge.

**[158]**For all the aforesaid reasons, including the factor alluded in para 149 above, I find on a balance of probabilities, the claim for the RM8.5 million and general damages in Suit 19 has not been proved by RC and TN against Arrasu and Maren for the payment of RM8.5 million and general damages. I therefore dismiss Suit 19 with costs.
Suit 284

**[159]**Suit 284 is a claim by GTG (Plaintiff) for an injunction to restrain the Defendants (Global City, Munisamy (deceased), Rajeswari (parents of Arrasu and Maren as directors of AM Associates) and AM Associates from taking over the Sanction Agreement and other agreements related to the V8 race in Kuala Lumpur. A declaration was also sought to declare the replacement of GTG with Global City in the Sanction Agreement is invalid, null and void.

**[160]**Madam Rajeswari (SP1), 80 year old testified that she does not play any role in AM Associates apart from being a director and that all decisions are made by Arrasu and Maren, her sons.

**[161]**In Suit 284 GTG seeks for a declaration that the replacement of GTG's name with Global City on the Sanction Agreement is invalid, void and ineffective. Counsel for GTG submits that GTG has proved that (i) Arrasu and Maren had scribbled, deleted and replaced GTG's name in the Sanction Agreement with Global City; and (ii) that the Board of GTG had no knowledge about Global City and that there was no resolution passed by the Board appointing Global City to enter any agreements on behalf of GTG.

**[162]**In respect of Suit 284, I am of the considered view that there is no merit in GTG's claim. Firstly, the Sanction Agreement has been terminated by V8 Supercars, therefore the claim for an injunction becomes academic (exh. P39, B4/667). Secondly, as pointed out by Counsel for Defendants, the issue in Suit 284 is connected directly to Suit 19 in that the prayer for declaration that the replacement of GTG with Global City is void depends on the finding in Suit 19 whether the replacement was done by fraud or otherwise. I adopt what I have stated in Suit 19 above and I am of the considered view that a declaration is not necessary and therefore GTG is not entitled to its claim for general damages.

**[163]**As for GTG's claim for RM605,000.00 in relation to the 2015 Television Production Agreement **('2015 TVPA'),** between GTG and V8 Supercars, Counsel for GTG submits that (i) it has been proved that RM605,000.00 was a misappropriation of GTG fund by Arrasu and Maren using Global City, being a breach of fiduciary duty; and (ii) there was no written consent or resolution from GTG Board agreeing to pay for the invoice issued to Global City by V8.

**[164]**I find that GTG's claim for RM605,000.00 is untenable for the following reasons. Arrasu had testified that the RM RM605,000.00 was the initial 50% paid to V8 for services rendered to GTG under the 2015 TVPA which was well within TN's and Marcus' knowledge as reflected in the email dated 21/7/2015 which enclosed the Draft (B4/561-577). The total sum payable under the 2015 TVPA was RM1.3 million. The 1st invoice dated 24/7/2015 by V8 Supercars pursuant to the 2015 TVPA was mistakenly issued in the name of Global City (B5/837). Notwithstanding this oversight in issuing in the wrong name by V8

Supercars, GTG nevertheless on 27/7/2015 made the 1st payment of RM605,000.00 to V8 Supercars. This was GTG's obligation under the 2015 TVPA and the services rendered under the 2015 TVPA was for the race organized by GTG, not Global City. Subsequently, V8 Supercars issued a 2nd invoice dated 28/7/2015 (B5/824) for the balance RM605,000.00 which was due with the instructions that payment be made to Astro Productions Sdn Bhd (B5/823-bottom). This payment was made by GTG on 28/7/2015. What is significant and not disputed is that both payments were co- signed by Marcus.

**[165]**I find the testimony of Arrasu below with regard to this issue and confirmed by the 1st and 2nd Reports (alluded in para 81 of this Judgment) as highlighted in submission to the Court by Counsel for the Defendants in Suit 284 strengthens the veracity of Arrasu's evidence. In Q&A 217 of his witness statement, Arrasu explained as follows:

> "Q217: The conclusion in the 2nd Report mentions that one payment of RM650,000 was made by GT Global for an alleged expense of Global City Grand Prix. Is this true and were there any payments made by GT Global on behalf of Global City Grand Prix?
>
> A217: There were no payment made by GT Global for Global City Grand Prix. All payments made by GT Global were for GT Global expenses. The RM650,000 payment referred to is a GT Global expense and accordingly rightly paid by GT Global for GT Global's TV production of the KL City Grand Prix, under an agreement entered by GT Global expense. I have explained this is in detail in my answer to Q214 above."

**[166]**In the 1st Report of UHY, at p.3581 (B18/3564-3583), it states that there should there be additional availability of documents, the findings may differ.

**[167]**At p.14 of the 1st Report (B18/3577) there is a finding which states-

> "We also noted from the invoice exhibited in Maren's Affidavit that GT Global has made a payment to V8 Supercars Australia Pty Ltd at Avesco Unit Trust ("Avesco Unit Trust") in relation to the **1st installment** of the 2015 Television Production Agreement amounting to RM650,026.99, although the invoice was addressed to Global City Grand Prix Sdn Bhd ("GCGPSB"). We noted that the payment was cleared on 27 July 2015."

I note that at the same page it states that reference should be made to Appendix 5 for supporting documents for payments made. However, I note in Appendix 5 to the 1st Report, there is no 2015 TVPA to show that the agreement is between V8 Supercars and GTG, not Global City.

**[168]**Looking at p.6 (B19/3699) of the 2nd Report of UHY there is a finding that RM650,026.99 was made to V8 Supercars on behalf of Global City. Further, at p.11 of the 2nd Report (B19/3704), it was concluded that *"GT Global made payment on behalf of GCGPSB (Global City) a company related to Maren and Arrasu.".* This 2nd Report makes no mention of the 2015 TVPA, the agreement under which the payment of RM650,026.99 was made and neither was there any mention of the invoice dated 28/7/2015 issued by V8 Supercars to GTG for the 2nd instalment under the 2015 TVPA, I find this points to the inconclusive and unreliable nature of the 1st and 2nd Reports as no proper conclusion can be made by UHY given that UHY was not in possession of all documents in relation to the payment of RM650,026.99 which was in the possession of GTG after the RC team took control of GTG.

**[169]**For all the reasons above, I find there is clearly no element of misappropriation and the allegation of GTG is unfounded and I therefore dismiss the GTG 's (Plaintiff) claim in Suit 284 with costs.
Suit 272

**[170]**Suit 272 is a claim by GTG (Plaintiff) for a declaration that Arassu and Maren (1st and 2nd Defendants respectively) had breached their fiduciary duties and for an injunction to restrain them from representing GTG without the consent of GTG's Board. Since the declaration sought stems from the allegation in relation to the replacement of GTG with Global City in the Sanction Agreement, I agree with Counsel for the 1st and 2nd Defendants that the outcome of Suit 272 depends on the findings made in Suit 19 as to whether the replacement was done by means of fraud or otherwise. In this regard I adopt what I

have stated in Suit 19 above and I am of the considered view that a declaration is not necessary and therefore GTG (Plaintiff) is not entitled to its claim for general damages.

**[171]**GTG submits that it has proved that Arrasu and Maren have committed breach of fiduciary duty against GTG using GTG's name entitling it to an injunction to prohibit the former from entering into any contract with third parties without the mandate, consent and resolution by approaching third parties to enter into contracts and/or knowledge of the GTG Board. I have dealt with this issue under the heading "Whether there is breach of fiduciary duties against GTG (5th Defendant) by Arrasu and Maren?" (under Suit 245) and I adopt my findings therein at paras 74-79 of this Judgment. Contrary to the submission of GTG, I find on a balance of probabilities, Arrasu and Maren had not breached their fiduciary duties as alleged by GTG and I dismiss the claim of GTG in Suit 272 with costs.

Suit 34

**[172]**Suit 34 is brought by GTG (Plaintiff) against ADM, Arrasu and Maren (Defendants) claiming RM300 million as loss of profits alleging that DBKL terminated the Concession due to ADM presenting a Winding-up Petition against GTG.

**[173]**Earlier in paras 141-144 above, I have explained why I rejected the contention of GTG that the presentation of the Winding-up Petition is an abuse of Court process and my finding is in the negative.

**[174]**I agree with the Defendants' Counsel's submission that it is the oppressive conduct of the RC team that led ADM to exercise their statutory right under Malaysian law to present a winding-up petition and it is not done mala fide. I find the presentation of the Winding-Up Petition is justified as it is my finding that 6 out of the 9 oppressive acts alleged in Suit 47 by ADM (Plaintiff) have been proved against the 1st to 6th Defendants. As Counsel for the Defendants correctly submits, the wrongful party has to bear the consequence that follow as a wrong party cannot rely on their wrongdoings to form a cause of action and benefit from it.

**[175]**It is undisputed that in Suit 34, GTG was prepared to consent for GTG to be wound up. Having taken such a position, I agree with the submission of Counsel for Defendants that GTG cannot now seek for loss of profits which purportedly arose as a result of the very same Winding-up Petition being presented. In other words, GTG cannot approbate and reprobate (*Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16 (CA) at 50 [105]).

**[176]**Regardless of my finding that ADM is not successful in proving the alleged oppressive act of the RC team conspiring with Faizal to divert the concession to City Motorsports, which as ADM submits would have stripped GTG of its main asset after the presentation of the Winding-up Petition, I am of the view it does not detract from the fact that at the point in time when ADM had to elect between proceeding with the Winding-up Petition or Suit 47, ADM opted the latter as it not only provided a more comprehensive relief but also addressed the alleged oppressive acts of the Defendants (of which I find 6 are proved) in the Tranche 2 Actions after the Winding-up Petition was filed.

**[177]**Further, I find that the RC directors (who had taken control of GTG) did not take any steps to challenge the termination of the MOA by DBKL but in fact had passed a resolution on 4/2/2016 which barred Arrasu and Maren from dealing with DBKL with regard to the MOA and the termination thereof. In this regard, I adopt my reasons on finding why ADM has proved the 9th oppressive act in Suit 47.

**[178]**As for the sum of RM300 million claimed as loss profits, GTG has taken DBKL's grant figure of RM30 million as yearly profit (30 million x 10 years Concession period). I find this manner of computation to be illogical for the following reasons: (i) it seems to suggest that the grant money need not be channeled into the running of the race but instead distributed entirely as profits; and (ii) there was no assurance or guarantee by DBKL or other government entity that they would be prepared to provide a grant of RM30millon for the entire 10 years Concession period. On a balance of probabilities, I therefore, find that Suit 34 has not been proved and I so dismiss GTG's claim.

Reliefs and Costs

**[179]**At the stage of the arguments on reliefs and costs, there was a change of lead Counsel for the RC team, being Dato' Malik Imtiaz. Briefly, the key considerations in determining the appropriate remedy under s. 181 of the CA 1965 are-

(i) Wide discretion - *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors* [2021] 1 LNS 302 per Nallini Pathmanathan FCJ at [151] that the Court is "at liberty to fashion the remedy in accordance with the factual matrix of the case" and "The remedy granted would depend on the complaint and the circumstances prevailing at the time of the hearing, not at the start of the proceedings."; *In re Bird Precision Ltd* [1986] 1 Ch 658 (English CA) In light of the wide discretion, the Court is obliged to grant the remedy sought by the claimant and appropriateness of the remedy is to be determined at the date of hearing and not the date of the filing of the claim.

In *Grace v Biagioli* [2005] EWCA Civ 1222 at paras 73-75, the English Court of Appeal held the same principle as in para (i) above and among others, stated "...The court is entitled to look at the reality and practicalities of the overall situation, past, present and future...".

(ii) The remedy must be proportionate to the prejudice suffered. It is not imposed on the defendant by way of punishment for bad behavior. - *Re Neath Rugby Ltd; Hawkes v Cuddy and Others* [2007] EWHC 2999 at paras 243-246

(iii) All relevant interests of creditors and other interested parties will have to be considered, including - In *Fulham Football Club (1987) Ltd v Richards and another* [2011] EWCA Civ 855 (English CA) at [46]

(iv) Winding up as a remedy - *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2019] 9 CLJ 785 per Raus Sharif FCJ (as he then was) at [45]; **Auspicious Journey** at [149], [150], [155], [156], [157] and [157].

**[180]**Regarding Suit 245, I reiterate the order I had made at para 104 above and on the prayer for damages, no damages are awarded and will be taken in Suit 47.

**[181]**In Suit 47, ADM (Plaintiff) seeks for the following reliefs:

"

a. a declaration that there was a breach of the terms of the 24.6.2015 Agreement on the part of the 1st, 2nd and 4th Defendants;

b. an order that the banking signatories be restored to their original groups as at 4.10.2015 and that one signatory of each shareholder approve all monetary transaction of the 9th Defendant;

c. save for statutory payments, an injunction to restrain the Defendants, whether by themselves or through their servants, agents, employees and/or otherwise howsoever from:

(i) effecting any payments out of any GT Global banking account, based and acting on the resolutions passed and carried at the Directors Meeting on 5.10.2015 and at any subsequent meetings; or

(ii) from transferring, charging, pledging, or dealing with the assets of GT Global.

d. an order that the 1st to 6th Defendants jointly and severally pay a sum of RM705,000.00 to the Plaintiff as compensation;

e. an order that the 1st to 6th Defendants indemnify the plaintiff, Arrasu and Maren from any liability in respect of the 1st to 6th Defendants' acts/omissions in management and operations of the 9th Defendant since 8.9.2015 until the date of this Judgment including but not limited to compliance with all statutory filing with the Inland Revenue Board of Malaysia, Companies Commission of Malaysia and all other government agencies;

f. an order that the 1st to 6th Defendants jointly and severally pay a sum of RM1,000,000.00 as exemplary damages to the Plaintiff; and

g. costs."

**[182]**Summarily, the RC team submits that-

(a) there should be no monetary damages awarded (in any form) for Suit 245 and Suit 47;

(b) that there should be no order for a buy-out in Suit 47;

(c) that GTG should be wound up; and

(d) costs for both Tranche 1 and 2 should be fixed at RM 100,000.00.

**[183]**We agree with the submission of Counsel for the RC team that a buy-out order is not a viable option given that, (i) GTG is dormant and ceased to be in an ongoing concern when the MOA was terminated by DBKL and therefore it would not make legal or commercial sense to impose such an order as fair valuation has to be determined as a going concern at the date of oppression (*Re Ghyll Beck Driving Range Ltd* [1993] BCLC 1126 at p.1134 and *Re Planet Organic Ltd* [2000] 1 BCLC 366 at p.370), (ii) a buy-out order would be disproportionate on the facts and circumstances of Tranche 1 and Tranche 2 Actions; and (iii) GTG owes creditors a sum in excess of RM6 million.

**[184]**Mindful of the principles applicable regarding the remedies available under s.181 CA 2016, and having regard to the circumstances as a whole and all relevant interests and taking into account the whole narrative and the findings in Suit 245 which culminated in the findings of the oppressive acts in Suit 47, I make the following order:

(a) that GTG be wound up pursuant to s.181(2(e) CA 1965;

(b) that there is no award for indemnity;

(c) that the 1st to 6th Defendants jointly and severally pay a sum of RM22,666,195.16 (which is inclusive of RM705,000.00) as compensatory damages; and

(d) that no exemplary damages are allowed as this claim has not been pleaded.

**[185]**For the award of compensatory damages, the computation is as follows: RM32,380,278.80 x 70 divide by 100. I am of the view that the award is fair and reasonable for the following reasons. I allow 30% nominal reduction based on the case of *Stealth Infra Sdn Bhd v SR Alias bin Marjoh* [2016] 9 MLJ 433 where at p.464 B-D, I followed the principle in the Court of Appeal case of *Juta Damai Sdn Bhd v Permodalan Negeri Selangor Bhd* [2014] 5 MLJ 676.

To reiterate, GTG (Plaintiff) claimed the sum of RM300 million as loss profits in Suit 34 (30 million yearly profit x 10 years Concession period). In Suit 245, ADM, Arrasu and Maren (the Plaintiffs) submit that the share of profits that ADM would be entitled to at the end of the Joint Venture is RM64,760,557.60 and if the option to renew the Concession is not exercised, there was a foreseeable profit of about RM32million. The Business Plan (B6/1018) was well within the knowledge of the RC team and Marcus. During the trial, TN, Neil and Marcus seem to that while the KL Grand Prix was successfully organised, GTG was mismanaged because no profits were made in the 1st year.

**[186]**However, Marcus Luer (PW9) an independent witness testified, among others, in cross-examination as follows:

"KFE From a commercial point of view, for an event which lost so much of money, would you agree with me it's not viable for future car race anymore?

MARCUS No.

MARCUS No, I disagree with that it is not viable, so I'm saying it is viable.

KFE Can you please explain why you disagree?

MARCUS Any new event, anyone in the world probably has ever put together, will lose money the first few years. **That's just pretty much basic standard operating procedure, even though we all in the industry love to make events profitable right away, that's not how it works,** because of what I said, explained earlier, you know, there is always a lack of trust, maybe, or the event hasn't happened yet, so the sponsors are not sure why they would invest etc. **But there is a value created right from the start when you actually put it together, and it's the same way another company would invest in a new product development. That is what you do when you create an event.** It's a new product which you have to develop. **You might put money in initially which is an investment, you don't really call it losses, but you will get your returns back as the event goes on, and in future years you will recover it. That's how normally traditional events work. And this event is no different."**

(Emphasis added)

Marcus Luer clarified in re-examination as follows:

"DPR It was suggested to you during cross-examination that the 2015 Car Race event had lost money and therefore, it was not a viable event. You disagreed. Could you please clarify why?

MARCUS **Viability in my mind isn't just based on the profitability of an event. Viability in my mind also means does the event have a future, is there interest, would there be companies engaged, is there interest by fans.** By having hundreds of thousands of people on the streets of Kuala Lumpur, it clearly showed there was interest by the public to see something like this. **There was interest by broadcasters to take the signal and air it and we had full house of VIPs. Many of them from large companies who could be future sponsors who were with us at the VIP hospitality suite and were giving us very positive feedback about the event, so if you add all that together therefore the viability in my mind isn't just about how much money it loses and therefore obviously, I don't know the details of that anyway but the potential of what the race had in the future."**

(Emphasis added)

**[187]**On the aspect of Marcus Luer's evidence that "[T]here is a value created right from the start when you actually put it together.," Simon Gardini (PW10), a track designer and is familiar with the motorsports industry supported Marcus Luer's evidence when he testified, among others, that-

"So the first year of this sort of events tends to be a lot more financially draining, and then you look through, once you already owned the infrastructure and the changes have been made in the street. **Then of course, your cost etcetera decrease in ear to year so the business model really is not a one year model it needs to be run over multiple years to make that money back."**

(Emphasis added)

**[188]**Marcus Luer who had 20 years of experience in the industry as sponsorship and media consultant also testified that there was significant interest by potential sponsors with respect to future races, namely, the race that was scheduled to take place in 2016 (NE 30/3/2018 p.570/21 and NE 30/3/2018 p.576/30). In fact, TN himself confirmed that there was significant interest in the 2016 race and some sponsors such as Petronas and Malaysian Airlines had indicated interest in participating in the 2016 race organized by GTG. Further, based on the claim in Suit 360 (Tranche1), Marcus (SD5) admitted that GTG would have make profits if the KL City Grand Prix was held for the remainder of the Concession period. Hence, I agree with the submission of Dato' Prem Kumar, Counsel for the Defendants in Tranche 1 and Plaintiffs in Tranche 2 (for convenience called **"ADM team")** that GTG would have made future profits is not in dispute and the only issue in dispute is the quantum.

**[189]**On the submission of Counsel for ADM that the RC team jointly and severally pay RM705,000.00 to ADM as equitable compensation, Counsel for the RC team argues that ADM is not entitled to RM705,000.00 because equitable compensation is a remedy typically available against trustees or others

in a fiduciary position for breaches of trust or fiduciary duty citing *Auden Mc- Kenzie (Pharma Division) Limited v Patel* [2019] EWCA Civ 2291 at [31], *Rembert v Daniel and another* [2018] EWHC 388 **(Ch)** at [39] and *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at p.438. Counsel for the RC team further argues that ADM's action was not premised on breaches of fiduciary duty and instead the 9 oppressive acts alleged by ADM were premised on breaches of the 24/6/2015 Agreement.

With respect, I disagree with the said submission of Counsel for the RC team. This is because I find there is in existence a Joint Venture Agreement albeit not reduced in writing for the reasons stated in para 24 of this Judgment. I draw support from the case of *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 1 CLJ Rep 321**.** In **Newacres** (supra), the Supreme Court, when dealing on the issue of fiduciary relationship, at p.332, referred to the respondent's argument that a fiduciary relationship is established between the appellant and the respondent when they entered into the joint venture agreement and cited the Australian Supreme Court case of *Brian Pty Ltd v. United Dominions Corporation Ltd.* [1983] 1 NSWLR 490**.** The Supreme Court stated- "Samuels JA at p.506 says that after reviewing the authorities, he is of the opinion that joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards every other member. In the same case Hutley JA at p.496 has this to say on this subject:

> Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint ventures, *inter se.* In *Canny Gabriel Castle Jackson Advertising Pty. Ltd. v. Volume Sales (Finance) Pty. Ltd.* [1974] 131 CLR 321, what was described as a joint venture was held to be partnership. That joint venturers have fiduciary relations, *inter se* would seem to be essential for the efficacy of the device.

Further the Supreme Court quoted the following excerpts from some Australian cases-

> "The Judges here were talking about fiduciary relations between the parties. In the case of *James Birtchnell & Another v. The Equity Trustees, Executors and Agency Company Ltd. & Anor. 42 CLKR 384, Dixon J at p. 407* explains the fiduciary relationship between partners and how the relationship is to be determined. This is what he says:
>
> **The relation between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the life-blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on'** (per Bacon VC in *Helmore v. Smith* [1890] 15 App. Cas 223 **at p. 223 at p. 225 [1886] 35 Ch D 436 at p. 444. ...**
>
> That passage was approved by Lord Wilberforce in the case of *New Zealand Netherlands Society 'Oranje incorporated v. Kuys & Anor* [1973] 2 All ER 1222.
>
> At p.1226 Lord Wilberforce says, after quoting the relevant passage of Dixon J's judgment:
>
> This was said the context of a partnership but the principle must be of general application."

At p.333, the Supreme Court then opined-

> We would, with respect, accept this proposition which goes to show that if the agreement of 2 October 1980 entered into by the litigating parties **is indeed a joint venture agreement then their relationship is a fiduciary one."**
>
> (Emphasis added)

It is to be noted that the principles approved by the Supreme Court in **Newacres** included the principle adopted in *United Dominions Corporation Limited v Brian Proprietary Limited And Others* [1984-1985] CLR 1, where the High Court of Australia held-

> "Although the relationship between participants in a joint venture which is not a partnership will be governed by the particular contract rather than extrinsic principles of law, the relationship may nevertheless be a fiduciary one if the

necessary confidence is reposed by the participants in one another. Of course, in partnership the parties are agents for each other and this may constitute a separate reason for the fiduciary character of a partnership. There may be no such agency between participants in a joint venture but, as Dixon J. pointed out in *Birtchnell v.Equity Trustees, Executors & Agency Co. Ltd. (31),* even in a partnership it is really the mutual confidence between partners which imposes fiduciary duties upon them and the same confidence may, in appropriate circumstance, be fund to exist between participants in a joint venture."

Therefore, I agree with the submission of the ADM team that had the Defendants not breached their fiduciary and contractual obligations under the Joint Venture and 24/6/2015 Agreement, the events that unfolded that led to the termination of the MOU would not have occurred.

**[190]**In respect of the claim for costs, ADM, Arrasu and Maren seek a total of RM1,327,994.00 in costs as shown in the following breakdown:

| **Suit No** | **Amount** |
|---|---|
| **TRANCHE 2 ACTIONS** | |
| Suit 245 and counterclaim | RM355,000 |
| Suit 47 | RM364,000 |
| **SUBTOTAL (Tranche 2)** | **RM719,000** |
| **TRANCHE 1 ACTIONS** | |
| Suit 19 | RM200,00 |
| Suit 34 | RM53,000 |
| Suit 272 | RM53,000 |
| Suit 284 | RM100,000 |
| Suit 886 | RM22,994 |
| Suit 28 | RM50,000 |
| Suit 355 | RM30,000 |
| **SUBTOTAL (Tranche 1)** | **RM608.994** |
| **GRAND TOTAL (Tranche 2+1)** | **RM1,327,994** |

**[191]**I award the following costs on a global basis:

(i) Costs for Tranche 2 Actions of RM500,000.00 to be borne jointly and severally by RC, TN TK, Neil, Marcus and Dilantha;

(ii) Costs for Tranche 1 Actions of RM100,000.00 to be borne jointly and severally by RC, TN TK, Neil and Marcus; and

(iii) Costs for Dilantha Suits (Tranche 1) of RM30,000.00.

**[192]**In awarding the costs above, the Court has taken into consideration the following factors under O.59 r.16 ROC 2012:

(a) In my view Tranche 1 and Tranche 2 Actions involve complex and difficult issues of fact and law which include the following matters identified in the submission of the ADM team:

"

i. whether there was a joint Venture Agreement between RC and ADM;

ii. whether the 24.6.2015 Agreement was binding;

iii. the terms of the Joint Venture Agreement;

iv. whether the acts and conduct of the RC Team, Dilantha, Faizal and City Motorsports amount to oppression;

v. the effect of inconsistent and self contradictory claims made by parties; and

vi. analysis of the Accounting Reports prepared by experts appointed by the RC Team and the ADM Team."

(b) The trial of the Tranche 2 Actions went on for 32 days; ADM team called 14 witnesses and the RC team called 10 witnesses. There was an additional 2 days of trial held for the Tranche 1 Actions wherein 2 witnesses were called and parties agreed to adopt the testimony of the relevant witnesses from the Tranche 2 Actions. Notwithstanding that only 2 witnesses were called for the Tranche 1 Actions, the parties had filed a full set of documents, prepared witness statements and complied with all pre-trial directions prior to the initial withdrawal of the Tranche 1 Actions by the Plaintiffs (the RC team and Dilantha) on 4/10/2017.

(i) As the subject matter of the proceedings involve the technicalities of organizing an international street race, Counsel for the ADM team had to spend substantial time to understand the technical components and the general mechanics of how to organise such an event. For the technical matters, the ADM team called Simon Gardini and Marcus Luer.

(ii) Consideration was given to the fact that accounting experts were appointed by the ADM team and the RC team to address the Counterclaims filed in Suit 245 and the Counsel for the ADM team had to expend time and labour to familiarise themselves with the accounts and the financial transactions of GTG.

(iii) Consideration was given to the numerous interlocutory applications filed and where costs were ordered by the Court as in Annexure 2.

(c) There were 20 volumes in the Tranche 2 Actions which formed the common bundle; while in Tranche 1 Actions, the Plaintiffs (RC team) filed 3 Bundles and the Defendants (ADM team) filed 8 bundles. These documents filed were very important given the contradictory positions held by the parties in respect of the events that occurred.

(d) The Tranche 2 Actions were important to the ADM team (Plaintiffs) because the claims were filed to protect their rights as equal shareholders of GTG and to seek relief for the breach of the Joint Venture Agreement and the 24.5.2015 Agreement by the RC team. The Tranche 1 Actions were also important to the ADM team as there were allegations of fraud, siphoning of contracts, dishonesty and breach of fiduciary duties which Arrasu and Maren had to defend.

(e) The claims involved in the Tranche 2 and 1 Actions are large as shown below-

**Tranche 2**

(i) The Tranche 2 Actions involves general damages including lost of future profits; and

(ii) in the Counterclaim in Suit 245 the Defendants therein claimed for the repayment of a total of approximately RM24.7 million from ADM, Arrasu and Maren.

**Tranche 1**

(i) Suit 19 - claim in the sum of RM8.5 million;

(ii) Suit 34 - claim in the sum of RM300 million; and

(iii) Suit 284 - claim in the sum of RM650,000.00.

**[193]**In so far as ADM and D6 (Faizal) and D7 (City Motorsports) are concerned, both parties agree that given the Court's findings on liability, there should be no order or relief for costs in Suit 47 and Suit 425 by the ADM team and vice versa.

**[194]**Both ADM team and D6 and D7 have agreed that there will be no order as to costs claimed with respect to Suit 425 appeals without prejudice to payment of any costs made and to both parties' right to appeal.

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**End of Document**