

**DALAM MAHKAMAH TINGGI D1 KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
(BAHAGIAN SIVIL)**

GUAMAN SIVIL NO: S6-22-1203-2005

ANTARA

KONSORTIUM PEMBORONG BERAS

MELAYU[KELANTAN] SDN BHD

(a minority shareholder suing on

behalf of itself and all other

shareholders of

FORMULA TIMUR SDN BHD)

.....PLAINTIF

DAN

1.PADIBERAS NASIONAL BERHAD.

2.FORMULA TIMUR SDN BHD

.....DEFENDAN

GROUND OF JUDGMENT

This is the hearing of Enclosure 31 i.e. the appeal of the Defendant against the decision of the SAR in dismissing the application of the Defendant to strike out the Plaintiff's Writ and Statement of Claim I Enclosure 21.

After reading through the written submissions, I dismissed the Defendants' appeal with costs. Dissatisfied with my decision the Defendant appealed to the Court of Appeal. Herein below are my grounds.

THE COURT'S FINDINGS

For clarity it is important to look at the structure of the 2nd Defendant. This was explained in the 1st Defendant's submission. The 2nd Defendant was formed pursuant to a Joint Venture Agreement dated 9.11.2001 ("the JVA") entered into between:

- the Plaintiff;
- the 1st Defendant ;and
- Konsortium Perdagangan Pantai Timur Sdn Bhd ("KPPT") .

Objective of formation of 2nd Defendant:

Selling and/or distributing rice.

Pursuant to Clause 2 of the JVA, the 2nd Defendant is to carry its business with the purpose of executing the joint venture between the parties to the JV A.

Percentage of shareholding of 2nd Defendant:

- The 1st Defendant – 40.00005%
- The Plaintiff – 40%
- KPPT – 19.99995%

At present :

- 1st Defendant holds 800,001 ordinary shares of RM 1.00 each of the 2nd Defendant (i.e. 40.00005%);
- the Plaintiff holds 800,000 ordinary shares of RM 1.00 each of the 2nd Defendant (i.e. 40%); and
- KPPT holds 399,999 ordinary shares of RM 1.00 each of the 2nd Defendant (i.e. 19.99995%).

The Board of Directors for the 2nd Defendant consist of 6 directors, of which:

- 3 directors are from the 1st Defendant;
- 2 directors are from the Plaintiff; and
- 1 director is from KPPT.

The chairman of the Board of Directors for the 2nd Defendant is to be appointed by KPPT.

Enclosure 21 was filed on the basis that the Plaintiffs Statement of Claim disclosed no cause of action capable in law of supporting a derivative action. The grounds stated by the defendant are as follows:

- a) The Plaintiff had failed to first bring its' complaints up and be put to vote at the board level of the 2nd Defendant before filing the derivative action;
- b) Though the Plaintiff alleges that KPPT is likely to side with the 1st Defendant thereby forming a majority, KPPT is not even named as a party to the derivative action; and
- c) The cause of action is for breach of the JVA, but the 2nd Defendant is not even a party to the JVA and therefore has no right or cause of action pursuant to the JVA. The said right belongs to the Plaintiff.

The Courts Findings

Since the Defendant's ground of striking out is based on derivative action, therefore the issue to be determined is whether the Plaintiff's Statement of Claim herein discloses a cause of action based on a derivative action.

For the Plaintiff to show that his action falls under the category of a derivative action, the Plaintiff would have to show to the court that its claim falls under one of the exception in ***Foss v Harbottle*** [1843]67 ER 189. These exceptions had been reiterated in our local case of ***Tan Guan Eng & Anor v Ng Kweng Hee*** [1992] 1 MLJ 487 at page 502 which states:

- (1) Ultra vires acts: ‘in cases where the acts complained of are wholly ultra vires the company or association the rule has no application because there is no question of the transaction being confirmed by any majority’.
- (2) Fraud on the minority: ‘where what has been done amounts to what is generally called in these cases as a fraud on the minority and the wrongdoers are themselves in control of the company) the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders’ action on behalf of themselves and all others’ .
- (3) Special majorities: ‘an individual member is not prevented from suing if the matter ... [is] one which could validly be done or sanctioned, not by a simple majority of the members ... but only by some special majority’.
- (4) Personal rights: Where ‘the personal and individual rights of members of [the plaintiffs] have been invaded’, the rule ‘has no application at all.

- (5) When the justice of the case requires it, though this has been doubted by the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries (No 2)*.”

A reading of the Plaintiff's Statement of Claim, with particular reference to paragraph 10.4 and 10.5, it is clear that the Plaintiff's claim is based on the exception of fraud on the minority in this action. The Plaintiff had pleaded that the action of the 1st Defendant was in contravention of clause 12, 13, 16 of the JVA between the Plaintiff, 1st Defendant and KPPT (shareholders of 2nd Defendant not to permit competition with the 2nd Defendant's business- refer to paragraph 5.2 of the Statement of Claim). Some of the purported contraventions alleged by the Plaintiff are:

- a) Stoppage of supply of rice by the 1st Defendant through its subsidiary Edaran Beras Nasional Sdn Bhd to 2nd Defendant;
- b) Decision of 2nd Defendant to release Australia White rice (Stale and in bad state) was sold to 2nd Defendant through Edaran;
- c) Introduction of market intervention programme i.e. the sale of local rice to the 2nd Defendant at a higher price through the 1st Defendant's subsidiary;
- d) The taking over of the Company Management through the formation of the Exeo was done through majority votes at the Board Meeting on 24 September 2004. The 1st Defendant is the Chairman of the Exco. All powers were transferred to the Exco which manages the 2nd Defendant. This was done in

contravention of Clause 6.9, 7.5 and 8 of the JVA. This is an act of fraud upon the minority shareholders. The 2nd Defendant was already in ruin and was not functioning at all.

As for the contention of the defendant that the Plaintiffs Statement of Claim disclosed no cause of action capable in law of supporting a derivative action as stated in his 3 points.

On the first point, there is no requirement for the Plaintiff to bring its complaints up at the Board level of the 2nd Defendant before filing this derivative action. It is sufficient for the Plaintiff to plead as in paragraph 4.2 of the Statement of Claim which states:

“.....The 3rd Shareholder of the Company is Konsortium Perdagangan Pantai Timur Sdn Bhd [No. 5610860-M] [the 3rd Shareholder] which may or may not be neutral but is likely to side the 1st Defendant. As such the Plaintiff was compelled to present this action on behalf of the Company which could not institute this action due to the 1st Defendant having de facto or de jure control of the Company”

The case of ***Wellersteiner v Moir*** (No 2) [1975] QB 373 illustrates the point that the law recognizes the situation that majority shareholders who have control of a company would not authorized the company to maintain an action against them. Thus evidence would have to be led at a trial for the Plaintiff to show that this is so.

Further there is no requirement for the Plaintiff to plead expressly that KPPT would team up with the 1st Defendant at the Board level to prevent the Plaintiff from seeking redress as paragraph 4.2 in the Statement of Claim clearly had pleaded the 1st defendant having control over the 2nd Defendant. Paragraph 10.22 and 10.23 of the Statement of Claim also states that the 1st Defendant had passed a Director's resolution dated 13.7.2005 under Regulation 90 of the Companies Act 1965 where the 1st Defendant and KPPT had signed except for the Plaintiff. Pursuant to this resolution it was resolved to disposed off the assets and winding up the 2nd Defendant. Therefore with the alliance of the 1st Defendant and KPPT that would be a majority in the 2nd Defendant.

It is clear that the entire cause of action as stated in the Plaintiff's claim is bona fide for the benefit of the Second Defendant. Refer to paragraph 4.2 of the Statement of Claim.

Therefore, based on the above stated reasons the Plaintiff has shown that it has a reasonable derivative cause of action against the Defendants. The appeal of the defendants in Enclosure 31 is hereby dismissed with costs and the decision of the SAR is hereby affirmed.

t.t. Datin Zabariah Mohd Yusof

Tarikh : 5.6.2009

Bagi pihak Plaintiff : Encik Clinton Gomez

Tetuan Rajinder Singh Veriah & Co

Bagi Defendan-Defendan : Encik Amir Salleh

Tetuan Kadir, Andri & Partners.