

Goldpage Assets Sdn Bhd v Gan Kam Seng & Ors

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS

NO WA-28JM-6-09 OF 2019

NADZARIN WOK NORDIN JC

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20 NOVEMBER 2020

Companies and Corporations — Application — Judicial management — Applicant applied for judicial management pursuant to s 405 of the Companies Act 2016 — Whether there was sufficient evidence to come to any finding based on probabilities that it was more probable that judicial management was achievable — Whether judicial management would serve the creditors' interest better than by resorting to winding up — Companies Act 2016 s 405(1)(b)

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This was an application by Golpage Assests Sdn Bhd ('the applicant') that the applicant be placed under a judicial manager pursuant to s 405 of the Companies Act 2016 as per amended ex parte originating summons in encl 73 which also sought that Baltasar bin Maskor to be appointed as the applicant's judicial manager. The applicant had entered into a joint venture agreement for purpose of developing a land as a mixed development project ('the project') and thereafter a supplemental joint venture agreement ('SJVA'). The applicant contended that the person who orchestrated the JV was one Teh Hock Seng ('THS'), the 99.9% shareholders in Plusbury. It was the applicant's contention that THS had led the applicant to believe that the estimated value of the land was approximately RM200m and that the project could yield more than RM1 billion if completely developed as planned. The JV was premised upon an understanding that THS would be responsible for the development of the project whereas the applicant would be responsible for financing, marketing and valuation aspect of the project. Premised on the understanding and recommendation by THS, one Utamal Land Sdn Bhd was appointed as the main contractor for the first four phases of the project. The applicant contended that at the material time, they had no knowledge that THS was the largest shareholder of Utamal Land, holding 99.9% of the shareholding. On 7 November 2013, by the consent of the Plusbury, the expiry of the JVA had been extended by three years to 5 July 2018. On 26 February 2018, the applicant company's solicitor wrote to Plusbury to put it on notice that the company intended to exercise its rights under the new cl 3A of the JVA but the Plusbury's solicitor replied by saying that the JVA and SJVA was deemed terminated. It was contended by the applicant that the applicant had no knowledge of the termination letter at the material time and the same was only extended to them on 28 May 2018. The applicant had issued a notice of arbitration to Plusbury. It was further submitted by the applicant that there was a reasonable probability of rehabilitating the applicant or of preserving its

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- A business as a going concern and judicial management would serve the creditors' interest better than by resorting to a winding up. The applicant stated that it sincerely believed that the winding up of the applicant would not be advantageous to the creditors as whole and that the appointment of a judicial management would serve a better the interests of the creditors of the company
- B a whole.

Held, dismissing the applicant's application:

- C (1) None of the so called parties interested in collaborating with the applicants had indicated that there were any form of agreement entered with the applicant and there was no indication that the parties would be injecting funds of any kind to the project or provided access to further financing for the project. To consider the judicial management order, there was insufficient evidence to come to any finding based on a
- D probabilities that it was more probable than not that any one of the outcomes in sub-s 405(1)(b) of the Companies Act 2016 was achievable. The court agreed with the counsel for Plusbury that hope and speculation was not sufficient in a judicial management application and that it was incumbent upon the applicant to convince that there was a real prospect rescuing the company through a judicial management application (see
- E paras 44, 47 & 55).
- F (2) The mere assertion that there was a reasonable probability of rehabilitating the applicant or of preserving the business as a going concern and judicial management would serve the creditors interest better than by resorting to a winding up and merely playing lip service to the requirements under s 405(1)(b) of the Companies Act 2016 was insufficient (see para 50).

[Bahasa Malaysia summary]

- G Ini adalah permohonan oleh Golpage Assests Sdn Bhd ('pemohon') bahawa pemohon diletakkan di bawah pengurus kehakiman menurut s 405 Akta Syarikat 2016 sepertimana saman pemula ex parte yang dipinda dalam lampiran 73 yang juga memohon agar Baltasar bin Maskor dilantik sebagai pengurus kehakiman pemohon. Pemohon telah memasuki perjanjian
- H usahasama bagi tujuan memajukan tanah sebagai projek pembangunan bercampur ('projek tersebut') dan selepas itu perjanjian usahasama sampingan ('SJVA'). Pemohon berhujah bahawa orang yang mengatur usahasama ('JV') itu adalah Teh Hock Seng ('THS'), 99.9% pemegang saham dalam Plusbury. Ia adalah hujah pemohon bahawa THS telah meyebabkan pemohon untuk
- I mempercayai bahawa anggaran nilai tanah adalah kira-kira RM200 juta dan projek tersebut dapat menghasilkan lebih daripada RM1 bilion jika dibangunkan sepenuhnya seperti yang dirancang. JV tersebut berpremiskan pemahaman bahawa THS akan bertanggungjawab untuk pembangunan projek tersebut manakala pemohon akan bertanggungjawab untuk aspek

pembiayaan, pemasaran dan penilaian projek tersebut. Berdasarkan pemahaman dan saranan oleh THS, Utamal Land Sdn Bhd dilantik sebagai kontraktor utama untuk empat fasa pertama projek tersebut. Pemohon berhujah bahawa pada masa matan, mereka tidak mengetahui bahawa THS adalah pemegang saham terbesar Utamal Land, yang memegang 99.9% pegangan saham. Pada 7 November 2013, dengan persetujuan Plusbury, tarikh luput JVA telah dilanjutkan selama tiga tahun hingga 5 Julai 2018. Pada 26 Februari 2018, peguam syarikat pemohon telah menulis surat kepada Plusbury untuk memberitahu bahawa syarikat itu berhasrat untuk melaksanakan haknya di bawah klausa baharu 3A JVA tetapi peguam Plusbury menjawab dengan mengatakan bahawa JVA dan SJVA itu dianggap telah ditamatkan. Adalah diujahkan oleh pemohon bahawa pemohon tidak mengetahui tentang surat penamatan pada masa matan dan perkara yang sama hanya diberikan kepada mereka pada 28 Mei 2018. Pemohon telah mengeluarkan notis timbang tara kepada Plusbury. Selanjutnya ia telah diujahkan oleh pemohon bahawa wujud kebarangkalian yang munasabah untuk memulihkan pemohon atau mengekalkan perniagaannya sebagai usaha berterusan dan pengurusan kehakiman akan menjaga kepentingan pemiutang lebih baik daripada mengambil tindakan penggulungan. Pemohon menyatakan bahawa ia benar-benar percaya bahawa penggulungan pemohon tidak akan bermanfaat bagi pemiutang secara keseluruhan dan bahawa pelantikan pengurusan kehakiman akan menjaga kepentingan pemiutang syarikat secara keseluruhan.

Diputuskan, menolak permohonan:

- (1) Tiada antara pihak-pihak tersebut yang berminat untuk berkolaborasi dengan pemohon telah menunjukkan bahawa terdapat apa-apa bentuk perjanjian yang dimasuki dengan pemohon dan tiada petunjuk yang pihak-pihak tersebut akan menyuntik dana dalam apa bentuk ke dalam projek tersebut atau memberikan akses kepada pembiayaan selanjutnya untuk projek tersebut. Bagi mempertimbangkan perintah pengurusan kehakiman, tiada keterangan yang mencukupi untuk mendapat apa-apa penemuan berdasarkan kebarangkalian bahawa ia lebih berkemungkinan daripada tidak untuk salah satu daripada hasil dalam sub-s 405(1)(b) Akta Syarikat 2016 boleh dicapai. Mahkamah bersetuju dengan peguam untuk Plusbury bahawa harapan dan spekulasi tidak mencukupi dalam permohonan pengurusan kehakiman dan bahawa ia adalah wajib untuk pemohon meyakinkan yang terdapat prospek sebenar untuk menyelamatkan syarikat melalui permohonan pengurusan kehakiman (lihat perenggan 44, 47 & 55).
- (2) Penegasan semata-mata bahawa terdapat kebarangkalian munasabah untuk pemohon direhabilitasikan atau mengekalkan perniagaan sebagai usaha berterusan dan pengurusan kehakiman akan menjaga kepentingan pemiutang dengan lebih baik daripada mengambil tindakan

- A penggulangan dan hanya menyebut tentang keperluan di bawah s 405(1)(b) Akta Syarikat 2016 adalah tidak mencukupi (lihat perenggan 50).]

Cases referred to

- B *AA Mutual International Insurance Co Ltd, Re* [2004] EWHC 2430 (Ch), Ch D (refd)
Auto Management Services Ltd v Oracle Fleet UK Ltd [2007] EWHC 392 (Ch), Ch D (refd)
- C *CIMB Islamic Bank Bhd v Wellcom Communications (NS) Sdn Bhd & Anor* [2019] MLJU 148; [2019] 4 CLJ 1, CA (refd)
Doltale Ltd v Lexi Holdings plc [2006] 1 BCLC 384, Ch D (refd)
Genesis Technologies International (S) Pte Ltd, Re [1994] 2 SLR(R) 298 (folld)
Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473, HC (refd)
- D *Spacious Glory Sdn Bhd v Coconut Tree Sdn Bhd* [2020] MLJU 1827, HC (refd)
Wan Soon Construction Pte Ltd, Re [2005] 3 SLR 375, HC (folld)

Legislation referred to

- E Companies Act 2016 ss 404, 405, 405(1), 405(1)(b)
Ho Kok Yew (Sharmaine Mok with him) (Ho Kok Yew) for the applicant in encl 73.
Malik Imtiaz Sarwar (S Ravenesan, Siti Nur Amirah Aqilah bt Adzman and Wong Ming Yen with him) (S Ravenesan) for the 32nd respondent, Plusbury Development Sdn Bhd.
Roshan Selvaratnam (Roshan) for the 33rd respondent, Unique Mix Sdn Bhd.
S Vengadeswaran (S Vengadeswaran) for the second to 28th respondents.
K Harikrishnan (K Harikrishnan & Co) for the creditor, Utamal Land Sdn Bhd.
- G *Suren Rajah (Rajah Chambers) for the 29th to 31st respondents.*

Nadzarin Wok Nordin JC:

H PRELIMINARIES

- I [1] This is an application by Goldpage Assets Sdn Bhd ('applicant') that the applicant be placed under a judicial manager pursuant to s 405 of the Companies Act 2016 as per the amended ex parte originating summons in encl 73 which also seeks that Baltasar bin Maskor be appointed as the applicant's judicial manager.

[2] When the application was first filed there was a secured creditor, Bank Kerjasama Rakyat ('BKR'), who had opposed the application but they have since withdrawn their objections. A

[3] I had on 6 April 2020 by way of four separate applications, allowed the respective respondents to intervene in the matter and to be heard before me with regards the application herein. B

[4] The first to 28th respondents are purchasers who have entered into sale and purchase agreements with the applicant company for the purchase of properties in phase 18 of the project and have not opposed the application herein. Whilst the 29th to 31st respondents are judgment creditors who were purchasers of two units of shop lots in phase 1B and 1C of the project and the 32nd respondent ('Plusbury') asserts that the applicant is indebted to it on account of monies purportedly paid by them to BKR on behalf of the applicant for the repayment of the bank facility offered by BKR. C D

[5] The 33rd respondent, Unique Mix Sdn Bhd ('UMSB') claims to be the creditor of the applicant via a judgment obtained in Civil Suit No WA-22NCC-171-04 of 2019. E

[6] The 32nd and 33rd respondents have obtained leave to proceed with their respective ongoing legal action against the applicant.

[7] At the hearing of the application before me on 8 October 2020, I was informed by counsel for the first to 28th respondents that the first respondent was no longer supporting the application and that he was discharging himself from acting for the first respondent. F

BACKGROUND G

[8] The applicant had entered into a joint venture agreement dated 19 September 2008 ('JVA') with Plusbury for purpose of developing a land measuring 344.369 acres ('lands') as a mixed development project ('project') and thereafter a supplemental joint venture agreement dated 6 July 2009 ('SJVA'). H

[9] The applicant contends that:

- (a) the person who orchestrated the joint venture ('JV') is one Teh Hock Seng ('THS') the 99.9% shareholder in Plusbury; I
- (b) THK had led the applicant to believe that the estimated value of the land was approximately RM200m and that the project could yield more than RM1 billion if completely developed as planned;

- A (c) the JV was premised upon an understanding that THS would be responsible for the development of the project whereas the applicant would be responsible for the financing, marketing and valuation aspects of the project ('understanding');
- B [10] Premised on the understanding and recommendation by THS, one Utamal Land Sdn Bhd ('Utamal Land') was appointed as the main contractor for the first four phases of the project. The applicant contends that at the material time, they had no knowledge that THS was the largest shareholder of Utamal Land, holding 99.9% of the shareholding.
- C [11] On 7 November 2013 by the consent of Plusbury, the expiry of the JVA had been extended by three years to 5 July 2018.
- D [12] On 26 February 2018, the applicant company's solicitors wrote to Plusbury to put it on notice that the company intended to exercise its rights under the new cl 3A of the JVA. On 12 March 2018, Plusbury's solicitors replied that pursuant to a letter dated 4 January 2016, the JVA and SJVA was deemed terminated ('termination letter').
- E [13] It is contended by the applicant that they have no knowledge of the termination letter at the material time and the same was only extended to them on 28 May 2018.
- F [14] As a result of the same, the applicant has issued a notice of arbitration to Plusbury on 28 June 2018 ('arbitration').
- G [15] The applicant has also filed and obtained on 8 October 2018 an injunction at the High Court vide an originating summons ('OS') to restrain Plusbury, their servants and/or agents from howsoever dealing, disposing, dissipating, charging or assigning the land pending the final award in the arbitration ('injunction'). The application was sought on, inter alia, that Plusbury had breached the JVA and sold three subdivided individual titles of the land without the consent of the applicant. Plusbury had appealed against the injunction and the same was dismissed by the Court of Appeal on 28 February 2020 but leave to appeal to the Federal Court was granted on 9 September 2020.
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- I [16] On 25 September 2019 the members and board of directors of the applicant had resolved to make this application.

THE APPLICANT'S SUBMISSIONS

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[17] The applicant submits that they have, subject to the extension, complied with all its obligations pursuant to the new cl 3 of the JVA.

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[18] The applicant's position is that the termination letter is null and void and that Plusbury will not honour and perform its obligations under the JVA and SJVA.

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[19] It is also contended by the applicant that as a result of the purported termination, they are now left with the obligation of funding the project of which the operational aspect of which it has little or no control over and it has been deprived of all interest in any of the resulting benefits of the project. The applicant also submits that the applicant's present difficulties is as a result of Plusbury's termination of the JVA and SJVA.

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[20] The applicant further contends that there are expectant innocent purchasers caught in the middle where completion and delivery of vacant possession of their respective units remain in vacuum, and that their overriding interest require focus and protection.

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[21] The applicant submits that there have been various judgments obtained against the applicant since 2015 totalling RM11,680,193.36 and that it is obliged to make the following monthly instalments:

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- (a) RM117,015.70 for tax arrears amounting to RM1,294,703.56 as at 15 March 2019; and
- (b) RM93,100 to Bank Islam for its banking facility amounting to RM18,015,869.72

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[22] There are also various claims made against the applicant by:

- (a) purchasers, suppliers and contractors for approximately RM9,096,310.87;
- (b) a claim from Utamal Land for RM7,386,867.90 allegedly due to them;
- (c) a suit for liquidated damages amounting to RM704,142.47 for late delivery;
- (d) a suit for the sum of RM1,005,300.50 by Unique Mix Sdn Bhd, the supplier of Utamal Land;
- (e) liquidated damages for late delivery in phase 1B for RM18,496,001.64, at phase 1C for RM9,365,637.32 all as at 31 August 2019; and

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- A (f) costs estimated for certificate of completion and compliance for phases 1B and 1C being RM4.5m and RM5m respectively.

B [23] The applicant thus claims that given the understanding, the judgments and potential claims were caused to be owed by THS, Utamal Land and/or Plusbury and as such shall be subject to the final award in the arbitration.

C [24] The company states that it has a one and a half storey hypermarket building and car parking lots at Kuala Selangor, Selangor which was valued at RM22.4m and is being currently leased at RM93,087.60 monthly to one Semarak Sentral Sdn Bhd.

D [25] The applicant consequently avers that as the project has come to a halt, the applicant is unable to pay its debts with the existing and potential claims outweighing the applicant's assets.

E [26] It is further submitted by the applicant that there is a reasonable probability of rehabilitating the applicant or of preserving its business as a going concern and judicial management will serve the creditors interest better than by resorting to a winding up and that it has received letters from various parties who had shown interest in collaborating with the applicant with a view to complete phase 1B and 1C of the project.

F [27] The applicant states that it sincerely believes that the winding up of the applicant would not be advantageous to the creditors as whole and that the appointment of a judicial manager would better serve the interests of the creditors of the company as whole.

G [28] The applicant has also made a proposal for a scheme as seen in exh HMM30 of encl 7 ('proposed scheme') and that they had on 23 October 2019 conducted a meeting with group of purchasers including the applicant company's director and solicitors. In the proposed scheme there was contained therein a nomination and/or appointment of a designated contractor to replace Utamal Land, outstanding items in phases 1B and 1C which were identified including the type and extent of work required to complete the same and the estimated costs and timeline for completion of each of the works identified.

I 29TH, 30TH AND 31ST RESPONDENTS SUBMISSIONS

[29] The 29th, 30th and 31st respondents submits, inter alia, that:

- (a) as a matter of public interest the application ought to be dismissed as an abuse of process on the applicant's part;

- (b) the test for a 'real prospect' under the CA 2016 should be a stringent one; A
- (c) the applicant had completely failed to show that it comes within the relevant sections in the CA 2016 for a JM Order to be given;
- (d) the applicant has failed to show how it will raise more funds in order for the project to be completed; and B
- (e) the costs or repairs for an abandoned project would have escalated in the last five years and the purported scheme of projected costs of RM3.5m to complete the project is unrealistic. C

PLUSBURY'S SUBMISSIONS

[30] Plusbury claims that as of June 2016 the applicant had failed to complete the construction of the project and that it was declared abandoned by the Majlis Daerah Kuala Selangor as well as 'pemaju sakit' by the Ministry of Housing and Local Government. D

[31] Plusbury contends that the failure is attributed to the applicant having failed to ensure the financial flow and/or assistance of the construction and development of the project. Which they then informed the applicant on 4 January 2016 that the JVA and SJVA had been terminated. E

[32] It is also contended by Plusbury that the applicant owes them RM12,514,666.26 and that BKR had issued a notice of demand to the applicant settle monthly instalments for financing obtained by the applicant for the project wherein part of the lands were charged to BKR vide a third party charge and for which Plusbury then paid RM12,514,666.26 part of the outstanding sums owed by the applicant to BKR due to the concern of the lands being foreclosed. Notwithstanding the same, BKR has subsequently obtained summary judgement against the applicant for RM9,332,492.92 and foreclosed on the lands in early 2020 and subsequently withdrawn its affidavit in opposition to the application herein. F
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[33] Plusbury also states that it is still paying a considerable amount of money for quit rent on the unsold and vacant lots which were supposed to be part of the applicants obligation under the JVA and SSVA, and that it was unable to prevent the auction of the land due to the injunction. I

[34] Plusbury also contends that the applicant has no plausible means to ensure the successful rehabilitation of the project.

A [35] It is also submitted that the arbitration proceedings have remained pending since 28 June 2018 due to the applicant's failure to actively pursue the same.

COURT'S FINDINGS

B [36] In a JM application, as the one before me, the court in making a judicial management order has to be satisfied under s 405(1) of the Companies Act 2016 that:

- C (a) ... the company is or will be unable to pay its debts; and
- (b) the Court considers that the making of the order would be likely to achieve one or more of the following purposes:
- D (i) the survival of the company, or the whole or part of its undertaking as a going concern;
- (ii) the approval under section 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;
- E (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

F [37] From a reading of s 405 of the Companies Act 2016, this court has to then consider that the making of the order is likely to achieve one or more of the following purposes as stated in s 405(1)(b) of the Companies Act 2016:

- (i) the survival of the company or the whole or part of its undertaking as a going concern;
- G (ii) the approval of a compromise or arrangement between the company and its creditors;
- (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

H See *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473, Wong Chee Lin JC (as she then was) where the learned judge had aptly explained the effect of and applicability of ss 404 and 405 of the Companies Act 2016.

I [38] In *Auto Management Services Ltd v Oracle Fleet UK Ltd* [2007] EWHC 392 (Ch), Warren J, in the UK equivalent of a judicial management application which is known as an administration, held that:

[3] There is no dispute about the applicable principles. There has to be a real prospect that the administration order will achieve the purpose. This does not mean that I need to be satisfied that, on a balance of probabilities, there will be a better

- outcome on administration as compared with winding up. There has to be only a real prospect. It is not enough to show a real prospect that administration would achieve no worse an outcome. *The prospect of a better result must be shown*. However, I venture to think if an administration can be shown in all but the most unlikely circumstances to produce a result no worse than liquidation and if it can be shown there are reasonably possible circumstances in which administration can, in fact, produce a better result, so that para 11(b) is satisfied, that will be a significant factor when it comes to exercising the discretion whether or not to make an order. A B
- [39] However as per my decision in *Spacious Glory Sdn Bhd v Coconut Tree Sdn Bhd* [2020] MLJU 1827 I have held that for the purposes of defining the term 'likely' under s 405 of the Companies Act 2016 this court will adopt the same definition with the term 'likely' as held in the UK in the case of *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch) to mean the applicant to demonstrate on a balance of probabilities that it is 'more probable than not' that this criterion will be fulfilled. C D
- [40] I have noted in the matter before me that the applicant claims that is unable to pay its debts with the existing and potential claims outweighing the applicant's assets and based on the available evidence before this court, in particular the judgments, the existing and potential claims against the applicants; I find that the applicant's claim that it is unable to pay its debts has been proven by the applicant to the satisfaction of this court. E
- [41] However based on the requirements under the Companies Act 2016 in respect of a judicial management application, the company not being able to pay its debts is only one of the considerations to be considered by this court. F
- [42] Pursuant to s 405 of the Companies Act 2016, the applicant had submitted that there is a reasonable probability of rehabilitating the applicant or of preserving its business as a going concern and judicial management will serve the creditors interest better than by resorting to a winding up and that it has received letters from various parties who had shown interest in collaborating with the applicant with a view to complete phase 1B and 1C of the project. G H
- [43] In this respect this court has examined the letters from the potential interested parties being Larisan Maju Sdn Bhd, Liam Soon Thiam Sdn Bhd and Nova Heritage Development Sdn Bhd at exh HMM27 of encl 1 and observe that in the letter dated 30 April 2018 from Larisan Maju Sdn Bhd to the applicant, Larisan Maju Sdn Bhd had stated that they were willing to work with the applicant as their project manager for the project whilst Liam Soon Thiam Sdn Bhd vide their letter dated 5 May 2018 that they were willing to work with the applicant to develop the project as they have more than 30 years I

A experience in housing developments in Selangor and Nova Heritage Development Sdn Bhd's letter of 22 May 2018 to the applicant stating their intent to be the turnkey contractor or partner for the project.

B [44] After viewing the said letters I find that none of the so called parties interested in collaborating with the applicant have indicated that they have entered into any form of agreement with the applicant and more importantly there is no indication that they would be injecting funds of any kind to the project or provide access to further financing for the project.

C [45] I have also been referred to the Companies Commission of Malaysia search, which can be found at encl 82 at exh TFK9, on these interested parties by counsel for Plusbury which show that they do not possess sound financial standing to offer substantial financial aid to the applicant and that both Larisan Maju Sdn Bhd and Liam Soon Thiam Sdn Bhd share common directors which raises in my view the bona fides of such third parties and of the applicant. Mere assertion as to the likelihood of financing without proper evidence is insufficient, see *Doltable Ltd v Lexi Holdings plc* [2006] 1 BCLC 384 where the High Court in England in a judgment by Mann J observed:

E [34] As to the first, it fails on the facts. There is no evidence as to the likelihood of a refinancing being achieved. The company had been seeking one for some months, apparently without success. There was no proper evidence that it was likely or indeed possible within an administration. There was evidence in the form of assertion, but that is not sufficient.

F [46] The applicant further submits that:

(a) there is at present nine unsold units under phase 1B and phase 1C of the project;

G (b) there remains a strong market traction in respect of the said phases and sales in this respect remains optimistic; and

(c) if the unsold units are successfully sold, it is expected to attract a revenue in the sum of approximately RM22.74m.

H [47] From the above and after reading the proposed scheme in exh HMM30 of encl 7, it is my view that the applicant is relying on the unsold units in the project as well as the possibility of the interested parties in collaborating with the applicant with a view to complete phase 1B and 1C of the project as the reasons or grounds for the court to consider in making the judicial management order. With respect, I have considered the said options available to the applicant based on the applicant's respective affidavits and the application itself and find that there is insufficient evidence before this court to come to any finding based on a balance of probabilities that it is 'more probable

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than not' that any one of the outcomes in sub-s 405(1)(b) of the Companies Act 2016 is achievable.

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[48] It is undisputed that there is currently the arbitration pending as well as the injunction which concerns not only the lands in question but the entire project vis a vis the termination of the JVA and the SJVA. This will undoubtedly lead to the disputes in respect of the project and therefore the lands as well being subject to litigation for some time to come. Any proposal by the applicant to rely on the lands and/or the project would in the circumstances be in my view unviable and not a preferred option as the creditors of the applicant, both existing and potential, would be tied to the outcome of the arbitration, which I may add is unknown not only as to whose favour it would be determined but also the time taken for such an award to be made, should the JM order be given. This in this courts opinion surely cannot be in the best interest of the creditors of the applicant.

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[49] I also hold that since the project has been abandoned by the applicant for more than three years, ie since June 2016 as declared by the Majlis Daerah Kuala Selangor as well as the project being termed 'pemaju sakit' by the Ministry of Housing and Local Government, see exh TFK1 and para 10 of encl 21, I find that the delay in filing this application is another factor which I have taken into account in determining whether to grant the JM order.

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[50] I further hold that the mere assertions of that there is a reasonable probability of rehabilitating the applicant or of preserving its business as a going concern and judicial management will serve the creditors interest better than by resorting to a winding up and merely playing lip service to the requirements under s 405(1)(b) of the CA 2016 is insufficient and I quote and adopt *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR 375 where it was stated by the Singapore High Court that:

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the court is not mere rubber stamp in as much as it will accede to any every request to order such other sections or provisions to apply almost, or even wholly, as a matter of course.

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[51] Closer to home, our Court of Appeal in the case of *CIMB Islamic Bank Bhd v Wellcom Communications (NS) Sdn Bhd & Anor* [2019] MLJU 148; [2019] 4 CLJ 1, the Court of Appeal had stated that:

[9] The effect of making a judicial management order in relation to an insolvent company which may have no prospect of recovering money or assets within a reasonable time indeed may be very drastic. Thus, the court's consideration at all stages, that is to say from the date the application is filed and from the date of the order, if any is given, must be based on strict proof and evidence and not merely surmise and conjecture.

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- A [52] This court has also found that the applicant only has the monthly rental from the shopping mall of RM93,087.60 monthly as its only income, I find that the mounting debts of the applicant when weighed against the existing and/or potential claims, do not support the applicants claim as in the application herein.
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- C [53] This court also wishes to refer to the applicant's contention that they are the owners of a one and a half storey hypermarket building and car parking lot at Kuala Selangor, Selangor which was valued at RM22.4m and which this court has, after being highlighted of the same by Plusbury's counsels, that the same in actual fact belongs to Plusbury as seen in the valuation report dated 28 May 2013 by Intra Harta Consultants Sdn Bhd at exh HMM26 in encl 2. It is clear therefore in this courts view that the applicant is therefore not bona fides in its application.
- D
- E [54] As a result of the same, I find that the applicant has not made a full and frank disclosure of all material facts before this court and I am unable to accept the applicant's counsels contention that this was a honest mistake on the part of the applicant as I find it unacceptable that the applicant does not know that the said one and a half storey hypermarket building and car parking lot at Kuala Selangor does not in actual fact belong to the applicant.
- F
- G [55] Although the applicant states that it has in its application focused on revitalizing the project and that the Companies Act 2016 does not say that the applicant has to assist the JM in presenting a viable scheme, I agree with counsel for Plusbury that hope and speculation is not sufficient in a JM application and that it is incumbent upon the applicant to convince this court that there is a real prospect rescuing the company through a Judicial Management application. I am guided by the Singapore case of *Re Genesis Technologies International (S) Pte Ltd* [1994] 2 SLR(R) 298 where the court held that a mere allegation of belief that the purposes of the judicial management would be satisfied without any substantiation would be insufficient to discharge its burden.
- H [56] All said and done and after considering in totality all the factors stated above I do not find that any of the considerations on the facts before me bring this application within the factors which this court has to consider under the respective sections and that a JM order would in the circumstances not achieve any of the statutory purposes under the CA 2016.
- I
- [57] Wherefore I hereby dismiss the application with costs of RM8,000 to the 29th-31st respondents, and RM15,000 each to the 32nd and 33rd respondents respectively after hearing/reading the submissions by the respective parties.

Applicant's application dismissed with costs of RM8,000 to 29th to 31st respondents and RM15,000 each to 32nd and 33rd respondents respectively.

Reported by Mohd Kamarul Anwar

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