FEDERAL TERRITORY OF KUALA LUMPUR

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

CIVIL SUIT NO: WA-22NCvC-535-07/2019

BETWEEN

TT DOTCOM SDN BHD
(Company No.: 52371-A) **...PLAINTIFF**

AND

1. **LOW WEY HENG**
   (I/C No.: 810627-02-5223)

2. **LEE PENG HONG**
   (I/C No.: 820919-14-5971)

3. **LOF MANAGEMENT SDN BHD**
   (Company No.: 1076395-X)

4. **AFFLEXIA SDN BHD**
   (Company No.: 1278353-V)

5. **ARTE PLUS @ JALAN AMPANG JOINT MANAGEMENT BODY**

6. ARTE S PENANG JOINT MANAGEMENT BODY

7. TAN KEE TAY
(I/C No.: 750622-07-5377)

...DEFENDANTS

GROUNDS OF JUDGMENT
(After a full trial)

A. INTRODUCTION

[1] The present case before this Court was initially a claim for conspiracy to injure by unlawful means, tort of unlawful interference, and breach of contract.

[2] The 1st to 4th Defendants were customers and subscribers of personal or home internet services which were supplied by the Plaintiff (a company engaged in the business of an internet service provider **("ISP")**).

[3] It was admitted and agreed by all parties that the personal home internet service packages subscribed by the 1st to the 4th Defendants were strictly and exclusively intended for personal home use only and were never intended to be used as a 'shared' commercial or

business connection to be shared and 'split' into any other location(s) other than the specific 'personal home' of the 'Applicant', applying for the home internet service connection.

[4] It was admitted and agreed that in breach of the contracts, the 1st and the 3rd Defendants have wrongfully split and shared 3 separate lines of personal home internet packages, between 30 locations (inclusive of the 2 intended locations which the home internet packages were intended for). Meanwhile the 2nd and 4th Defendants admitted that they had wrongfully split and shared 1 line of personal home internet package between 10 locations (inclusive of the 1 intended location which the home internet package was intended for).

[5] Nonetheless, it is not to say that the 1st to 4th Defendants' admissions on their liability for breach of contract came easily. Their admissions were only made after the Plaintiff had to undertake arduous measures of two separate interlocutory Applications for two Anton Piller Orders (in which, after many hardships and obstacles, definitively revealed apparatuses and evidence of unlawful sharing and splitting of the home internet lines) and after the Plaintiff accedes to only proceed with the sole cause of action in breach of

contract (while abandoning their initial causes of action for tortious unlawful interference and conspiracy to injure by unlawful means).

[6] In fact, the 1st to 4th Defendants stood sternly on their defence denying any wilful breach of contract, from the beginning right until the eve of the trial at the very last minute. All the while (before the 1st to 4th Defendants came clean and proffered due honesty, candour, and frankness to this Court) they vehemently tried to impress upon this Court that supposedly all the unlawful tampering and splitting of the home internet lines were either already within the Plaintiff's knowledge or were arranged and approved by the Plaintiff's own 'agent'.

[7] Nevertheless, this supposed 'agent' was never called as witness especially considering the 1st to 4th Defendants' admission of guilt and liability for breach of contract. Thereto, the trial need not proceed to determine the issue on liability for breach of contract, and trial indeed proceeded only on two remainder issues:

a. Whether or not the Limited Liability Clause applies to limit the 1st to 4th Defendants' liability for their wilful breach of contract;

b. In view of the answer to the first issue, what would be the appropriate quantum of damages to be awarded to the Plaintiff?

[8] Apart from these two issues, it gleaned from the parties' submission on a third issue, being the extent of admitted liability between the 1st to 4th Defendants. Succinctly, the third issue to be determined is whether or not the 1st Defendant and 3rd Defendant-Company should be made jointly and severally liable, and whether or not the 2nd Defendant and 4th Defendant-Company should be made jointly and severally liable. It is apparent that the Defendants are attempting to contend along the lines of privity of contract and the veil of incorporation to further demarcate and limit the personal liabilities of the 1st and 3rd Defendants as individuals.

[9] In any case, it is pertinent to first appreciate the facts of the case so as to build the appropriate foundation as well as context to properly determine the remainder issues at trial.

B. FACTS OF THE CASE

[10] TT Dotcom Sdn Bhd **(The Plaintiff)** is a licensed ISP under the Communications and Multimedia Act 1998 who provides, among many telecommunications solutions, internet connection services.

[11] Low Wey Heng **[the 1st Defendant (D1)]** is a Malaysian citizen who (unbeknownst to the Plaintiff) engages in a business of short term rentals **("AirBnB")** of many apartment units through his corporate vehicle and entity, LOF Management Sdn Bhd **[the 3rd Defendant (D3)]**. D1 is also the Director of D3.

[12] Lee Peng Hong **[the 2nd Defendant (D2)]** is a Malaysian citizen who (unbeknownst to the Plaintiff) engages in an AirBnB business of many apartment units through his corporate vehicle and entity, Afflexia Sdn Bhd **("the 4th Defendant / D4")**. D2 is also the Director of D4.

[13] This Court must remark that neither of the Defendants have fully and frankly disclosed to this Court the exact number of apartment units they operate (and unlawfully split the internet connections to). Neither were any documentary evidence were furnished by the

Defendants to honestly disclose to this Court of the true extent of their AirBnB business and actual number of apartment units they operated.

[14] Short of any documentary evidence, D2 who testified at trial as SD-1, admitted that D2 himself with his vehicle D4, operated (and unlawfully shared the internet service connection) between at least 10 Apartment Units in Arte Plus @ Jalan Ampang **("Arte Ampang").** Also short of any documentary evidence, D1 who testified at trial as SD-2, admitted that D1 himself with his vehicle D3, operated (and unlawfully shared the internet service connection) between at least 10 Apartment Units in Arte Ampang, and a further whopping ***"17 to 20"*** Apartment units in Arte S Penang **("Arte Penang").**

[15] It was admitted and agreed in the Plaintiff's, D1, and D3's Statement of Agreed Facts that, D1 and D3 collectively have subscribed to three of the Plaintiff's '1Gbps TIME Fibre Home Broadband' **("Home Package").** Two of which were applied to be installed at Apartment unit 3-P1-2 Arte Penang, while one was applied to be installed at Apartment Unit T1-2-3 Arte Ampang. Thus, by contract, the

Defendant was supposed to only use the 3 Home Packages within **2 Apartment Units only**.

[16] In brazen act of breach and tampering of the internet connections, D1 and D3 instead have unlawfully shared the 3 Home Packages between at least 30 Apartment units (instead of only 2). The fact of D1 and D3's unlawful sharing and splitting of the Home Packages was readily admitted in paragraph 11 of the same Statement of Agreed Facts.

[17] It was admitted and agreed in the Plaintiff's, D2, D4 and D7's Statement of Agreed Facts that, D2 and D4 collectively have subscribed to one of the Plaintiff's Home Package. This sole Home Package was applied to be installed at Apartment unit T1-1-8 Arte Ampang. Thus, by contract, the D2 and D4 was supposed to only use the sole Home Packages within **1 Apartment Unit only**. In brazen act of breach and tampering of the internet connections, D2 and D4 instead have unlawfully shared the 1 Home Package between at least 10 Apartment units (instead of only 1). The fact of D2 and D4's unlawful sharing and splitting of the Home Package was readily admitted in paragraphs 20 and 21 of the same Statement of Agreed Facts.

[18] Through a routine random usage tracking analysis upon D1-D4's internet usage, the Plaintiff have found an irregular usage pattern which indicates uncharacteristic continuous use of internet connection for weeks, at all times without any zero download rate (which in simpler terms mean that the Defendants were found to be using the internet for weeks at a time, without rest, and without sleep).

[19] Due to this suspicious irregular use pattern, the Plaintiff accordingly mobilized its team to investigate and conduct a 'Traceroute test' within a different Apartment Unit (other than the specified installation location) and found that the different Apartment Unit's internet connectivity was 'sourced' from the same Home Packages which D1-D4 had subscribed.

[20] To unravel the truth behind the unlawful sharing and splitting of the Home Packages, the Plaintiff had commenced the present suit, and first applied for and was granted an Anton Piller Order dated 8.8.2019 **("APO 1")**. However, the execution of APO 1 met with many obstacles and was hindered by the non-cooperation by the Joint Management Bodies of Arte Penang and Arte Ampang **("JMBs")**. This hindrance was the reason the Plaintiff had then

amended its Writ and Statement of Claim to include both of the JMBs as parties to the suit (as D5 and D6 respectively). Upon the inclusion of the JMBs as parties in the suit, the Plaintiff then applied for and was granted another Anton Piller Order on 10.9.2019 **("APO 2")**. APO 2 was executed on 17.9.2019.

[21] For the sake of brevity, this Court shall not delve deep into the findings from the reports of the APO 1 and APO 2's execution, as the act of unlawful tampering, sharing, and splitting of the Home Packages (as a breach of contract) has already been admitted by the 1st to 4th Defendants right during trial.

[22] It was recorded and agreed by all parties' learned counsels in Open Court on 24.1.2022 that D1 to D4 admits liability to breach of Contract (for wrongfully sharing and splitting the Home Packages). It was also recorded that the Plaintiff withdraws its claim against the 7th Defendant. Thus, the remainder issues to be determined at trial is as to the applicability of the Limited Liability Clause, and the determination of the appropriate quantum of damages to be awarded to the Plaintiff.

C. WHETHER OR NOT THE 1ST DEFENDANT OUGHT TO BE JOINTLY AND SEVERALLY LIABLE WITH THE 3RD DEFENDANT-COMPANY

[23] This part of this decision is specific only to the liability of D1 and D3. D2 and D4 had not submitted any contention on privity of contract or separation of entities between D2 and D4-company. Now, D1's desperate attempt to demarcate and mitigate his liability hangs on the thin thread of contention that the contract entered into for 2 of the Home Packages for the single Arte Penang Unit, was entered into between D3-company and the Plaintiff. D1 contends that he should only be liable for the breach of the contract relating to the Home Package for the single Arte Ampang Unit.

[24] D1 alluded that the contract that binds the parties come in the form of Service Order Forms **("SOFs")** which would contain the contracting parties' details and signature. D1 further contends that the SOF (under Order number BC230023 and BC230024) **("Arte Penang SOFs")** for the Arte Penang Unit, was applied for and signed on behalf of the D3-company. In short, D1 insists that these two SOFs are **D3's accounts** and not personally his accounts.

[25] On the contrary, it is perplexing that D1 would argue this contention considering D1 himself has readily admitted that the two Home Packages applied under the two Arte Penang SOFs are his own accounts and not D3's accounts. This admission of accounts ownership is exceedingly obvious in paragraphs 6, and 7 of the Plaintiff's, D1, and D3's Statement of Agreed Facts (reproduced below):

6. The Defendants were the subscribers of Plaintiff's Internet Home Package where:-

(a) The 1st Defendant has 3 accounts as follows:-

(i) 2 accounts bearing the installation address at Apartment #3-P1-2 at Arte Penang; and

(ii) 3rd account bearing the installation address at T1-2-3 at Arte Ampang;

7. The installation details of the 1st Defendant's 3 accounts are as follows:

Service Order No.	Apartment Suite Unit & Location	Installation Date
BC230023	#3-P1-2 Arte Penang	31.5.2018
BC230024	#3-P1-2 Arte Penang	31.5.2018
RI515174	#T1-2-3 Arte Ampang	21.11.2018

[26] It is vividly obvious that all three accounts (inclusive of both the Arte Penang SOFs) were defined and admitted by the D1 and D3 as ***"the 1st Defendant's 3 accounts"***. Considering D1 and D3 has already previously admitted that all three accounts belonged to D1, then D1 cannot now renege on his own signed admission that the Arte Penang SOFs were indeed his, and not the D3-company's account. If D1 did not care to make such distinction in the Statement of Agreed Facts, then D1 cannot now insist on such distinction now after the fact. In any case, D1 ought not to be allowed to shift his stance as and when he pleases or fancies.

[27] The **Federal Court's decision** in the case of **Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331** has cautioned against such adoption of contradictory stances:

"When the parties to a transaction ***proceed on the basis of an underlying assumption either of fact or of law*** *– whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them –* ***neither of them will be allowed to go back on the assumption when it would be***

unfair or unjust to allow him to do so". It would facilitate moral decadence within our social structure.

[28] Such approbating and reprobating of stances have also been cautioned against by the **Court of Appeal** in the case of **Cheah Theam Kheang v City Centre Sdn Bhd & Other Appeals (2012) 2 CLJ 16** which had held the following:

"In other words of Sir Nicolas Browne-Wilkinson VC in Express Newspapers Plc v News (UK) Ltd and Others (1990) 3 All ER 376 at pp. 383 to 384: There is a principle of law of general application that ***it is not possible to approbate and reprobate****. That means you are not allowed to blow hot and cold in the attitude that you adopt.* ***A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance"***

[29] Furthermore, a plain examination of the Arte Penang SOFs would sufficiently reveal that indeed D1 was a party of the Arte Penang SOFs, as the very **"Applicant"** applying for the Home Packages. The fact that D1's name and particulars were filled in as the

Applicant was also readily admitted by D1 during cross-examination.

[30] Adding further to D1's involvement, privity and liability over the Arte Penang SOFs is *res ipsa* the sheer form and purpose of the Home Packages. The Home Packages were intended for 'Home' use, and not 'Corporate' use. Be that as may, it may D3 is a corporate entity, but it shall always remain an artificial entity. An artificial entity can own or even hold property but nevertheless, no artificial entity such as a company can be 'at home'. 'Home' per se by definition is not mere property or building, but the dwelling of a real household consisting of real people. Thus, the two Arte Penang SOFs can only refer to D1's home and personal dwelling. If the Defendants are vehemently relying on the terms of the contracts to lean on the Limited Liability Clause, then surely the Defendants must respect and honour the true intent, form, and purpose of the SOFs and Home Packages.

[31] Considering the 1st Defendant's and 3rd Defendant's own admission and the glaring particulars contained in the SOFs, it is overwhelmingly clear that D1 is personally liable and privy to all three accounts (inclusive of the 2 Arte Penang SOFs). Therefore, it

is this Court's decision that D1 and D3 shall be jointly and severally liable for all three accounts which D1 was the named Applicant (the Arte Ampang SOF and the 2 Arte Penang SOFs).

D. WHETHER THE LIMITED LIABILITY CLAUSE APPLIES

[32] It is pertinent that this Court highlights that the determination of the applicability of the impugned Limited Liability Clause here would be a two-tier exercise. The first tier of the exercise would be for this Court to first determine whether or not the impugned clause be applicable in the present case to govern the relationship of the parties.

[33] Nevertheless, whether or not the applicability (if indeed the impugned clause was found to be applicable) would in actual effect be limiting the 1st to 4th Defendants' liability, is totally a matter of construction and interpretation of the impugned clause itself. Thus, the 2nd tier of the exercise, is to determine the proper construction and interpretation of the impugned clause itself.

D(i) Whether the Limited Liability Clause operates to govern the relationship between the parties

[34] This impugned Limited Liability Clause is a clause which is contained in the same General Terms and Services **("GTS")** which all parties agreed, should be read together with the SOFs. Upon signing the SOFs, the parties also undersign a declaration that they shall be bound by the GTS.

[35] In fact, the Plaintiff's very basis of contractual breach for wrongfully splitting and sharing the Home Packages was premised on Clause 4.1 of the GTS. The GTS per se is not appended together with the SOF but the declaration under the SOFs refers to the GTS which can be found in a website address (which any customer can access and download from).

[36] In any case, both the Plaintiff and Defendants all vehemently place heavy reliance on the GTS to make their cases.

[37] Of course, in view of seeking due and proper damages for D1 to D4's admitted breach of contract, the Plaintiff strenuously

contended that the Limited Liability Clause does not apply to limit the quantum of damages the Defendants owe to the Plaintiff.

[38] In the alternative, the Plaintiff also submitted that even if the Limited Liability Clause applies, the proviso of, and proper interpretation of the Limited Liability Clause would still deem that the limitation stipulated does not apply against the Defendants' act of wrongfully sharing and splitting of the Home Packages. Former contention of which this Court is not too convinced with. On the contrary, the latter contention does indeed carry much merit. Nevertheless, at this juncture, this Court shall first determine whether or not the Limited Liability Clause applies or otherwise.

[39] The Defendants in contrast, vehemently contended that the Limited Liability Clause shall apply and quantum shall be assessed according to the set limitation imposed by the Limited Liability Clause.

[40] Clause 9.1 of the GTS **("impugned Clause")** is the contractual provision which the Plaintiff fashions as an exclusion or exemption clause. In contrast, the Defendant insists that the impugned Clause

is not an exclusion clause, but merely a limited liability clause set to limit the quantum that a party can be made liable to in case of a dispute. The impugned clause reads as follows:

"9.1 Direct Losses. Unless otherwise specified in the applicable Services Schedule, the liability of each party to the other for all damages, losses, costs, or expenses arising out of, in connection with or related to the Services Order, regardless of the legal principle that imposes such liability, whether in contract, equity, intended conduct, tort or otherwise, will be limited to and will not exceed, (in the aggregate for all claims, actions and causes of action of every kind and nature), an amount equal to the aggregate value of the monthly recurring charges payable to TIME (excluding any third party recurring charges) for a 12 month period. This limit does not apply to any Charges owed by the Customer to TIME, recovery of the Balance Charges and/or any third party recurring charges incurred in order to provide the Service"

[41] The Plaintiff's contentions in denying the applicability of the impugned Clause are *inter alia* the following:

a. The parties were not aware of or did not intend to be governed by the impugned clause at the time of the SOFs signing;

b. The GTS was dated after the SOF's inception and thus cannot be considered as part of the parties' bargain or contemplation at the time of signing;

c. The impugned Clause is an exclusion clause, which cannot apply when the breach is a fundamental breach which goes to the root of the contract;

d. The impugned Clause is an exclusion clause, which offends Section 29 of the Contracts Act 1950.

[42] This Court does not hesitate to dismiss the Plaintiff's contentions on the supposed 'parties' contemplation' and the issue regarding the date of the GTS. During trial, the learned counsel for the Plaintiff have tried to lead evidence (in cross-examination) that the Defendants allegedly have not contemplated or were not aware of (or have been communicated about) the impugned Clause before or at the time the SOFs were signed. Nonetheless, this Court cannot ignore the fact that the Plaintiff seeks to claim for breach of contract on the basis of a provision which was contained within the same GTS that also contains the impugned Clause.

[43] The Plaintiff's reliance on the Federal Court decision in **Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor [2015] 6 MLJ 310** is unfortunately misplaced. Indeed, and this Court agrees, as what the Federal Court has intimated, a contract is akin to a meeting of the minds, and the minds can only meet if the parties' intentions are 'communicated' between each other to be contemplated or intended upon within the parties' state of minds. But this decision does not necessarily entail to gloss over or negate the ***'non est factum'*** rule. It is equally an important rule of contract law that a person, even if blind, would be fully responsible to a contract which he had signed. He cannot feign ignorance that he had not read or kept himself abreast of the terms included in a contract he had signed. If this Court were to entertain such contention that the Defendants can only rely upon a specific portion of the GTS that the Defendants had read, then pandemonium would ensue as any and all contractual partisans would simply contend he had not 'read' or were not aware of provisions (that he signed) he so wishes to escape from.

[44] This Court can do no better than to refer to the **House of Lords** in the case of ***Saunders (Executrix of the estate of Rose Maud Gallie (deceased)) v Anglia Building Society (formerly***

Northampton Town and County Building Society) [1970] 3 All ER 961:

*"a man **cannot escape from the consequences**, as regards innocent third parties, **of signing a document** if, being a man of ordinary education and competence, **he chooses to sign it without informing himself of its purport and effect**.*

...

*... **a person who signs a document**, and parts with it so that it may come into other hands, **has a responsibility**, that of the normal man of prudence, **to take care what he signs**, which, **if neglected, prevents him from denying his liability under the document** according to its tenor."*

[45] The same principle was locally upheld in the case *of* ***Liow Ah Chew v Lim Hock Chai & Ors & Another Appeal [2010] 1 LNS 1865*** in which the Court had held the following:

*"As for the other documents, **apart from the plaintiff's oral assertions in court that she had signed blank papers, the plaintiff had not adduced any other evidence to support or***

corroborate her evidence. *This is crucial because the allegation of having signed blank papers formed the main plank of her claim of having been defrauded.* ***She must prove her assertion****. Furthermore, the law demands that a* ***person who signs a document and parts with it so that it may come into other hands has a responsibility that of a normal man of prudence to take care what he signs****. Additionally, the law says that the onus of proof rests upon him that signs to prove he acted carefully and not upon the 3rd party to prove the contrary,(see Saunders v. Angelia Building Society [1971] AC 1004 followed in Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 at 642).* ***This means that the plaintiff was expected to exercise the care that a normal person of prudence would when signing documents and was not expected to blindly sign blank pieces of paper."***

[46] The Plaintiff cannot detract from the fact that the SOFs clearly stipulate that the GTS shall be read together with the SOFs. The applicability of the GTS (and all of its terms within the GTS) has been 'communicated' to the Defendants, and the law shall presume that by reasonable prudence, that the Defendants have indeed read and understood the contents of the GTS. In any case, the Plaintiff itself relies heavily upon the GTS. So does the Defendants are

relying on the same GTS for the applicability of the impugned Clause. Therefore, it is only just that the entirety of the GTS be considered applicable and not any specific or limited portions of the same.

[47] As against the Plaintiff's contention that the GTS was dated after the signing of the SOFs, this Court also does not hesitate to find this contention is without any merit. This is simply for the fact that the Declaration under the GTS does not specifically refer to any dated GTS. The declaration only makes general reference to the GTS which could be downloaded from a website address or URL. The declaration in literal terms only entail that the terms and services are as per the GTS which can be downloaded from the site address (without any reservations or specific stipulation of time and date). Thus, the declaration itself by literal meaning, stipulates that the applicable terms of service are as per the GTS available to be downloaded at any point in time. If the Plaintiff intends that the GTS applicable can only refer to the GTS at the time of the SOFs signing, then the declaration should have been made clear of that intended effect. But there is no such stipulation in the present case. The declaration merely reads:

"Declaration and Terms & Conditions

I hereby declare that all of the information and documents provided are true and valid. I have read and understood the contents of this form, and agree to be bound by the Terms & Conditions as stated on www.time.com.my/terms-and-conditions which accompany the subscription of product(s) and/or service(s)"

[48] Thus by the literal construction of the declaration above, it is sufficiently clear that the real intention was that the applicable GTS is whatever GTS which was accessible and downloadable from the link, which can be updated (and be made applicable) at any time. The declaration by its own design allows the 'dynamic' applicability of the GTS at any given time.

[49] The more substantive contention by the Plaintiff against the applicability of the impugned Clause is the supposition that the impugned Clause is an exclusion clause that (i) offends Section 29 of the Contracts Act 1950 and (ii) cannot be applied as an exclusion clause cannot operate to gloss over a fundamental breach.

[50] This Court must first express that it is perplexing that the Plaintiff in its course of argument, had attempted to distinguish the present case from the landmark **Federal Court** decision in the case of ***CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ*** by conceding that the impugned Clause **only seeks to limit the quantum of damages** and is entirely different with the exclusion clause dealt with by the Federal Court in *Anthony Lawrence* (which instead seeks for total exclusion of rights to pursue action and finding of liability).

[51] This glaring concession by the Plaintiff is sufficiently telling that the impugned Clause is not an exclusion clause and merely a Limited Liability Clause. The impugned Clause does not seek to totally exclude right to action or suit and does not seek to exclude liability. Instead, the impugned Clause still allows a modicum of legal action and finding of liability although the quantum of damages is already pre-determined by a set limitation or calculation.

[52] In actuality, (apart from the principle of fundamental breach vehemently contended by the Plaintiff) it would have been sufficient for the Plaintiff to simply prove that the impugned Clause indeed was an exclusion clause which offends Section 29 of the Contracts

Act 1950. Nonetheless, fact of the matter is that it is simply untenable and unfeasible to contend that the impugned Clause was an exclusion clause. By its literal meaning, the impugned Clause does not prohibit commencement of action or suit to claim for damages or to find liability. By its literal meaning, the impugned Clause only seeks to 'limit' the quantum of damages to a set calculation. Therefore, it is sublimely clear that the impugned Clause is not an exclusion Clause and is not in any contravention against Section 29 of the Contracts Act 1950.

[53] Even the **Federal Court** in ***Anthony Lawrence*** held a similar reservation as to clauses which only seeks to limit or restrict, and not to exclude liability *in toto* or "absolute restrictions":

"We pause here to state our view on the proposition that courts must be careful not to apply this principle where there are limitations placed on the rights and remedies of the contracting parties. In our view, limitations placed or spelt out in an exclusion clause does not offend s 29 of our Contracts Act 1950 which speaks of ***absolute restriction****. Mere limitations and/or some restrictions added into an exclusion clause is insufficient to invoke s 29.*

[54] Thus, at the very least at this juncture, this Court finds that the impugned Clause is instead a Limited Liability Clause (and thus is applicable in the present case). Nonetheless, the interpretation and practical machination of the Limited Liability Clause does not automatically mean that the quantum of damages ought to be limited. Whether or not quantum ought to be limited shall be determined in the 2nd-tier exercise below.

D(ii) <u>Whether or not the proper interpretation and construction of the Limited Liability Clause shall limit the quantum of damages owed by D1 – D4 to the Plaintiff</u>

[55] As this Court briefly alluded above, although this Court is not in agreement with the Plaintiff in the former issue, this Court is in full agreement with the Plaintiff that even if the Limited Liability Clause applies, the proper construction of the Limited Liability Clause does not practically operate (in the present case) to limit the quantum of damages.

[56] Although this Court must highlight that this Court is aware that a portion of the Plaintiff's submission also contains a contention that the Limited Liability Clause could not have anticipated or covered

instances of fraud. (see ***CIMB Bank Bhd v Maybank Trustees Bhd and other appeals*** **[2014] 3 MLJ 169**) This Court indeed agrees that in essence "fraud unravels all". Of course, if a party has fraudulently flouted a contract, he cannot now seek protection from the same contract he had defrauded. Nonetheless, this Court's hands are tied to consider a plea of fraud simply for the fact that the Plaintiff has agreed to abandon its pleading of conspiracy to injure by unlawful means, and its pleading for tortious unlawful interference. It must be stressed that a case on fraud certainly weighs heavier and stricter (in its pleading) as compared to a plea of breach of contract. In fact, it is trite law that a cause of action for fraud must be specifically pleaded and even appropriately particularised. Thus, although the Defendants' act is to an extent akin to fraudulent conduct of stealing internet connectivity to be supplied to other unsubscribed Apartment units), this Court cannot go along this line of argument as there was no pleading of fraud or particulars of fraud pleaded by the Plaintiff (due to the mutual abandonment of other causes of action in view of the mutual agreement and finding of liability limited to breach of contract).

[57] Nonetheless, the Plaintiff's main contention on the proper construction of the Limited Liability Clause is on the 'business and

commercial sense approach' rule of interpreting and constructing a contractual provision. This rule of contractual interpretation was first heralded by the **House of Lords** in the hallowed case of ***Prenn v Simmonds [1971] 3 All ER 237***. The House of Lords propounded that:

a. Even at the face of a clear term of wording of a clause (and there are two competing interpretations of the same term or wording), **the Court must prefer the interpretation which makes "commercial good sense":**

> *"In the light of the aim of the agreement, and even on a purely linguistic construction, the references to 'profits' in paras (a) and (b) were to the consolidated profits of the group and not to the profits of the holding company, RTT Ltd, only; furthermore* ***this construction was in accordance with commercial good sense..."***

b. Even if the terms of a clause is clear, the Court can still look beyond mere linguistic considerations and look into the 'genesis' of the transaction (surrounding circumstances) as to conclude an interpretation which makes good business sense:

"In order for the agreement of 6 July 1960 to be understood, it must be placed in its context. ***The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.***

...

Surrounding circumstances may, he says, 'stamp upon a contract a popular or looser meaning' than the strict legal meaning, ***certainly when to follow the latter would make the transaction futile.***

[58] Succinctly, if there are two competing interpretation of the same term in a contract, the Court cannot subscribe to the interpretation that is counterintuitive to the business sense of the transaction, or the interpretation which would make the transaction futile. Instead, the Court ought to prefer the other interpretation which makes more business sense in line with the commerce and purpose of the transaction.

[59] The **Federal Court** in ***Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770*** has upheld the same sentiment:

*"**In this case, we would also assert that no businessman, who had not taken leave of his senses, would intentionally enter into an agreement which exposed him to unfair trading** and the kind which is actionable in a passing off action. We would also adopt the same reasoning to say that we should not manipulate the contractual word 'competition' used in cl 5 to say that the appellants cannot be restrained from unfair competition. We would also quote and adopt the following words of Lord Diplock in yet another recent case of Antaios Compania Naviera SA v Salen Rederierna AB:11*

***... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense**."*

[60] More recently, the **Federal Court** has restated the same principle in the case of ***SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464*** for the Courts to prefer the interpretation that makes business common sense in cases where there are two or more competing interpretations:

"Thus the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of Arnold v Britton), where His Lordship accepted the unitary process of construction in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 para 21 that:

... if there are two possible constructions, ***the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other****.*

[61] This Court also finds great wisdom in the **Court of Appeal's** decision in ***Bon Chong Hing & Anor v Gama Trading Company (Hong Kong) Ltd [2011] 6 CLJ 493:***

*"**[35]** From all these authorities, the following principles can be discerned. That the task of interpreting a contract requires an objective approach. And the court must determine the objective aim or purpose of the transaction and this is usually done by taking into account the factual matrix that forms the background to the contract. At the end of the day, the correct test to apply is the test of a reasonable man and this is said to be the stamp of an objective*

approach as opposed to the subjective view of a party to the contract. ***Of course, emphasis is always placed on the words used in the contract but where the words used lead to a conclusion that defies business logic, then the contract must be construed in such a way as to make it conform to business logic.***

[62] Thus applying the principles above, this Court first ponders, what is the genesis, and true commercial purpose of the SOFs and Home Packages? The true commercial purpose of the SOFs and Home Packages are that:

a. The Home Package internet was supposed to be used for **Home or Personal use only**; and

b. The Home Package internet was **not supposed to be abused, shared, and split to other unlisted Apartment units** in the **operation of a commerce** or business of AirBnB.

[63] The above are the true nature of the transaction appropriately understood and agreed upon by all parties. Now, bearing the 'genesis' above, this Court proceeds to determine the logical and

appropriate interpretation of the final limb (and proviso) of the Limited Liability Clause:

*"**This limit does not apply** to any **Charges owed by the Customer** to TIME, recovery of the Balance Charges and/or any third party recurring charges incurred in order to provide the Service"*

[64] This is the final limb and proviso that the Defendants have not appropriately and frankly addressed. In actuality, the Limited Liability Clause is not absolute, and instead is a conditional limitation. As it stands, the limitation does not apply over "Charges owed" by the Defendants to the Plaintiff for services which have been rendered to the Defendants.

[65] Similarly, this Court certainly does not appreciate the 2nd and 4th Defendants' selective reading of the Service Schedule C and attempted to furnish an unpleaded contention on another Limited Liability Clause in Clause 11.6 of Service Schedule C (what more an improper reading of the same). This Court shall deal with this improper defence before continuing to determine the appropriate interpretation of the impugned Clause/Limited Liability Clause.

[66] It is overwhelmingly obvious that D2 and D4's reliance on Clause 11.6 of Service Schedule C is entirely unpleaded (and it is utterly prejudicial against the Plaintiff that it is forced to answer this unpleaded defence of D2 and D4 at this late stage after trial). Paragraphs 25 and 26 of D2 and D4's Statement of Defence had not at all pleaded any reliance on clause 11.6 of Service Schedule C (in setting up their defence on the limitation of liability). This Court accordingly shall dismiss this contention *in limine*.

[67] This Court can do no better than to refer to the wisdom of the **Federal Court** in the case of **RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188**

*"... **It is a cardinal rule in civil litigation that the parties must abide by their pleadings**. This is trite as can be seen from the decision of this court in Menah Sulong v Lim Soo & Anor [1983] 1 CLJ 26 where Ong Hock Thye CJ said:*

> *I think it is necessary in this case to emphasize once again that the courts should give their decision in strict compliance with the pleadings...*

...

On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence *under the guise of doing justice for the parties lest it be accused of being biased towards one against the other.* ***The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place.*** *Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts."*

(see also ***Fanuc Sdn Bhd v Adenland (Cheras) Sdn Bhd & Anor [2022] 1 MLJ 525 ; Ketua Pengarah Jabatan Kerja Raya v Strongkota Development Sdn Bhd and another Appeal [2016] 6 MLJ 512***)

[68] Even if some credence was paid to this unpleaded defence, it is sublimely clear that D2 and D4 had proffered an incomplete reading of the Service Schedule C. It is pertinent that clause 11.6 is within the same heading which contains clause 11.2. Clause 11.6 only mentions of the RM 500.00 early termination fee as "compensation"

outside of the charges which the Defendants owe to the Plaintiff. Similar to the GTS, the Plaintiff under Clause 11.2 of the Service Schedule C **is still not precluded from claiming for "charges" accrued from the service already provided to the Defendant.**

[69] Clause 11.6 of Service Schedule C merely reads:

*"11.6 The Service Termination Fee is the only **compensation** that we may recover from you for a breach of the General Terms or this Service Schedule **unless otherwise stated herein"***

[70] And indeed Clause 11.2 of the same Service Schedule C stated "otherwise" regarding "charges in arrears and any Charges":

11. TERMINATION

11.1 For the purposes of this Service, Clause 8 of the General Terms are excluded and shall not be applicable.

11.2 You may terminate your subscription of the Service at any time even during the Initial Service Term by giving us 30 days prior notice, and if the termination is :

(a) due to our breach of the terms in this Service Schedule or the General Terms or due to a Force Majeure Event, then you do not need to pay us the Service Termination Fee NOR the Balance Charges; or

(b) not due to our breach of the terms in this Service Schedule or the General Terms, then you are to pay us the Service Termination Fee only;

and in either case, (i) you will pay us any Charges in arrears and any Charges incurred from the last billing cycle to the date of termination, and (ii) the termination is effective on the expiry of the 30 day notice period.

[71] Thus, again it all falls back to the proper interpretation of what "Charges" actually entail in both the GTS and even the Service

Schedule C. The 1st to 4th Defendants of course has proffered an absurd and constricted meaning of "Charges":

Defendants' Absurd interpretation:

Charges only refer to the 12 months' subscription charges for the service for the singular internet line under the SOF.

[72] The absurdity of this interpretation is blatant. By the Defendants' interpretation, the Defendant is practically seeking to merely pay the same exact amount for 12 months of services they are already owing the Plaintiff under the SOFs as though there was never any breach (unlawful sharing and splitting of the Home Packages) in the first place. The effect of this interpretation would make the entire business and transaction be commercially futile and pointless as it would leave the Defendants unscathed from their unlawful and wrongful sharing and splitting of the internet connection, while leaving the Plaintiff totally vulnerable to blatant abuse and misuse of their Home Internet services.

[73] The very root of the Plaintiff's Home Packages is so that the internet is strictly used for personal or home use, and not to be wrongfully shared or split for the operation of a business. It would not be in line with any business sense for the Defendants to insist that the

impugned Clause would not have any deterrent effect, and instead would be encouraging wrongful sharing or splitting of the Home Packages. Borrowing the words of the **Federal Court** in **Seet Chuan Seng,** the Plaintiff (as a reasonable man) would never take leave of its senses and agree to such a term which would leave their business vulnerable to unfair trading and wrongful sharing or splitting of their internet services.

[74] On the contrary, this Court is in full agreement of the Plaintiff's far more reasonable, logical, and commercially sensible interpretation of "Charges":

Plaintiff's commercially sensible interpretation:

Charges refer to the actual internet service and connectivity which the Plaintiff had provided to the Defendant inclusive of the line at the designated Apartment unit under the SOFs as well as all the other unlisted Apartment units which the Defendants have wrongfully split and shared the Home Packages with.

[75] The Plaintiff's construction and interpretation of the Limited Liability Clause is infinitely more reasonable and in line with the genesis and true commercial purpose of the transaction (for the Home Packages

to not be abused, shared, and split). The Defendants simply cannot expect this Court to ascribe to an interpretation which would encourage wrongful breaches and would leave contractual delinquents unscathed.

[76] In any case, "Charges" shall mean and refer to all of the internet connectivity which the Plaintiff have provided and supplied to the Defendants, knowingly (under the SOFs), and unknowingly (from the Defendants wrongful sharing and splitting of the Home Packages). And since "Charges" is exactly the exception to the limitation under the same Limited Liability Clause, then, by the operation of the proviso itself, the 12 months' liability limitation does not apply as against the nature of the Defendants' indebtedness owed to the Plaintiff. Thus, the appropriate quantum to be calculated shall be determined without the limitation stipulated under the Limited Liability Clause. Thereto, although by Contract per se, the Limited Liability Clause is indeed within the parties' bargain and terms, the limitation still does not apply by the interpretation and practical machination of the same proviso to the Limited Liability Clause.

E. ASSESSMENT OF DAMAGES

[77] If D1 to D4 had been fully frank and honest with this Court on the actual number of units they operate and have split the Home Packages with, this Court would have had the necessary 'precise' information to calculate the appropriate quantum of damages. Considering "Damages" under the GTS and the Service Schedule C refers to all of the internet connectivity which the Plaintiff have provided and supplied to the Defendants, knowingly (under the SOFs), and unknowingly (from the Defendants wrongful sharing and splitting of the Home Packages), then the quantum of damages can simply be calculated *vide* this formula:

Appropriate package price (RM) x Length (years) of subscription x Actual Number of Apartment units operated by Defendants = Services Rendered or Charges owed

[78] Nonetheless, this Court must highlight that neither the Defendants nor the Plaintiff has furnished this Court with sufficiently cohesive and precise information so as to put the above formula into application.

E(i) <u>The unsubstantiated number of Apartment Units that have shared the wrongfully split Home Packages</u>

[79] It stands resolute that any due diligence and effort to determine the appropriate package rate or price, would entirely go to waste if the Defendants (D1 – D4) do not furnish into Court any cogent evidence to limit the number of Apartment Units they actually operate and wrongfully shared the Home Packages with. It is a grave misconception by the Defendants that they are somehow excused or absolved from furnishing any form of evidence to the number of Apartment units (merely because that the burden of proof to prove the Plaintiff's claim solely lies on the Plaintiff).

[80] On the contrary, the 'legal burden of proof' for the Defendants to prove their case (to limit their liability as the Defendants have vehemently contended) shall always lie on the Defendants themselves. The Defendants cannot wait or expect the Plaintiff to prove the precise number of Apartment Units the Defendants operated, to see if the burden of proof 'shifts' to the Defendants.

[81] The legal burden of proof always lies on a party who intends to prove or posit a fact (and this legal burden never shifts). If the Defendants

intend that the quantum should be limited to a set or precise number of Apartment units, then the legal burden of proof always lie on the Defendants themselves to adduce evidence to prove the precise number of Apartment units the Defendants actually operated.

[82] The **Federal Court** has recently shed further light to demystify this rampant confusion in the case of ***Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697*:**

'There is an essential distinction between burden of proof and onus of proof, ***burden of proof lies upon the person who has to prove a fact and IT NEVER SHIFTS****, but the onus of proof shifts'.* ***The 'burden of proof' in s 101*** *is the burden to establish a case* ***which rests throughout on the party who asserts the affirmative of the issue****... In some jurisdictions,* ***the s 101'burden of proof' is labelled 'legal burden'*** *while the s 102 burden of proof' is referred to as 'evidential burden'... In Ranchhodbhai Somabhai And Anr v Babubhai Bhailalbhai And Ors AIR 1982 Guj 308, P Desai and S Majmudar thus* ***illustrated the 'burden of proof to establish the case which NEVER SHIFTS"***

[83] This is consistent with **Section 101 of the Evidence Act** which reads

"Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist"

[84] Thus, since the Defendants are adamant to limit their liability based on the number of units they operate (or shared the Home Packages with), it is then the Defendants' legal burden to prove the precise and exact number of units they actually operate and have wrongfully split the Home Packages with. Unfortunately, the testimonies of the 1st and 2nd Defendants during trial had only been evasive, uncorroborated, and even inconsistent.

[85] Specifically regarding the 2nd Defendant (testifying as SD-1), it is only vaguely and baselessly contended that D2 and D4 only operated 10 units in Arte Ampang. D2 in fact admitted that the actual number of units he operated can actually be proven with the relevant documents, although he also admitted that he had not adduced any of these documents in Court and would require time to search for these alleged documents. So D2 first testified that he had personal

knowledge on the number of units and the relevant documents to prove the same (although admitting that he had not produced any of these alleged documents in Court):

FJL	Alright. The agreements with the unit owners and proof of payment to the unit owners, these documents will show how many units you were operating, isn't it?
LEE	Yes.
FJL	Alright. But you've produced none of these?
LEE	Because there is a different number of unit in different time period. So, we are very difficult to prove that. If the rental is not good, so the owner will take control, will take back, the owner take control back the unit.
FJL	Alright.
YA	You does not answer the question.
FJL	Yes.

[86] D2's **("LEE")** testimony above clearly admits that there were documents which could prove the precise number of Apartment units that D2 and D4 collectively operate. D2 further admitted that although having knowledge of these material documents, D2 had somehow not furnished these critical documents into Court to prove D2 and D4's case or Defence.

[87] However, further into the cross-examination, D2 suddenly denied having any personal knowledge on the actual number of Apartment Units and instead insisted that he only goes by what was informed to him by his "staff" (who was not called by the D2 or D4 as witness).

YA	The staff told me. You don't perhaps the 10 sharing units, the 10 units sharing lines, your staff told you.
LEE	Yes.
YA	That, you do not know how many units you're managing also.
LEE	I don't know.
YA	But you, the sharing, but you don't have documents to show here, I just want to find out that whether in these documents, is there any document to show that, you know, how many units are you managing, how many units are short-term, how many units are long-term? No documents in Court?
LEE	Should –
YA	No? Nothing to show us lah. Nothing to show, all nothing to show. Ok. You have no documents whatsoever about managing the Arte unit?
LEE	No.
YA	No document at all? Ok. Alright.

[88] D2 even went as far to admit in his testimony that (apart from not calling the alleged "staff" as witness) D2 had also failed to furnish any documents to support the staff's alleged information.

[89] Thus, as far as D2 and D4's precise number of Apartment units, D2 and D4 have not at all discharged their legal burden of proof to limit their liability.

[90] Similarly, D1 and D3 had only vaguely and baselessly contended that they operated only "17 to 20 units" in Arte Penang and 10 units in Arte Ampang. Mirroring D2 and D4's failure to discharge their legal burden of proof, D1 **("LOW")** and D3 had also admitted that there exists documents in their possession which could prove the precise number of Apartment units they operated but also admitted to the fact that none of these material evidence were tendered into Court:

FJL	Ok, so at that time you would have had records of the units that were being used, am I right?
LOW	Correct.

...

FJL	And so I would be correct to say that in this case, in this Court you have not produced any documents on how many units were being used at that time?
LOW	Correct.

LOW	What kind of document that I can show how many unit?
FJL	Proof of payment to the unit owners. Agreements, written agreements, where you have written agreements,
LOW	Okay.
FJL	Where you incur cost to clean.
LOW	Okay.
FJL	You have none of those documents here to support your answer in Question 6, isn't it?
LOW	No.

[91] The above testimonies considered, it is sublimely apparent that neither of D1 to D4 was ever frank or was ever honest to this Court on the precise number of the Apartment units they actually operated and have wrongfully shared the Home Packages with. It is certainly vexing that the Defendants during oral submissions have suggested that calculations can be based on the total number Apartment units which wrongfully have split the Home Packages, but at the same time adopted an evasive attitude when testifying on the actual number of the Apartment units the Defendants operated.

[92] For a Defence that is staunchly attempting to limit the quantum of damages, it is utterly perplexing that the Defendants would not think it be crucial to tender documentary evidence on the precise number of Apartment units they operated (especially so when the trial is limited to assessment of quantum of damages). Thus, this Court also agrees with the Plaintiff that an adverse inference ought to be drawn against D1 to D4 under **Section 114(g) of the Evidence Act 1950**.

[93] The Defendants' evasive testimony and glaring lack of documentary evidence certainly has impaired this Court's ability to use the formula above. The Defendants cannot simply expect this Court to take their word or say-so and just use whatever number of Apartment units they alleged to operate as the final multiplier in the formula. That would be far too presumptuous of this Court and would gravely prejudice the Plaintiff.

E(ii) The Appropriate Package for the Defendants' Business Model

[94] During trial, it came to light that during the time of the Defendants' subscription of the Plaintiff's Home Packages, there were two other internet subscription packages that the Plaintiff also offers:

a. FTTO Business Package (RM398/month); and

b. Custom Enterprise Package (Enterprise Package).

[95] From the outset, the rate paid for the Home Packages cannot be the Appropriate Package as the true form and function of a Home Package is for personal and home use only.

[96] The learned counsels for D1 to D4 then vehemently argued that the Appropriate Package should be assumed to be the FTTO Business Package. The learned counsels went as far as to suggest that the Defendants could have subscribed multiple FTTO Business Packages for each of the Apartment Units that they operate. But to this Court's chagrin, again this sheer suggestion is yet another attempt to wrongfully abuse the Plaintiff's internet services. It is yet again another suggestion to wrongfully 'stretch' the FTTO Business Package beyond the Business Package's form and function. As had

been explained by the Plaintiff's witness, one Norhayati binti Shaari (SP-6) the FTTO Business Package cannot be subscribed multiple times by one account (or business or individual) (to accommodate a short term rental or hospitality business model) as the form and function of the FTTO Business Package does not cover a business model of an AirBnB or even a hotel (where there is only one account holder i.e, the singular business managing multiple Apartment units or Hotel rooms):

NOR We would direct them to get the enterprise package because the requirement is fit for a, you know, they are like hotel users as well as we have also this service apartment users.

FJL Ok, so specifically the RM398 rate would it be applicable for a Airbnb?

NOR No.

FJL Ok. And next question on this issue as well, for the LTTO, sorry HTT, FTTO and FTTH packages, are the lines that are provided under those packages, can they be shared or split amongst multiple users?

NOR No, we don't allow.

FJL Then, can I take you to Bundle B1, the thick bundle, page 57?

YA Just to confirm the answer because the RM398 package will not be applicable to a bnb.

FJL Yes, Airbnb.

YA It's not applicable?

NOR Not applicable.

...

NOR Ok. Because bnb because we, Yang Arif, we classify them under hospitality, hotels.

YA Hospitality, ok.

[97] The FTTO Business Package cannot be 'masked' as a split for one singular business. It does not make sense that say, **10 BUSINESS** packages be subscribed by one business for **10 RESIDENTIAL** units. And the Plaintiff does not offer such use or multiple subscription (indirect split) of the FTTO Business Package.

[98] Just because it is called a 'business package' does not automatically mean that the FTTO Business Package is or should be made available for all business models. And this Court agrees. It does not make sense for the Defendants to abuse the business package by repeatedly subscribing individual business packages as many as the Apartment units the Defendants are operating. It still does not detract from the fact that there is only **ONE BUSINESS** managing Multiple units of residential apartments. It is not that each of the residential apartments represents individual businesses to be entitled to subscribe to the FTTO Business Package.

[99] Besides, since the Defendants were not candid to appropriately share with this Court the precise number of Apartment units they operate, thus even if this Court were to agree that the Defendants can subscribe to multiple FTTO Business Packages, this Court still cannot use the formula above as this Court still cannot multiply the

FTTO Business Package to the precise number of Apartment Units that the Defendants allegedly operated.

[100] Thus, the only package that the Plaintiff actually offers that would be suitable for the Defendants' AirBnB or hospitality model, would be the Custom Enterprise Package. As SP-6 has explained, for hotels, apartments or any business models in hospitality, the customer would be referred to the Custom Enterprise Package. The reason that the Enterprise Package is suitable is because the Enterprise Package shall already anticipate and factor into the splitting or sharing of one Enterprise Package with all of a Hotelier's rooms or an AirBnB Operator's Apartment units. The Customer shall sit down with the Enterprise team and appropriately tailor the package according to the customer's number of rooms or even apartment units. As far as the parties are concerned, the Enterprise Package is the only package that readily anticipates and allows sharing and splitting of internet lines.

[101] Thus, (considering that the Enterprise Package would have allowed the sharing or splitting of the internet connections) if the Enterprise Package be made the baseline to assess the quantum, then the

precise number of the Defendants' Apartment units is no longer necessary to be determined.

[102] Therefore, considering the glaring absence of precise evidence as to the actual total number of the Defendants' Apartment units, this Court has no choice but to abandon the formula, and do the best this Court can utilise other available evidence tendered into Court.

[103] This Court finds great wisdom in the **Federal Court's** decision in ***Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] 3 MLJ 141:**

*"**However, the fact that assessment is difficult due to the nature of the damage is no reason of awarding no damages or nominal damages.** In Biggin & Co Ld and another v Permanite, Ld, Berry Wiggins & Co Ld (third parties) [1951] 1 KB 422, in action against a seller for delivering defective goods the court held that claimant was entitled to claim damages in respect of the diminution in the market value of the goods. It was also held that where the market value was the measure of damages, **the absence of precise evidence of it was no ground for awarding nominal damages only. The court must determine the damages as best as it could.***

...

Where precise evidence is available, as for example if there is a special device to measure the loss of revenue due to the tampering of electricity supply, naturally the court expects to have it, ***but where it is not the court must do the best it can.***

[104] This Court also refers to the **Court of Appeal's** decision in ***Ng Hong Chai v JB Securities [2009] 2 MLJ 250***:

*"**[113]** **It is not easy to assess damages. The difficulty, however, cannot disentitle the plaintiff from pursuing his claim under this head. The court will always assess damages as best as it can on the available evidence** (Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (A Firm) [1979] AC 91 at p 106 (PC).*

***[114]** The sole object of awarding damages is to compensate the plaintiff for the loss he incurs as a result of the defaults of the defendant. Damages too is awarded as a mark of disdain against the defendant who has inflicted that loss onto the plaintiff.*

[105] Thus, the only evidence available to this Court were merely the Appropriate Package (Enterprise Package) and the term (in years)

of the Defendants' subscription with the Plaintiff. As far as D1 and D3 is concerned, it was never pleaded or contended that they have terminated their subscription earlier than the 24 months' service term under the SOFs. Thus, the subscription term for D1 and D3 shall be the full 24 months (2 years). As against D2 and D4, it is admitted in evidence that D2 and D4 had indeed paid an early termination fee and had only subscribed to the Plaintiff's Home Package for 12 months. Therefore, the subscription term for D2 and D4 shall be 12 months (1 year).

[106] Based on the Plaintiff's quotation, the Enterprise Package would have costed all Defendants between RM450,000.00 to RM515,000.00 per year. Nonetheless, to do appropriate justice, this Court must make the appropriate deductions considering it is also in evidence that the Enterprise Package comes with ancillary features, solutions or 'bells and whistles' beyond the simple internet connection that the Defendants intended to subscribe. This Court is also aware that the Enterprise Package price is also the package subscribed by bigger hoteliers (which the Defendants are not).

[107] Thereto, considering the Defendants' lack of candidness to share with this Court the precise amount of Apartment units they operate,

as well as the fact that the Enterprise Package is the only package (that the Plaintiff offers) which suits the Defendants' AirbnB Business model at the time, this Court has no other choice but to use the Enterprise Package as the appropriate base price. Nonetheless, considering the factors for deduction alluded to above, this Court shall take the lower range annual subscription fee (RM450,000.00) and halve the same to be **RM225,000.00/year ("Base Price")**

[108] Therefore, as against D1 and D3, the final quantum of damages they owe to the Plaintiff are as follows:

1st and 3rd Defendants		
Account(s)	**Subscription Term**	**Final Quantum (Base price (RM225,000.00) x Subscription Term**
Arte Ampang	2 years	RM450,000.00
Arte Penang	2 years	RM450,000.00
TOTAL QUANTUM		RM900.000.00

[109] Meanwhile, as against D2 and D4, the final quantum of damages they owe against the Plaintiff are as follows:

2nd and 4th Defendants		
Account(s)	**Subscription Term**	**Final Quantum (Base price (RM225,000.00) x Subscription Term**
Arte Ampang	1 year	RM225,000.00
TOTAL QUANTUM		RM225.000.00

F. THIS COURT'S DECISION AFTER FULL TRIAL

[110] Thus, it is this Court's decision, on the balance of probabilities, that the Plaintiff's claim against D1, D2, D3, and D4 be allowed.

[111] Upon this Court's intricate and critical assessment, this Court hereby finds that Low Wey Heng (1st Defendant) and LOF Management Sdn Bhd (3rd Defendant) are jointly and severally liable to pay the Plaintiff RM900,000.00 in damages. Meanwhile, this Court also finds that Lee Peng Hong (2nd Defendant) and Afflexia Sdn Bhd (4th Defendant) are jointly and severally liable to pay the Plaintiff RM225,000.00 in damages.

[112] This Court also orders that the 1st Defendant an d the 3rd Defendant are jointly and severally liable to pay costs of RM35,000.00 to the

Plaintiff, while the 2nd Defendant and the 4th Defendant are jointly and severally liable to pay costs of RM20,000.00 to the Plaintiff.

(AZIMAH BINTI OMAR)

Judge

High Court of Kuala Lumpur

Dated 29 June 2022

For the Plaintiff	-	Messrs Gan Partnership Foo Joon Liang, Tasha Lim Yi Chien and Tay Lay Keng (Pupils in Chambers)
For 1st Defendant and 3rd Defendant	-	Messrs Y.C. Wong Elson Beh Hong Shien and Lau Jun Yi

For 2nd and 4th Defendant - Messrs Zaid Ibrahim & Co.

Su Siew Ling, Stanley Lee Wai Jin and Kimberly Chen