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

**(COMMERCIAL DIVISION)**

**ORIGINATING SUMMONS NO: WA-28JM-6-09/2019**

In the matter of section 11 of Arbitration Act 2005

**AND**

In the matter of a Notice of Arbitration dated 28.06.2018

**AND**

In the matter of a Joint Venture Agreement dated 19.9.2008, as amended by the Supplementary Joint Venture Agreement dated 6.7.2009, between Goldpage Assets Sdn Bhd and Plusbury Development Sdn Bhd

**AND**

In the matter of section 404, 405 and 407 of the Companies Act 2016

**AND**

In the matter of Order 92 rule 4 of the Rules of Court 2012

**GOLDPAGE ASSETS SDN BHD**
**(Company No. 816803-A) … APPLICANT**

**AND**

**UNIQUE MIX SDN BHD**
**(Company No. 198001001447 [55230-T] … PROPOSED INTERVENER**

## JUDGMENT

1. This is an application under enclosure 10 herein being the Amended Notice of Application by one Gan Kam Seng and 27 others as proposed interveners (First Proposed Interveners) to intervene pursuant to Order 15 Rule 6(2)(b)(ii) of the Rules of Court 2012 to become interveners in these proceedings.

2. The grounds relied on by the First Proposed Interveners are that they are bona fide purchasers who have now become victims as a result of legal proceedings between Goldpage Sdn Bhd (Applicant), and one Plusbury Sdn Bhd.

3. There is also another application under enclosure 16 being the Notice of Application by one Tee Ah Kiat and 2 others as proposed interveners (Second Proposed Interveners) to intervene pursuant to Order 15 Rule 6(2)(b)(ii) of the Rules of Court 2012 to also become interveners in these proceedings.

4. The grounds relied on by the Second Proposed Interveners are that they have obtained judgment against the Applicant for RM857,203.27 (not inclusive of interest) (Judgment) via Civil Suit No. BA-B52NCVC-79-03/2019 and that todate the Applicants have failed to satisfy the said Judgment. It is further stated that the Applicants application for judicial management under section 405 of the Companies Act 2016 will affect their rights as owners to obtain vacant possession of properties purchased from the Applicant where there has been a delay of more than 3 years.

5. There is also an application filed by Plusbury Sdn Bhd (Plusbury) under enclosure 20 to intervene in the proceedings and be made a party thereto on the ground that Plusbury is a creditor of the Applicant for the sum of RM12,514,666.26 by way of a Joint Venture Agreement dated 19.9.2008 (JVA) and an Additional Joint Venture Agreement dated 6.7.2009 (SJVA) which were executed for the purposes of a mixed development of a piece of land belonging to Plusbury. It was further contended that Plusbury had made the said payment to Bank Kerjasama Rakyat Malaysia Berhad on behalf of the Applicant to avoid legal proceedings on the land and/or the land being forfeited of which the Applicant has todate failed to repay to Plusbury.

6. Plusbury also contends that the Applicant's application for judicial management will seriously affect the JVA and the SJVA and that such application clearly shows that the Applicant has wrongly blamed Plusbury for the Applicant's current insolvency and that the Applicant has shown an intention not to repay the monies it owes to Plusbury.

7. Finally, there is an application by one Unqiue Mix Sdn Bhd (UMSB), a proposed intervener under enclosure 26 to intervene in the proceedings and be made a party thereto on the ground that UMSB will be affected by the Applicant's application for judicial management. UMSB had presented a winding up petition at the High Court at Kuala Lumpur upon the ground that the Applicant owes them a debt of RM1,005,300.50 and that a consent order had been entered with the Applicant at the hearing of the said petition of which in furtherance of the said consent judgment /

order UMSB had then filed a civil suit to recover the sums as per the consent judgment / order which the Applicant is contesting.

**Applicant's Submissions**

8. The Applicant had at the outset submitted that by the provisions of statute and case law precedent, all of the proposed interveners have no locus standi to appear at the hearing of an application to oppose the application of a judicial management order as they are not parties who have appointed or may be entitled to appoint a receiver or receiver and manager and/or are in any way secured creditors of the Applicant and that none of them is a creditor majority in number and value that represent 75% of the total value of creditors and that their total combined sums (not including Plusbury) represent only a mere 16.88% of the total value of creditors.

9. The Applicant thus quotes Rule 13 (1) (a) & (b) - Part III, Judicial Management of the Companies (Corporate Rescue Mechanism) Rules 2018 and the case of ***Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another*** **[2018] 10 CLJ 412; [2019] 8 MLJ 473** in support of its contentions and submits that the basic rule for intervention i.e that where a judgment in a particular case may affect the rights of non parties, such non parties ideally should have the right to be heard, does not apply herein.

10. It is further argued inter alia by the Applicant that the statutory provisions that avail an ailing corporation with the prospect of the appointment of a judicial manager (JM) are conceived for a reason

and that Parliament would have intended for such an ailing corporation to be given such advantage and opportunity for it to have a ‘last ditched effort’ why it ought to be maintained as a going concern vis a vis the JM.

11. It is also submitted by the Applicant that the reason why the relevant statutory provisions limit the genre or type of creditors that can appear at the hearing of an application for a JM would pose as an unnecessary and/or unwarranted obstruction as well as impede the process to the administration of justice.

12. The Applicant contends that its objective to appoint a JM is with a view to achieve a more advantageous realisation of the company’s assets as opposed to a winding up.

**Proposed Intervenor’s Submissions**

13. It is submitted by the First Proposed Intervenors that they are purchasers who have entered into a sale and purchase agreement with the Applicant for the purchase of properties in respect of Phase 1B of a project which the Applicant has undertaken to complete, and since the project is uncompleted they have an interest in the Application by the Application for a proposed JM to revive project which will affect them and that they have filed suit at the Shah Alam court to compel the Applicant to complete the project. The First Proposed Intervenors are therefore applying to intervene to support the JM Application.

14. The Second First Proposed Intervenors on the other hand submits that they have an interest in the impeding JM hearing due to their position as judgment creditors and wish to ensure full and frank disclosure by the Applicant at the said JM hearing in order to circumvent possibility of the Judicial management order being set aside due to non disclosure of material facts. It is further submitted that at this juncture the Second First Proposed Intervenors merely wish to participate at the said impeding JM hearing and that the Applicant will not be prejudiced by their proposed intervention in the proceedings.

15. Plusbury submits that 2 questions arise in their application to intervene in the proceedings, namely whether it is precluded from doing so and if it is not, whether it has basis in law and fact to intervene. It is argued that Plusbury is not precluded from intervening and that the High Court has wide jurisdiction and powers and is obliged to exercise the same in a manner that does not deny free access to the courts and to justice.

16. Plusbury further contends that it is for the court to determine if Rule 13 of the Companies (Corporate Rescue Mechanism) Rules 2018 has the effect of absolutely precluding parties other than those provided under the said Rule 13 from being heard and whether this can be readily inferred as the underlying intention of the makers of the said Corporate Rescue Mechanism Rules as the said Rules are silent on the question of intervention. It is also submitted that Rule 2 of the Companies (Corporate Rescue Mechanism) Rules 2018 allows for recourse to the Rules of Court 2012 where there is no specific procedure provided in the Rules.

17. Following from this Plusbury submits that Order 15 Rule 6(2)(b)(ii) of the Rules of Court 2012 provides for intervention applications, and that the test for intervention can be found in *the* ***Pegang Mining Company Limited v. Choong Sam & Ors*** **[1969] 2 MLJ 52** which Plusbury claims they have satisfied as they are a creditor having expanded approximately RM12,514,666.26 and that the case of ***Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another*** **[2018] 10 CLJ 412** does not stand in their way to intervene.

18. In UMSB's Submissions, UMSB had submitted that the Court should adopt a purposive approach in the interpretation of the section 409 of the Companies Act 2016 as it is contended that the same was never intended to restrict the opposition to section 405 of the Companies Act 2016. UMSB thereafter refers to the fact there is no restriction to unsecured creditors or specifically to secured creditor to oppose a JM Application and refers to the explanatory note in the the Companies Bill 2015 Amendment in Committee D.R 2015. UMSB further adopts Plusbury's submissions before this court.

**Courts Findings**

19. At this juncture, this court is only applying its mind to the various enclosures before it namely enclosures 10, 16, 20, 26 and not the main application by the Applicant for the appointment of a JM as per the Originating Summons (OS) before it. For that reason, I have also not referred to the arguments put forth by the Applicant

in its written submissions at enclosure 34 with regards the OS and the factual background thereto.

20. This Court after having heard the respective counsels on 13.3.2020 had thereafter reserved its judgment to the 17.3.2020 which however could not be delivered to the Management Control Order (MCO) and was ultimately delivered via email on 6th April 2020.

21. Thus, upon reading the respective written submissions as well as having considered the arguments of the respective counsels on 13.3.2020, this Court had granted Order In Terms for enclosures 10, 16, 20, 26 on the following grounds as mentioned hereinafter.

**Unsecured Creditors under Judicial Management**

22. Let me now approach the issue of whether the creditors, all of whom are unsecured may intervene, file affidavits and oppose the Ex Parte Application for a JMO. Reading Part III Division 8 Subdivision 2 of the Companies Act 2016 (CA) in relation to Judicial Management as a whole and in particular sections 404, 405 and more particularly Section 409 thereto, I am of the considered view that there is nothing in the CA which prevents any party from attempting to oppose the Judicial Management Order.

23. What Section 409 (a) and (b) states is that "*Subject to subsection 405(5), the Court shall dismiss an application for a judicial management order if it is satisfied that-*

*(a) a receiver or receiver and manager referred to in subparagraph 408(1)(b)(ii) has been or will be appointed; and*

*(b) the making of the order is opposed by a secured creditor*."

24. I am of the view that Section 409 merely mandates or makes it compulsory to dismiss the JM if a secured creditor who has appointed or will appoint a receiver or receiver and manager of the whole, or substantially the whole of a company's property under the terms of any debentures of a company (words as per *subparagraph 408(1)(b)(ii))* opposes the making of the JMO. In this regard I am in agreement with the authors of the '*Companies Act 2016: The New Dynamics of Company Law in Malaysia* ' by Kenneth Foo Poh Khean and Lee Shih at p. 454, where the learned authors say: "*Under the CA 2016, both conditions to veto the application must be met through the appointment of the above receiver or receiver and manager, and with the secured creditor opposing the application.*

*Therefore, only a secured creditor who is entitled to appoint a receiver or receiver and manager over the whole, or substantially the whole, of the company's property would be able to exercise this veto. A secured creditor may have obtained substantial fixed charges over the company's property but without a debenture to allow for the appointment of a receiver or receiver and manager. Such a secured creditor would not be able to exercise any veto over the judicial management application*."

25. On the other hand, subsection 405(5)CA provides-

"*5) Nothing in this section shall preclude a Court:*

*(a) from making a judicial management order and appointing a judicial manager if the Court considers the public interest so requires; or*

*(b) from appointing, after the making of an application for a judicial management order and on the application of the person applying for the judicial management order, an interim judicial manager, pending the making of a judicial management order, and such interim judicial manager may be the person nominated in the application and may exercise such functions, powers and duties as the Court may specify in the interim order*."

26. I am of the view that this sub section only refers to the public interest element and the appointment of an interim judicial manager which the Court has to consider in a JM application, if the need so arises, which is consonant with the view expressed by Wong Chee Lin JC (as she then was) in ***Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd & Another*** **[2018] 10 CLJ 412***.*

27. Whereas Section 404 of the CA states that-

"*An application for an order that a company should be placed under a judicial management and for an appointment of a judicial manager may be made to the Court by the company or its creditor if the company or its creditor considers that:*

*(a) the company is or will be unable to pay its debts; and*

*(b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up*.'

28. Each of the said sections, 404, 405 & 409 of the Companies Act 2016 do not specify anywhere that an unsecured creditor cannot take part in the JM hearing or oppose the JM Application.

29. I refer to the case of ***Krishnadas Achutan Nair & Ors v. Manivam Samykano*** **[1997] 1 CLJ 636; [1997] 1 MLJ 94**, with regards the interpretation of a statute where the Federal Court has held that:

> *"The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:*
>
> *As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. Per Gibbs Jin Beckwith v. R. [1976] 12 ALR 333, at p. 337."*

30. I further rely on the case of ***Metramac Corp Sdn Bhd v. Fawziah Holdings Sdn Bhd*** **[2006] 3 CLJ 177** Augustine Paul FCJ said at p. 200:

> *"**Thus when the language used in a statute is clear effect must be given to it**. As Higgins J said in Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd [1920] 28 CLR 129 at pp 161-162:*
>
> ***The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole**. The question is, what does the language mean; and **when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning** even if we think the result to be inconvenient, impolite or improbable.*
>
> ***The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention** (see Nathu Prasad v. Singhai Kepurchand [1976] Jab LJ 340). Thus the duty of the court , and its only duty, is to expound the language of a statute in accordance with the settled rules of construction and has nothing to do with the policy of any statute which it may be called upon to interpret (see Vacher & Sons Ltd v. London Society of Compositors [1913] AC 117; NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79; [1987] 1 MLJ 39)."*
>
> *(emphasis added).*

31. I have thus in coming to my decision also taken parliaments intent from the Hansard, which is an acknowledged legitimate aid to interpretation, as provided to me by counsel for UMSB, in respect of the provisions of the JM wherein at Bil 16 31.3.2016, Parlimen Ketigabelas Penggal Keempat, Mesyuarat Pertama, there is no mention of any restriction to unsecured creditors and the Companies Bill 2015 Amendment in Committee D.R 2015 where in the explanatory Statement to the Bill, vis a vis the relevant parts on the JM, Parliament did not appear to restrict the same to only secured creditors(at Tab 4 of the said Interveners Bundle of Authorities). I am also fortified in this by Sec 17A of the Interpretation Act 1948 which provides that "*In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object*."

32. Accordingly, from the said aids of interpretation mentioned aforesaid as well as a plain reading of the said section 409(a) and (b) of CA 2016, I have taken a purposive approach in interpreting the relevant sections in the Companies Act 2016 as well as the Corporate Rescue Mechanism Rules. In ***Pengusaha Tempat Tahanan Perlindungan Kamunting Taiping & Ors v. Badrul Zaman bin PS Md Zakariah*** **[2018] 12 MLJ 49** where the Federal Court has stated that *"In interpreting the provisions of an Act of Parliament, the trend now is to adopt such a construction as will promote the legislative intent or purpose underlying the provisions. This purposive approach has been given statutory recognition for the courts to adopt by virtue of s. 17A on the Interpretation Acts*

*1948 and 1967. The Federal Court in* ***DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor*** **[2002] 3 CLJ 69; [2002] 2 MLJ 11***; and* ***Chor Phaik Har v. Farlim Properties Sdn Bhd*** **[1994] 4 CLJ 285; [1994] 3 MLJ** 345 *had adopted the purposive approach by making reference to the Parliamentary reports or Hansard as an aid to statutory interpretation in interpreting the provisions of Acts of Parliament. In that case, Haidar FCJ, in delivering the judgment of the court remarked: "It will give statutory force to the courts to look the policy speech of the Minister or the promoter of the Bill in Hansard for the purpose of an aid to the interpretation of statutes."*

33. I am thus of the considered view that it cannot be case that unsecured creditors be shut out from a JM hearing and that it was not the intent of Parliament to restrict the opposition of the JM to only secured creditors. The words in the said sub sections, do not state that any other creditor cannot oppose the JMO but it is obligatory upon the Court, by the use of the word ‘shall’ therein, to dismiss the application for a JMO if the secured creditor who is one who can also appoint a receiver or receiver manager, opposes the JMO. In '*Companies Act 2016: The New Dynamics of Company Law in Malaysia* ' by Kenneth Foo Poh Khean and Lee Shih at p. 454, the learned authors refer this as the right to exercise the veto.

34. Whether any other creditor can oppose or otherwise is, with respect, within the discretion of the court who must exercise its discretion judiciously. I agree with counsel for Plusbury that the preclusion of the courts jurisdiction is not to be readily inferred and

that the jurisdiction of the Court ought not to be displaced by an Act and that there should be an open access to justice for all. See ***Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors & other appeals*** **[2018] 3 CLJ 145**, where the Federal Court stated: *"As civil courts are courts of general jurisdiction, the exclusion of their jurisdiction is not to be readily inferred. The Federal Court held in Metramac Corp. Sdn Bhd (formerly known as* ***Syarikat Teratai KG Sdn Bhd) v. Fawziah Holdings Sdn Bhd*** **[2006] 3 CLJ 177; [2006] 4 MLJ 113 (at para. [17] (CLJ); para. [36] (MLJ))***: The rule that the exclusion of jurisdiction of civil courts is not to be readily inferred is based on the theory that civil courts are courts of general jurisdiction and the people have a right, unless expressly or impliedly debarred, to insist for free access to the courts of general jurisdiction of the state*."

35. Such unsecured creditors views need not necessarily form the basis of this courts decision as the court will decide on whether to grant a JMO based upon the criteria in sections 404 & 405 and whether they have been satisfied and proven by the applicant. Accordingly, I may consider the objections or at least the view of the unsecured creditors.

36. Although, Wong Chee Lin JC (as she then was) had in ***Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another*** **[2018] 10 CLJ 412** stated ***'[51]*** *What about other creditors of the company?* ***[52]*** *The CA 2016 does not require the applicant to serve a notice of the application for JMO to any other creditors of the company, other than the debenture holder.* ***[53]*** *From a reading of the CA 2016, it appears that 'other creditors' of the*

*company is only entitled, during the hearing of the application for JMO, to oppose the nomination of the judicial manager and not to the making of the judicial management order - see: sub-s. 407(3) of the CA 2016*.' It is with the greatest respect, based on my reading of her ladyship's judgment, that Her Ladyship did not expressly say other creditors could not oppose the JM.

37. It is only Under Rule 13 of the Companies (Corporate Rescue Mechanism) Rules 2018, that it appears that a creditor cannot oppose the JM, where the said rule states:

> *(1) Only the following person may appear at the hearing of an application for a judicial management order to oppose the application:*
>
> *(a) any person who has appointed or is or may be entitled to appoint a receiver or receiver and manager under subparagraph 408(1)(b)(ii) of the Act; or*
>
> *(b) any secured creditor referred to in paragraph 409(b) of the Act.*
>
> *(2) The person referred to in subrule (1) who intends to appear at the hearing of an application for a judicial management order shall serve the notice of intention to appear on the applicant or his solicitor.*

38. I am of the view that Rule 13, and in fact the entire Companies (Corporate Rescue Mechanism) Rules 2018) has to be read in conjunction with the parent act i.e the Companies Act 2016, and that as the Companies Act does not prohibit any creditor from

being heard at the JM and/or to oppose the JM, and based on my reasonings above on the right of any creditor to be heard, I hold that the Companies (Corporate Rescue Mechanism) Rules 2018 being a Subsidiary Legislation cannot contravene the parent Act i.e the CA 2016 and thus the interveners may be heard in the JM application including to oppose the said JM. Authority for this can be found in sec 23 of the Interpretation Act 1948 & 1967 which reads *"(1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency'.* See also the federal court case of *United Malayan* ***Banking Corporation Bhd v. Ernest Cheong Yong Yin*** **[2002] 2 CLJ 413*.***

39. I am invited by counsels for the intervener to refer to and do indeed note that the Companies (Corporate Rescue Mechanism) Rules 2018 does not provide for any intervention proceedings in a JM Application but that Rule 2 of the same does state that "*Where there is no specific procedure provided in these rules in respect of a voluntary arrangement or judicial management, the procedure provided in the rules of Courts 2012 [P.U.(A) 205/2012] shall apply*." Following from this I agree with Plusbury's counsel that order 15 rule 6 (2) (b) (ii) of the Rules of Court 2012 shall be applicable. Order 15 rule 6 (2) (b) (ii) of the Rules of Court 2012 states:

> "*Subject to this rule, at any stage of the proceedings in any cause or matter, the court may on such terms as it thinks just and either of its own motion or on application:-*

*(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*

*(b) order any of the following persons to be added as a party, namely:-*

*(i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*

*(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."*

40. Based on the said rule, it is a settled legal principle that the Court will allow an interested party to intervene if his legal rights and interest in relation to the subject matter of the action would be directly affected by any order which may be made in the action. See: (i) ***Pegang Mining Co Ltd v. Choong Sam & Ors*** **[1968] 1 MLRA 925 ; [1969] 2 MLJ 52**, and (ii) ***Pilecon Engineering Bhd v. Malayan Banking Berhad & Ors*** **[2012] 3 MLRH 639**.

41. If I may just respectfully quote the Privy Council in Pegang Mining (supra) where it was alluded: "*In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases*."

42. I therefore allow enclosure 10 prayer (a), enclosure 16 prayers 1 & 2, enclosure 20 prayers a, b and c , enclosure 26 prayers 1, 2 and 3 with costs being in the cause for each enclosure

Dated 10 June 2020

**NADZARIN BIN WOK NORDIN**
**JUDICIAL COMMISSIONER**
**KUALA LUMPUR HIGH COURT**

*Parties*

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Messrs Ho Kok Yew

Dato' K Kirubakaranfor Unique Mix Sdn Bhd
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Dato’ Malik Imtiaz, S Raven & Mohammad Danial Hazizan for Plusbury Sdn Bhd
Messrs S Ravenesan

Suren Rajah for Tee Ah Kiat & 2 others
Messrs Wong Chambers

S Vengadeswaran for Gan Kam Seng & 27 others
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