

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

ORIGINATING SUMMONS NO. S5-24-2066-2007

In the matter of Melawati Recreation Berhad (Company No. 123368-U) (in Voluntary liquidation)

And

In the matter of Trust Deeds between Melawati Recreation Berhad and Mayban Trustees Berhad (in voluntary Liquidation) and its people of that time and in future being members of Kelab Century Paradise dated 2.7 .1993, 27.2.1995, 27.10.1995, 4.5.1995, 8.6.2000, 17.7.2001 and 8.5.2002

And

In the matter of the license agreement between Melawati Recreation Berhad and the Members executed on the said dates

And

In the matter of Section 269, 270 and 274 of the Companies Act

And

n the matter of Section 41 of the Specific Relief Act 1950

And

In the matter of Order 15 rule 16 and Order 92 of the Rules of the High Court 1980

BETWEEN

1. **NG SHU TSUNG (720702-08-5949)**
2. **RITA BIULA A/P A. SONNY CORRAY (570212-10-5758)**
3. **MOHAN A/L SATKUNASINGAM (620609-05-5317)PLAINTIFFS**

AND

1. **JEYARAJ A/L RATNASWAMY**
2. **MUSTAPHA BIN MOHAMED**
3. **KKLUB BERHAD (748835-W)..... DEFENDANTS**

GROUND OF JUDGMENT

Enclosure 10 is the 3rd Defendant's application for an order to strike out the Originating Summons ('OS') dated 5.9.2007 filed herein pursuant to Order 18 rule 19 (1) (a), (b) and (c) of the Rules of the High Court, 1980 ("RHC).

Enclosure 22 is the 1st and 2nd Defendants application for an order to strike out the Originating Summons ('OS') dated 5.9.2007 pursuant to Order 18 rule 19 (1) (a), (b) and (d) of the Rules of the High Court, 1980 ("RHC") .

The orders that are sought under the O/S with respect to the 1st and 2nd Defendants are:

- a) A declaratory order that the 1st and 2nd Defendants as liquidators of Melawati Recreation Berhad ("MRB") have a duty inter alia to the Plaintiffs to furnish information on the sale of the assets of Kelab Century Paradise ("the Club") and/or MRB", and

b) A declaratory order that the 1st and 2nd Defendants as liquidators of MRB have a duty to determine whether the rights of the members of the Club are fully protected, if the assets of the Club are and/or MRS are sold to the 3rd Defendant or any other party.

In the Originating Summons against the 3rd Defendant, the Plaintiffs are praying for an order that they need not pay the membership fee imposed by D3 and alternatively, that D3 has no right to collect any fee until it had fulfilled all its obligations under the SPA, which the Liquidators and D3 have entered into.

Background Facts

Melawati Recreation Berhad (now in liquidation) (“MRB”) was the owner of Kelab Century Paradise (“the Club”). The Club provided recreational facilities and amenities to its members.

MRB offered for sale, membership in the Club to the public. For this purpose, MRB issued a Prospectus dated 9.10.2005 pursuant to Section 90 of the Companies Act 1965 .

Amongst the provisions of the Prospectus in so far as they are relevant to the present dispute are-

- (i) The Club is a proprietary club;
- (ii) No proprietary rights or interests over the assets, moveable or immovable property of the Club is vested in the members;

- (iii) The members are bound by the Licence Agreement and Trust Deeds;
- (iv) The legal status of a member is one of a mere licensee, possessing only a contractual right to use and enjoy the facilities in the Club subject to due observance of the relevant agreements and bye-laws of the Club.

On the above basis, the Plaintiffs applied for and were accepted as members of the Club.

MRB was placed under creditors' voluntary liquidation on 26.1.2006. The 1st and 2nd Defendants were appointed joint liquidators ("the Liquidators") of MRB.

The Liquidators undertook the process of realization of the assets of MRB, whereby the Club and the land ("the Land") on which it is situated were put up for sale by the Liquidators. A tender exercise was held on 26.7.2006. D3 was the successful bidder.

On 9.10.2006, the Liquidators and 3rd Defendant entered into a Sale and Purchase Agreement (the SPA) in respect of the purchase of the business of the Club and the Land. The consideration for the purchase is RM16 million.

Paragraph 7 of the SPA expressly provides that on execution of the SPA, the Liquidator shall transfer the business of the Club inclusive of its members to 3rd Defendant. Upon the purchase of the business of the Club by the 3rd defendant, the license of the members of the Club which was

contracted with MRB came to an end upon MRB under liquidation and the sale of business to the 3rd Defendant.

Upon the transfer of the business of the Club, 3rd Defendant issued a prospectus dated 6.8.2007 (the D3 Prospectus).

The D3 Prospectus provides that, 3rd Defendant had agreed to accept the existing members of the Club on 2 conditions i.e.:

- (i) the requirement for the execution of a fresh Licence Agreement;
- (ii) the payment of the discounted membership fee.

It is the second requirement that has led to the dispute between Plaintiff and 3rd Defendant in the present case. The Plaintiffs are not prepared to pay the membership fee to D3.

Striking Out by the 1st and 2nd Defendants

Scandalous, frivolous and vexatious or otherwise an abuse of the process of court

The 1st and 2nd Defendants are alleging that the O/S ought to be struck out for being scandalous, frivolous and vexatious or otherwise an abuse of the process of court.

As against the 1st and 2nd Defendants, the Plaintiffs are seeking an order against the Liquidators that the latter have an obligation to protect the interest of the existing members in the sale of the Club to D3.

A member of the Club, in consideration of payment of fees and subscriptions to MRB, has only a contractual right as a mere licensee to use and enjoy the common facilities of the Club with other members and/or persons permitted by MRS subject to the terms and conditions in the Licence Agreement (exhibit D-2 of Enclosure 21) and the Rules of the Club.

The Licence Agreement does not vest any tenancy or proprietary rights or interests in the members over the assets and movable and Immovable property of the Club. Therefore there is no interest of the Plaintiffs here that needs to be protected when the SPA was executed.

The Plaintiffs are not parties to the SPA.

Therefore the O/S is scandalous, frivolous and vexatious or otherwise an abuse of the process of court.

No Reasonable Cause of Action

It is clear from the Statement pursuant to Section 90 of the Companies Act 1965 (Exhibit D-1 of Enclosure 21) and the Licence Agreement (Exhibit D-2 of Enclosure 21), that no tenancy or proprietary rights or interests in the members over the assets and movable and immovable property of the Club.

The Plaintiffs or the members of the Club are not privy to the SPA. Therefore, the Plaintiffs or the members of the Club does not have any interest in the properties of the Club and hence has no interest in the SPA.

Furthermore, the Plaintiffs have ceased to be members to the Club by reason of their own default by not paying the membership fee. Thus, the Plaintiffs have no locus to institute this action against the Club, which effectively means that the Plaintiffs in the action herein have no reasonable cause of action against the Defendants.

Striking out by the 3rd Defendant

The 3rd Defendant applied to strike out the Originating Summons dated 5.9.2007 pursuant to Order 18 rule 19(1)(a)-(d) of the RHC 1980.

As against the 3rd Defendant, the Plaintiff are praying for an order that they need not pay the membership fee imposed by the 3rd Defendant and alternatively, that D3 has no right to collect any fee until it had fulfilled all its obligations under the SPA.

From the facts of this case it is clear that, the appointment of the Liquidators and the sale of the Club points to MRB not being able to perform its obligation under the Licence Agreement.

There is no privity between the Plaintiffs and the 3rd Defendant as far as the SPA is concerned. Under Clause 7 of the SPA the business of the Club is transferred to the 3rd Defendant on execution of the SPA. The Plaintiffs have no legal basis or standing to interfere in the SPA and to impose terms on the 3rd Defendant. Plaintiffs cannot claim any rights against the 3rd Defendant under the SPA nor impose obligations on the 3rd Defendant under the SPA.

Thus, the Plaintiffs has no cause of action against the 3rd Defendant. The Plaintiffs remedy, if any would be a claim for damages against the proprietors of the Club, not the 3rd Defendant.

Thus, due to the above reasons the application by the Defendants in Enclosure 10 and 22 are allowed with costs.

t.t. Datin Zabariah Mohd Yusof

Tarikh : 9.6.2009

Bagi pihak Plaintiff : Encik T.Gunaseelan

Tetuan Gunaseelan & Associates

Bagi pihak Defendan 1 : Cik Sharlini Jeyaratnam

Tetuan Bodipalar Ponnudurai Nathan

Bagi pihak D2 & D3 : M. Sujatha & Benjamin Dawson & Ang Soon Roy

Tetuan Shamiah, K.E. Ng & Siva