A **PIONEER HAVEN SDN BHD**

**v.**

**HO HUP CONSTRUCTION COMPANY BHD & ANOR AND OTHER APPEALS**

B

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA

C [CIVIL APPEALS NO: W-02(NCC)-1604-2011, W-02(NCC)-1779-2011, W-02(NCC)-1718-2011, W-02(NCC)-1666-2011]
27 FEBRUARY 2012

D ***COMPANY LAW:*** *Directors - Disposal of company property by directors - Approval of shareholders at general meeting not obtained - What amounts to 'disposal' - Directors entering into joint venture agreement with developer to develop company's land - Power of attorney given to developer - Whether there was substantive 'disposal' of company's*
E *land to developer - Whether beneficial ownership of land vested in developer - Whether majority shareholder has right to sue directors - Companies Act 1965, s. 132C(1)(b), (2) & (3)*

***COMPANY LAW:*** *Members' rights - Proper plaintiff rule - Suit by*
F *shareholder against company's directors - Allegation that directors disposed of company's land in breach of fiduciary duties or for improper purpose - Whether shareholder the proper plaintiff to sue directors for company's alleged losses*

***COMPANY LAW:*** *Members' rights - Rule against reflective loss - Suit*
G *by shareholder against company's directors for allegedly damaging value of his shareholding - Whether diminution in value of shareholder's shares merely a 'reflection' of company's loss - Whether shareholder's loss 'franked' by company's loss - Whether loss suffered by shareholder 'personal' and 'independent' - Whether shareholder has cause of action*
H *under common law*

***COMPANY LAW:*** *Derivative action - Suit against directors - Test to be applied - Whether directors in control of general meeting - Alleged wrongdoers/directors already removed by time suit was commenced -*
I *Whether shareholder's derivative action misconceived*

***COMPANY LAW:*** *Directors - Fiduciary duties - Test to be applied - Whether a reasonable board of directors similarly circumstanced would have acted similarly - Whether directors acted in best interest of company and shareholders - Whether directors committed company to agreement in bad faith or for improper purpose - Business judgment - Companies Act 1965, ss. 132, 354(1)*

***WORDS & PHRASES:*** *"disposal" - Companies Act 1965, s. 132C(1)(b) - What amounts to "disposal of a substantial portion of the company's undertaking or property" - Whether legal and beneficial ownership of property must pass - Directors entering into joint venture agreement with developer to develop company's land and executing power of attorney in favour of developer - Whether amounts to substantive 'disposal' of land*

***WORDS & PHRASES:*** *"shall not carry into effect any arrangement or transaction" - Companies Act 1965, s. 132C(1) - Comparison with prior version "shall not carry into effect any proposal or execute any transaction" - Whether amendment means directors can now 'enter' into agreements without shareholders' approval but merely cannot 'implement' them*

***WORDS & PHRASES:*** *"from entering into a transaction" - Companies Act 1965, s. 132C(2) - Power of court to restrain company directors 'from entering into a transaction' in contravention of s. 132C(1) - Transaction or agreement already 'executed' - Whether pre-emptory power in s. 132C(2) still exercisable*

The plaintiff, Ho Hup Construction ('Ho Hup'), was an affected issuer under Bursa Malaysia's Practice Note No 17; it had until 4 April 2010 to submit a regularisation plan to avoid being delisted. Ho Hup was the majority shareholder of the 1st defendant Bukit Jalil Development ('BJD'). A Ho Hup EGM was scheduled to be convened on 17 March 2010 with a resolution to remove Ho Hup's existing directors. However, at a board meeting held on 16 March 2010, the directors of BJD (3rd, 9th and 10th defendants) passed a resolution committing BJD to a joint-development agreement ('the JDA') with the 11th defendant Pioneer Haven ('Pioneer'). Under the JDA, Pioneer would develop a piece of land owned by BJD ('the land') with a guaranteed income of RM265 million to BJD. BJD then executed a power of attorney in favour of Pioneer but remained the legal owner of the land. Thereafter, the 2nd to 8th defendants were removed as

directors at the Ho Hup EGM of 17 March 2010 whilst the 3rd, 9th and 10th defendants were formally removed as directors of BJD at a shareholders' meeting on 10 May 2010.

Ho Hup then brought a suit (both in its own right and by way of a derivative action) against the defendants claiming that the JDA should be voided as the prior approval of the shareholders of BJD for it had not been obtained as required under s. 132C Companies Act 1965 ('CA65'). Central to Ho Hup's case was the contention that the JDA together with the said power of attorney amounted to a 'disposal' of company property, *ie*, the land, within the meaning of s. 132C CA65 because they vested *de facto* control of the land in the hands of Pioneer. It was further claimed that in failing to obtain approval for the JDA from the shareholders at a general meeting the defendants had breached their fiduciary, common law and statutory duties as the directors of Ho Hup and/or BJD.

The trial judge allowed Ho Hup's claim (but dismissed the derivative action) holding that: (i) Ho Hup had an independent right of action to commence the suit against the defendants under s. 132C(2) CA65 and under common law; (ii) the 2nd to 8th defendants had acted in bad faith and/or in breach of their fiduciary duties to Ho Hup in committing BJD to the JDA without the prior approval of the shareholders of BJD; (iii) the 4th to 8th defendants were not entitled to the relief provided in s. 354 CA65; (iv) the JDA was void under s. 132C(3) CA65 as it amounted to a 'disposal' of company property, *ie*, the Land, in contravention of s. 132C(1)(b) thereof; and (v) Pioneer was liable for knowingly assisting the defendants in breaching their fiduciary and statutory duties.

**Held (allowing the defendants' appeals)**
**Per Zainun Ali JCA (delivering the judgment of the court):**

**(1)** The question whether Ho Hup could bring this action in its own right against the defendants depended on whether the JDA together with the power of attorney amounted to a 'disposal' of company property (*ie*, the land) under s. 132C(1)(b) CA65 and, if so, whether the defendants had breached their fiduciary, common law and statutory duties as the directors of Ho Hup and/or BJD in committing BJD to the JDA without obtaining the prior approval of the shareholders at a general meeting. (paras 75 & 76)

**(1a)** The JDA was an agreement between BJD and Pioneer for the joint development of the land and the division of the profits therefrom. It was not an agreement for the sale of the land; there was no transfer of ownership to Pioneer. The JDA was a *bona fide* commercial arms-length agreement. (paras 79-82)

**(1b)** The trial judge had misdirected himself in holding that there was a 'disposal' of company property within the meaning of s. 132C(1)(b) CA65. This was because: (i) a 'disposal' would require a transfer of, or change in, the beneficial ownership of the land – whereas upon a true construction of the terms of the JDA such beneficial ownership would remain with BJD at all times; (ii) Pioneer was not at liberty to dispose of the land except to sell the properties built under the JDA to purchasers; (iii) the power of attorney only enabled Pioneer to transfer or charge the land or any part thereof in accordance with and for the purposes of the JDA; and (iv) the land would revert to BJD upon the termination of the JDA. (paras 99-119)

**(1c)** Consequently, Ho Hup was not entitled to bring this action in its own right as the JDA and the power of attorney did not amount to a 'disposal' of the land to Pioneer under s. 132C(1)(b) CA65. (paras 141-142)

**(1d)** Section 132C(2) CA65 empowers the court to restrain the directors of a company from 'entering into a transaction' in contravention of s. 132C(1) thereof. However, the JDA herein had already been 'executed' and there was no longer any transaction which the court could restrain the defendants (*ie*, BJD's directors) from entering into. The pre-emptory relief in s. 132C(2) CA65 was thus not available to Ho Hup. (paras 143 & 175)

**(2)** Ho Hup was neither the owner of the land nor a party to the JDA. Thus even if BJD had suffered loss or damage by reason of the JDA, Ho Hup was not the 'proper plaintiff' to bring this action against the directors of Ho Hup/BJD, Pioneer or BJD. Ho Hup was simply a shareholder of BJD which was the registered proprietor of the land; it did not have the right to step into the shoes of BJD because of the 'proper plaintiff rule'. (paras 147-154)

**(2a)** The trial judge was also wrong in holding that Ho Hup had a personal cause of action in its own right under common law based on the loss of value to its shareholding in BJD. This was because any diminution in Ho Hup's shares in BJD would merely be a 'reflection' of the loss suffered by BJD and not a 'personal' or 'independent' loss suffered by Ho Hup. In other words, Ho Hup's loss as a shareholder, if any, would be 'franked' by that of the company BJD. In any case, no evidence was adduced to show that there was a diminution in the value of Ho Hup's shares in BJD as a result of the JDA with Pioneer. (paras 167-173)

**(3)** At the material time when this action was filed, the new board of BJD was comprised solely of directors nominated by Ho Hup. By that time, Ho Hup would be in control of any BJD general meeting if one was convened. The alleged wrongdoers (3rd, 9th and 10th defendants), having been removed as directors, were no longer in control of BJD. The trial judge was thus right in dismissing Ho Hup's derivative action against the defendants. (paras 188-212)

**(4)** In considering Ho Hup's claim that the defendants had breached their fiduciary, common law and statutory duties as the directors of Ho Hup and/or BJD, the test to be applied was whether a reasonable board – similarly circumstanced as the defendants were – would have regarded the JDA with Pioneer as in the best interest of the BJD and BJD's shareholders. (paras 231-236)

**(4a)** Ho Hup was under severe financial distress. It had to deliver an acceptable regularisation plan (by 4 April 2010) to avoid being delisted from the stock exchange; to eliminate its accumulated losses (RM110 million); to repay outstanding bank loans (RM101 million); and to settle liquidated ascertainable damages due to purchasers, as well as moneys owed to and deposits collected from them (RM23 million, RM45 million and RM8 million). Without funds or the ability to secure financing, Ho Hup was unable to develop the land by itself, nor could it dispose of the land as that would leave it without an income-generating asset to maintain its listing status. On the other hand, the entire cost of the JDA would be wholly funded by Pioneer whilst BJD would receive a

guaranteed income of RM265 million from it. In these circumstances, the decision taken by the defendants to commit BJD to the JDA with Pioneer was not an unreasonable business judgment or for an improper purpose or in bad faith. (paras 40-49, 81 & 281-298)

***Bahasa Malaysia*** *Translation Of Headnotes*

Plaintif, Ho Hup Construction ('Ho Hup'), adalah penerbit terjejas di bawah Nota Amalan No 17 Bursa Saham; ia mempunyai sehingga 4 April 2010 untuk pelan penyusunan bagi mengelakkan daripada dinyahsenaraikan. Ho Hup adalah pemegang saham majoriti defendan pertama Bukit Jalil Development ('BJD'). Satu EGM Ho Hup dijadualkan untuk diadakan pada 17 Mac 2010 dengan resolusi untuk menyingkir pengarah-pengarah sedia ada Ho Hup. Walaubagaimanapun, di mesyuarat lembaga yang diadakan pada 16 Mac 2010, pengarah-pengarah BJD (defendan ketiga, kesembilan dan kesepuluh) meluluskan satu resolusi mengamanatkan BJD kepada perjanjian pembangunan usahasama ('JDA') dengan defendan kesebelas Pioneer Haven ('Pioneer'). Di bawah JDA, Pioneer akan membangunkan sebidang tanah yang dimiliki BJD ('tanah') dengan pendapatan terjamin RM265 juta kepada BJD. BJD kemudiannya memeterai satu surat kuasa wakil yang berpihak kepada Pioneer tetapi BJD kekal sebagai pemilik dari segi undang-undang tanah. Selepas itu, defendan kedua sehingga kelapan disingkir sebagai pengarah-pengarah di EGM Ho Hup pada 17 Mac 2010 manakala defendan ketiga, kesembilan dan kesepuluh disingkirkan sebagai pengarah-pengarah BJD di satu mesyuarat pemegang-pemegang saham pada 10 Mei 2010.

Ho Hup kemudiannya membawa kes (dalam hak sendiri dan melalui tindakan terbitan) terhadap defendan-defendan memohon supaya JDA terbatal atas sebab kelulusan terlebih dahulu pemegang-pemegang saham BJD tidak diperolehi seperti yang diperlukan di bawah s. 132C Akta Syarikat 1965 (AS65). Isu utama kes Ho Hup adalah hujahan bahawa JDA bersama-sama dengan surat kuasa wakil tersebut menyebabkan 'pelupusan' harta syarikat iaitu tanah tersebut, dalam erti s. 132C AS65 kerana mereka mempunyai pengawalan *de facto* ke atas tanah itu di dalam kawalan Pioneer. Ia juga dihujah bahawa kerana gagal mendapatkan kelulusan daripada pemegang-pemegang saham untuk JDA di mesyuarat agung defendan-defendan telah melanggar tanggungjawab fidusiari, common law dan statutori mereka sebagai pengarah-pengarah Ho Hup dan/atau BJD.

A Hakim bicara membenarkan permohonan Ho Hup (tetapi menolak tindakan terbitan) dengan memutuskan bahawa (i) Ho Hup mempunyai hak persendirian untuk bertindak dengan memulakan guaman terhadap defendan-defendan di bawah s. 132C(2) AS65 dan di bawah common law; (ii) defendan kedua hingga kelapan
B telah bertindak tidak jujur dan/atau telah melanggar tanggungjawab fidusiari kepada Ho Hup dalam mengamanatkan BJD kepada JDA tanpa kelulusan terlebih dahulu daripada pemegang-pemegang saham BJD; (iii) defendan keempat hingga kelapan tidak berhak kepada relif yang disediakan di dalam s. 354 AS65; (iv) JDA tidak
C sah di bawah s. 132(C)(3) AS65 kerana ia membawa kepada 'pelupusan' harta syarikat iaitu tanah tersebut, bertentangan dengan s. 132C(1)(b); dan (v) Pioneer bertanggungjawab kerana telah secara sedar membantu defendan-defendan melanggar tanggungjawab fidusiari dan statutori mereka.

D

**Diputuskan (membenarkan rayuan defendan-defendan)**
**Oleh Zainun Ali HMR (menyampaikan penghakiman mahkamah):**

E **(1)** Persoalan sama ada Ho Hup boleh membawa tindakan ini sebagai haknya sendiri terhadap defendan-defendan bergantung kepada sama ada JDA bersama-sama dengan surat kuasa wakil membawa kepada 'pelupusan' harta syarikat (tanah tersebut) di bawah s. 132C(1)(b) AS65 dan, jika
F demikian, sama ada defendan-defendan telah melanggar tanggungjawab fidusiari, common law dan statutori mereka sebagai pengarah-pengarah Ho Hup dan/atau BJD dalam mengamanatkan BJD kepada JDA tanpa memperolehi kelulusan terlebih dahulu pemegang-pemegang saham di
G mesyuarat agung.

**(1a)** JDA adalah persetujuan di antara BJD dan Pioneer bagi pembangunan bersama tanah tersebut dan pembahagian keuntungan daripadanya. Ia bukan satu persetujuan bagi penjualan tanah; tiada pemindahan pemilikan kepada Pioneer.
H JDA adalah satu persetujuan komersial 'armslength' yang *bona fide*.

**(1b)** Hakim bicara telah tersalah arah apabila memutuskan bahawa terdapat 'pelupusan' harta syarikat dalam maksud s. 132C(1)(b)
I AS65. Ini adalah kerana: (i) satu 'pelupusan' memerlukan pemindahan, atau perubahan di dalam hakmilik benefisial tanah – manakala atas pentafsiran sebenar terma-terma JDA

hakmilik benefisial akan kekal dengan BJD pada setiap masa; (ii) Pioneer tidak boleh melupuskan tanah tersebut kecuali untuk menjual hartanah yang dibina di bawah JDA kepada pembeli-pembeli; (iii) surat kuasa wakil hanya membenarkan Pioneer memindah atau gadai tanah tersebut atau mana-mana bahagiannya mengikut dengan dan untuk tujuan-tujuan JDA; dan (iv) tanah tersebut akan dikembalikan kepada BJD atas penamatan JDA.

**(1c)** Akibatnya, Ho Hup tidak mempunyai hak untuk membawa tindakan ini dalam haknya sendiri kerana JDA dan surat kuasa wakil tidak membawa kepada 'pelupusan' tanah tersebut kepada Pioneer di bawah s. 132C(1)(b) AS65.

**(1d)** Seksyen 132C(2) AS65 memberi kuasa kepada mahkamah untuk menahan pengarah-pengarah daripada 'memasuki satu transaksi' bertentangan dengan s. 132C(1) itu. Walau bagaimanapun, JDA ini telahpun 'dilaksanakan' dan tiada lagi apa-apa transaksi di mana mahkamah boleh menahan defendan-defendan (iaitu, pengarah-pengarah BJD) daripada memasukinya. Relif 'pre-emptory' di dalam s. 132C(2) AS65 oleh itu tidak boleh digunapakai oleh Ho Hup.

**(2)** Ho Hup bukan pemilik tanah tersebut mahupun pihak kepada JDA. Oleh itu jika BJD telah mengalami kerugian atau kerosakan kerana JDA, Ho Hup bukanlah 'plaintif yang betul' untuk membawa tindakan ini terhadap pengarah-pengarah Ho Hup/BJD, Pioneer atau BJD. Ho Hup hanya pemegang saham BJD iaitu pemilik berdaftar tanah tersebut; ia tidak mempunyai hak untuk memakai kasut BJD disebabkan 'proper plaintiff rule'.

**(2a)** Hakim bicara juga salah dalam memutuskan bahawa Ho Hup mempunyai kausa tindakan peribadi dalam haknya sendiri di bawah common law berdasarkan kehilangan nilai pegangan sahamnya di dalam BJD. Ini adalah kerana sebarang penurunan saham-saham Ho Hup dalam BJD akan hanya menjadi 'pantulan' kerugian yang dialami BJD dan bukan kerugian 'peribadi' atau 'persendirian' yang dialami Ho Hup. Dalam erti kata lain, kerugian Ho Hup sebagai pemegang saham, jika ada, akan di 'franked' oleh syarikat BJD. Tiada keterangan dikemukakan untuk menunjukkan bahawa terdapat penurunan nilai saham-saham Ho Hup di BJD akibat JDA dengan Pioneer.

**(3)** Pada waktu material apabila tindakan ini difailkan, lembaga baru BJD terdiri daripada pengarah-pengarah yang dicalonkan oleh Ho Hup sahaja. Pada masa itu, Ho Hup boleh mengawal apa-apa mesyuarat am BJD jika satu diadakan. Orang-orang yang didakwa membuat kesalahan (defendan ketiga, kesembilan dan kesepuluh), yang telah disingkirkan sebagai pengarah-pengarah, tidak lagi mengawal BJD. Hakim bicara oleh itu betul apabila menolak tindakan terbitan Ho Hup terhadap defendan-defendan.

**(4)** Dalam mempertimbangkan hujahan Ho Hup bahawa defendan-defendan telah melanggar tanggungjawab fidusiari, common law dan statutori mereka sebagai pengarah-pengarah Ho Hup dan/atau BJD, ujian yang perlu dipakai adalah sama ada lembaga yang munasabah – yang berada dalam kedudukan yang sama seperti defendan-defendan – akan menganggap JDA dengan Pioneer sebagai satu kepentingan yang terbaik bagi BJD dan pemegang-pemegang saham BJD.

**(4a)** Ho Hup mengalami kesusahan kewangan yang teruk. Ia perlu membentukkan satu rancangan penyusunan yang boleh diterima (sebelum 4 April 2010) untuk mengelakkan daripada penyahsenaraian daripada bursa saham; untuk menghapuskan kerugian yang amat banyak (RM110 juta); untuk membayar balik pinjaman-pinjaman bank yang tertunggak (RM101 juta); dan untuk menyelesaikan gantirugi-gantirugi yang dipastikan kepada pembeli-pembeli, dan juga wang-wang yang terhutang dan deposit yang dikumpul dari mereka (RM23 juta, RM45 juta dan RM8 juta). Tanpa dana atau keupayaan untuk memperoleh pembiayaan, Ho Hup tidak dapat membangunkan tanah sendiri, dan tidak boleh melupuskan tanah kerana ia akan meninggalkannya tanpa satu aset menjana pendapatan untuk mengekalkan status penyenaraian. Sebaliknya, seluruh kos JDA akan dibiayai sepenuhnya oleh Pioneer manakala BJD akan menerima pendapatan terjamin RM265 juta daripadanya. Dalam keadaan sedemikian, keputusan yang diambil oleh defendan-defendan untuk mengamanatkan BJD kepada JDA dengan Pioneer bukan merupakan pertimbangan perniagaan yang tidak munasabah atau untuk tujuan tidak wajar atau dengan niat jahat.

**Case(s) referred to:**

*Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors [1995] 4 CLJ 551 CA* ***(refd)***

*Alexander and Another v. Standard Merchant Bank Ltd [1974] (4) SA 730 (W)* ***(refd)***

*Australian Trade Commission v. Film Funding and Management Pty Ltd [87 ALR 49* ***(refd)***

*Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch 62* ***(refd)***

*Cheam Tat Pang v. PP [1996] 1 SLR 541* ***(refd)***

*Darvall v. North Sydney Brick and Tile Co [1989] 16 NSWLR 260* ***(foll)***

*Dominion Insurance Co of Australia Ltd (in liquidation) & Anor v. Finn [1989] 7 ACLC 25* ***(refd)***

*Foss v. Harbottle (1843) 2 Hare 461* ***(refd)***

*Harlowe's Nominees Pte Ltd v. Woodside (Lakes Entrace) Oil Co NL [1968] 121 CLR* ***(refd)***

*Howard Smith Ltd v. Ampol Petroleum Ltd [1974] AC 821* ***(refd)***

*Johnson v. Gore Wood and Company [2001] 1 All ER 481* ***(foll)***

*Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA* ***(refd)***

*Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Tan Tien Chi & Anor [1995] 3 CLJ 520 CA* ***(refd)***

*Maelor Jones Investments (Noarlunga) Pty Ltd and Ors v. Heywood-Smith [1989] 7 ACLC 1232* ***(refd)***

*Mills v. Mills [1938] 60 CLR 150* ***(refd)***

*Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor & Another Appeal [2003] 3 CLJ 339 CA* ***(refd)***

*Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2) [1989] 1 All ER 387* ***(foll)***

*Re Loteka Limited [1989] 15 ACLR 620* ***(refd)***

*Re Margart Pty Hamilton v. Westpac Banking Corporation & Another [1985] BCLC 314* ***(foll)***

*The Standard Chartered Bank of South Africa Ltd v. Hunkydory Investments (188) Pty Ltd Case No 15427/08* ***(refd)***

*Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC* ***(refd)***

**Legislation referred to:**

Companies Act 1965, ss. 132C(1)(b), (2), (3)

**Other source(s) referred to:**

Loh Siew Cheang and William F Wong, *Company Law, Powers of Accountability,* p 1256

*(Civil Appeal No: W-02-(NCC)-1604-11)*

*For the appellant - Dato' Seri Muhammad Shafee Md Abdullah (Alvin Tang, Ooi Huey Ling, Janice Yap & Azad Bashir Abdul Kariem Bashir with him); M/s Ranjit Ooi & Robert Low*

*For the respondent - Malik Imtiaz Sarwar (Yoong Nim Chor & Jenine Gill with him); M/s Yoong & Partners*

A *(Civil Appeal No: W-02-(NCC)-1779-11)*
*For the appellant - Azhar Azizan Harun (Wong Mun Hoe with him); M/s Cheang & Ariff*
*For the respondent - Malik Imtiaz Sarwar (Yoong Nim Chor & Jenine Gill with him); M/s Yoong & Partners*

B *(Civil Appeal No: W-02-(NCC)-1718-11)*
*For the appellant - S Suhendran (William Leong & Yap Soon Lee with him); M/s William Leong & Co*
*For the respondent - Malik Imtiaz Sarwar (Yoong Nim Chor & Jenine Gill with him); M/s Yoong & Partners*

C *(Civil Appeal No: W-02-(NCC)-1666-11)*
*For the appellant - Khoo Guan Huat (Harold Tan with him); M/s Skrine*
*For the respondent - Malik Imtiaz Sarwar (Yoong Nim Chor & Jenine Gill with him); M/s Yoong & Partners*

D *Reported by Gan Peng Chiang*

## JUDGMENT

E **Zainun Ali JCA:**

**[1]** These four (4) appeals and cross-appeal at hand, charge us with a duty to decide on multifarious issues, which relate to specific questions of corporate rights.

F **[2]** Of these are the issues of "the right plaintiff rule" and its adjunct, the issue of *locus*; the principles governing the right of shareholders in a company and the balance of power between the majority and the minority; the issue of directors' fiduciary duties and duty of care at common law and their "business judgment"; G the question of construction of the joint venture agreement (JDA) and the question of what amounts to "disposal" pursuant to s. 132C of the Companies Act 1965 ("CA").

**[3]** For ease of reference the four (4) appeals by the various H appellants (defendants), against the decision of the learned trial judge on 7 May 2011 are as follows:

(a) Court of Appeal Civil Appeal No: W-02-(NCC)-1718-2011 ("D2's Appeal") filed by Vincent I Lye ("Vincent Lye");

(b) Court of Appeal Civil Appeal No: W-02-(NCC)-1779-2011 ("D3's Appeal") filed by Lim Ching Choy ("LCC");

(c) Court of Appeal Civil Appeal
No: W-02-(NCC)-1666-2011 ("D3's – D8's Appeal") filed by Lai Moo Chan, Long Md Nor Amran bin Long Ibrahim, Mohd Shahril b Tan Sri Hamzah, Foo Ton Hin and Low Teik Kien ("the D4 – D8").

(d) Court of Appeal Civil Appeal
No: W-02-(NCC)-1004-2011 ("Pioneer Haven's Appeal") filed by Pioneer Haven Sdn Bhd the 11th defendant in the High Court Action (the "Pioneer Haven").

**[4]** For the purposes of this judgment, we will refer to the parties as they appear in the court below.

**[5]** Considering the fact-intensive nature of these appeals, it is crucial that the facts and issues are laid down comprehensively as to put the legal landscape in its proper context.

## The Background Facts

**[6]** The plaintiff Ho Hup Construction Company Bhd is a public-listed company. Its principal business is property development. Its subsidiary, Bukit Jalil Development Sdn Bhd ("Bukit Jalil") is the 1st defendant. Ho Hup owns 70% of the issued and paid up capital of Bukit Jalil. The remaining 30% is owned by a company called Zen Courts.

**[7]** Bukit Jalil owns a piece of land measuring 60 acres ("the land") which has become central to the dispute between the parties.

**[8]** Ho Hup had been a distressed company for several years. It had suffered losses, leading it to announce on 31 July 2008 that it was an affected issuer under Bursa Malaysia Practice Note No. 17 ("PN17").

**[9]** On 30 October 2009, Ho Hup announced a proposed Regularization Plan under PN17. Amongst the proposals was for Ho Hup to carry out a 95% capital reduction to address its accumulated losses. Ho Hup had applied to extend the deadline imposed by Bursa to submit a Regularization Plan. Bursa granted Ho Hup an extension expiring on 4 April 2010.

**[10]** Against this background, the events surrounding and the issues and details of the corporate personalities involved in these appeals are therefore pivotal.

**[11]** In view of the changes to the Boards of Ho Hup and Bukit Jalil wrought by the 17 March 2010 EGM, a good starting point would be the position of the corporate structure of these two companies prior to 17 March 2010.

**[12]** Prior to 2008, the Managing Director of Ho Hup was one Dato Low Tuck Chong ("LTC"). He is the brother of the 8th defendant, Low Tiek Kien ("D8").

**[13]** LTC was suspended as Managing Director by Ho Hup on 28 August 2008 and was later removed as Ho Hup's Director on 23 October 2008. Meanwhile, the 2nd defendant Lye Ek Seang ("D2") was appointed as Director of Ho Hup on 6 August 2007 and was subsequently appointed as Deputy Executive Chairman on 1 December 2008.

## The First EGM

**[14]** Meanwhile, LTC's family company ("LC Sons") and one Choo Soo Har, convened an Extraordinary General Meeting to be held on 4 February 2010 ("the 1st EGM"), to remove all the existing Directors of Ho Hup, save his own brother, Low Tiek Kien ("D8"). In the process, a company called Extreme Systems Sdn Bhd, which is a shareholder of Ho Hup, obtained an interlocutory injunction to restrain the holding of the EGM.

## The Second EGM

**[15]** LC Sons and Choo once again requisitioned for a second EGM to be held on 17 March 2010 ("the 2nd EGM"), for the same resolution ie, to remove all the existing directors except D8, and to appoint others in their place.

**[16]** However, on the eve of the 2nd EGM, ie, on 16 March 2010, a Board Meeting of Bukit Jalil was held. It was attended by directors nominated by Ho Hup. They were the 3rd defendant, Lim Ching Choy ("D3"), the 9th defendant Woo Thin Choy ("D9"), the 10th defendant Chong Kok Weng ("D10") and the financial officer of the Ho Hup Group ie, Ivan Ho.

**[17]** The board of directors passed a resolution that Bukit Jalil enter into a Joint Development Agreement ("the JDA") with the 11th defendant, ie, Pioneer Haven to jointly develop the land.

**[18]** The JDA

(a) What the JDA contemplates, in essence is for a development of the land by Pioneer Haven and a division of profits between Pioneer Haven as developer and Bukit Jalil as land owner.

(b) The land was charged to CIMB in which the debt under the charges (as stated in the JDA) was said not to exceed RM81 million.

The Express Terms of the JDA *inter alia*, include the following:

(c) The JDA is a joint venture between the parties. It is not a sale of the land or any part thereof (s. 3.1 JDA);

(d) A representation on the part of Bukit Jalil that no consent either of the shareholders of Bukit Jalil or Ho Hup are required for the entry and performance of the JDA (s. 11.1(c) JDA).

(e) The entire costs of developing the land is funded solely by Pioneer Haven which is not entitled to charge the land for the purposes of securing financing for the development (s. 21.1 – 21.3 JDA);

(f) Bukit Jalil is not required to contribute any funds towards the development of the land (s. 22.3 JDA);

(g) Bukit Jalil's entitlement, as land owner under the JDA is 17% of the Gross Development Value ("GDV") of the land, which translates to the estimated sum of RM425 million (s. 18.2 JDA);

(h) Irrespective of the commercial risks associated with the development of the land, Bukit Jalil will receive a minimum guaranteed entitlement of RM265 million from the project (s. 18.3 JDA);

(i) It is common ground that at all material times, Bukit Jalil is and continues to be the legal and beneficial owner of the land. Thus there is no transfer of ownership of the land, whether pursuant to the JDA, or otherwise;

(j) The JDA was approved by the then existing and authorised board of directors of both Ho Hup and Bukit Jalil (which comprise the 2nd to 10th defendants) (D2 to D10);

**[19]** The JDA also provides for an Endorsement and Undertaking ("EU") to be executed by Ho Hup in favour of Pioneer Haven. This document ensures that the JDA would proceed smoothly in which Ho Hup would endorse and consent to the JDA and *inter alia*, undertakes not to interfere, interrupt nor cause any inconveniences to Pioneer Haven in their performance of the JDA.

**[20]** In conjunction with the JDA, a Power of Attorney ("the PA") was also given by Bukit Jalil dated 16 March 2010, in favour of Pioneer Haven.

**[21]** After the execution of the JDA, the 2nd to 8th defendants (D2 to D8) were removed as directors of Ho Hup during an EGM of Ho Hup on 17 March 2010.

**[22]** The 3rd, 9th and 10th defendants (D3, D9 and D10) were formally removed as directors of Bukit Jalil at a shareholders meeting of Bukit Jalil on 10 May 2010.

**[23]** Before getting into the heart of the matter, it would be useful at this juncture to illustrate the designations which each of the named corporate personalities hold in the relevant companies ie, Ho Hup and Bukit Jalil. This would to a large extent, assist us in ascertaining their respective spheres of influence and where they stand in the scheme of things.

(a) The 1st defendant (D1), Bukit Jalil is a nominal defendant.

(b) The 2nd defendant (D2), Lye Ek Seang also known as Vincent Lye was the Deputy Executive Chairman of Ho Hup at the material time.

(c) The 3rd defendant (D3), Lim Ching Choy was the Managing Director of Ho Hup at the material time.

(d) The 4th to 8th defendants were the non-executive Directors of Ho Hup at the material time (D4 – D8).

(e) The 9th defendant (D9) Woo Thin Choy was the Director of Bukit Jalil and was also the Group Chief Operating Officer of Ho Hup at the material time. D9 executed the JDA on behalf of Bukit Jalil.

(f) The 10th defendant (D10) Chong Kok Weng was a Director of Bukit Jalil at the material time.

(g) Ivan Ho was the Financial Officer of the Ho Hup Group at the material time. A

**(Ho Hup's) Claim**

**[24]** It is clear that Ho Hup's entire claim is predicated on the entry of the JDA between Bukit Jalil and Pioneer Haven which Ho Hup asserts should be voided because shareholders' approval of Bukit Jalil and Ho Hup were not obtained pursuant to s. 132C of the Companies Act 1965 ("the Act"). B

Ho Hup's complaints are that: C

(i) The JDA falls within s. 132C of the Act as a disposal of the land, yet no shareholder approval was obtained;

(ii) D2 to D10 as Directors breached their duties for failing to obtain shareholders' approval in committing Bukit Jalil to the JDA which was of dubious commercial viability. A conspiracy to commit Bukit Jalil to the JDA is also alleged. D

(iii) D3, D9 and D10 had breached their statutory and fiduciary duties and duties at common law to Ho Hup and Bukit Jalil. E

As regards D3, the impugned act was for having committed Bukit Jalil to the JDA without the prior approval of Ho Hup in general meeting. As against D3, D9 and D10 the impugned act was for having committed Bukit Jalil to the JDA without the prior approval of Bukit Jalil in general meeting. In so doing, the 3rd, 9th and 10th defendants had acted *ultra vires* their powers. F

**[25]** If Ho Hup's amended statement of claim can be condensed, it would manifest that the above said defendants have breached their multiple duties in committing Bukit Jalil and indirectly, Ho Hup to in effect, divest beneficial ownership of the land to Pioneer Haven, by causing Bukit Jalil to enter into the JDA; that this was done without "shareholder' approval in general meeting of either company and without specific legal advice on the matter" (paras. 19 and 22 of the amended statement of claim). G H

**[26]** Ho Hup's contention that shareholder's approval is mandatory for the JDA to be entered is based on the following (Sub-paragraph 25-3 of the amended statement of claim): I

(i) The terms of the JDA, or the JDA read with the Power of Attorney, is tantamount to a disposal of the Land by Bukit Jalil within the meaning of Section 132C of the Act;

(ii) That there was no reasonable basis for committing Ho Hup and Bukit Jalil to the JDA;

(iii) The commercial viability of the JDA was, and still is, suspect;

(iv) The haste in which the JDA was entered showed the intention on the part the Defendants to pre-empt the outcome of an EGM which was to take place on 17.3.2010.

**[27]** Thus by reason of the above-mentioned issues, Ho Hup claimed that both Ho Hup and Bukit Jalil had suffered injury and loss due to the nefarious acts of the defendants; and commenced the suit against the defendants both in its own rights and by way of derivative action for the benefit of Bukit Jalil.

## In The High Court

**[28]** Consequent upon a trial which took twelve (12) days, with six (6) witnesses for Ho Hup and ten (10) for the defendant, the learned trial judge decided in favour of Ho Hup against the defendants as follows:

(i) In relation to the question of *locu*s, the learned trial judge held that Ho Hup has an independent right of action to commence the suit against D2 and D8 (as Directors of Ho Hup) and against D3, D9 and D10 (as Directors of Bukit Jalil) under s. 132C(2) read with s. 132C (1b), CA;

(ii) that Ho Hup's derivative action for and (on behalf of Bukit Jalil) was untenable as against D2 to D8 (as Directors of Ho Hup) and as against D3, D9 and D10 (as Directors of Bukit Jalil);

(iii) that D2 to D8 had breached their fiduciary duties to Ho Hup by committing Bukit Jalil to the JDA in breach of s. 132C without the prior approval of the shareholders of Bukit Jalil where they were held to have acted in bad faith;

(iv) that D4 to D8 were not entitled to rely on s. 354 Companies Act 1965 and that therefore they were not excused from any negligent default, breach of duty or breach of trust on their part pursuant to the said section;

(v) that the Joint Development Agreement (JDA) is void under s. 132C Companies Act, because no shareholder approval of Bukit Jalil and/or Ho Hup was obtained; that the JDA amounted to a disposal of the land under s. 132C, Companies Act 1965;

(vi) Finally, the learned trial judge found Pioneer Haven liable for knowingly assisting the Directors of Ho Hup and/or Bukit Jalil in breaching their statutory and fiduciary duties.

**[29]** Aggrieved by these findings, the defendants filed their appeals, which came up for our consideration. No appeal has been lodged by Ho Hup in respect of the dismissal of their claim against D3, D9 and D10 (as directors of Bukit Jalil).

**[30]** We heard all parties before us on 24 November 2011 and we reserved our judgment.

**[31]** On 20 December 2011 judgment was delivered. We were unanimous in allowing the four (4) appeals.

**[32]** We now give our reasons which are amplifications of our broad grounds delivered on 20 December 2011. However in this judgment for a clearer understanding of the issues raised, we shall re-arrange the sequence in which they appear in our broad grounds.

**[33]** We would begin by exploring the background to the entry of the JDA since issues which are related to the JDA are pivotal to the claim. Our findings on the other grounds will follow, which we believe, would place the curious issues before us in perspective.

## Findings

**[34]** In articulating the issues raised in these appeals, we were taken by the defendant counsels' submission that a determination of the issue of *locus standi* itself, could result in Ho Hup's action being dismissed on that ground alone since this is a threshold question.

## Ho Hup's Locus

**[35]** In relation to *locus*, Ho Hup claimed that:

(i) It has a right of personal action against the defendants under s. 132C(2) and in common law by virtue of loss to its shareholding in Bukit Jalil; and

(ii) That it has the right to maintain derivative action (on behalf Bukit Jalil) against the defendants.

The High Court held that Ho Hup had a cause of action in its own right on two (2) grounds:

(a) common law personal cause of action based on its shareholding, being a loss in value to its shareholding; and

(b) a statutory cause of action under s. 132C(2).

**[36]** Having said that, we are of the view that it is pertinent to now determine firstly, whether Ho Hup has the right to sue in its own right both under common law and under statute (ie, under s. 132C(2) of the Act).

**[37]** However, the answer to the above question would depend on whether Ho Hup is the proper plaintiff.

**[38]** In our view, this question and consequentially, the rest of the legal issues raised in these appeals can be answered only if the antecedent facts can lend themselves to the issues at hand. In other words, the issue of *locus standi* will be answered only when certain legal issues are determined.

**[39]** In view of the fractious history of this appeal, it would be helpful to now narrate in greater detail the brief points as outlined in the earlier part of this judgment. Thereafter, a proper consideration of the facts and the law can be had, in answer as to whether Ho Hup has what it takes to succeed in its claims against the defendants.

**[40]** Beginning with the PN17 status of Ho Hup, it is undisputed that Ho Hup has to comply with the deadline for submission of the Regularization Plan to Bursa Malaysia (The Malaysian Stock Exchange) by 4 April 2010. This was the condition requisite for Ho Hup to avoid delisting under PN17.

**[41]** Secondly, Ho Hup and Bukit Jalil need to show as part of the Regularization Plan, that it had the necessary funding to develop the land in order to meet Bursa's requirements for eliminating the accumulated losses of RM110 million.

**[42]** Thirdly, there was a need to make timely repayment of outstanding loans of RM101.10 million with the banks. Ho Hup and Bukit Jalil had defaulted in their obligations to CIMB which held a charge over the land and CIMB had rejected proposals to reschedule repayment of loan and was about to commence foreclosure proceedings on the land.

**[43]** The Ho Hup Board had in announcing its financial year ending 31 December 2007 accounts and its 31 December 2008 accounts, filed solvency declarations that Ho Hup will be able to pay all its debts within twelve (12) months from the date of the announcement.

**[44]** Thus, besides the PN17 conditions, Ho Hup had to also secure funds to repay the bankers under the PN1 solvency declarations.

**[45]** Fourthly, there is the need to make timely settlement of outstanding liquidated ascertainable damages (LAD) due to purchasers under the Bukit Jalil Projects. This LAD amounted to RM23 million. Some 28 purchaser who were owed close to RM45 million, had filed or were in the process of filing petitions for the winding up of Bukit Jalil.

**[46]** Fifthly, there was the urgent need to resolve the end financing problems of the 47 units of shop offices which Bukit Jalil had sold and had collected RM8 million in deposits. The purchasers were unable to obtain financing to purchase the units as no bank was willing to provide Bukit Jalil end – financing facilities. The said purchasers were in the midst of making a demand for the refund of the RM8 million deposit.

**[47]** Thus, as against the above five (5) critical issues, the one viable option open to Ho Hup was the joint venture arrangement to develop the land. There were two other options (as advised by AmInvestment and Newfields Advisors Sdn Bhd) ie, to sell the land or for Ho Hup to do its construction business itself. However, the sale of the land was not feasible since it would not comply with Bursa's requirements under PN17, since Ho Hup would then not have sufficient income-generating assets to maintain its listing status after the land was disposed.

**[48]** The option that Ho Hup develops the land itself was also not feasible, since it did not have funding and could not secure financing. Under those conditions, what choice were the defendant directors left with?

**[49]** The dire circumstances they were in made it logical for them to conclude that the joint venture proposal presented the best option and outlook for the company.

**[50]** But Ho Hup looked on with askance at the directors' concurrent decision, as can be discerned in its counsel's submission.

**[51]** It is clear to us that the decision which the defendants made to enter into the JDA was a business judgment. This issue will be expanded latterly.

**[52]** At the material period ie, prior to 16 March 2010, D2 (Vincent Lye) and D3 (Lim Ching Choy) were the Deputy Executive Chairman and Managing Director of Ho Hup respectively until their removal as directors on 17 March 2010. D9 (Woo) and D10 (Kok Weng) were directors of Bukit Jalil and were part of the management team of Ho Hup. Woo was also the Group Chief Operating Officer of Ho Hup.

**[53]** On the afternoon of 16 March 2010, Lim Ching Choy the then Managing Director of Ho Hup gave a notice to the 4th to 8th defendants for a Board Meeting.

**[54]** A meeting of Board of Directors of Ho Hup was held on 16 March 2010 at about 4.30pm. Those present were D3 to D9 and three representatives from Tricor Corporate Services Sdn Bhd (the company secretarial firm of Ho Hup).

**[55]** At this meeting, Woo circulated a two page board paper and presented to the Ho Hup Board of Directors a proposed joint development ("proposal") between Bukit Jalil and Pioneer Haven for a piece of freehold land (the land), belonging to Bukit Jalil into a mixed commercial and residential development. This proposal was for the Joint Venture Agreement (JDA) to be entered.

**[56]** Woo explained to the meeting the management rationale of the proposal. Woo further informed the 4th to 8th defendants that the Board of Directors of Bukit Jalil (ie, Chong Choy, Woo and Ivan Ho) had already, at an earlier meeting held on the same day ie, on 16 March 2010, approved the proposal.

**[57]** Ho Hup in its submission, made much of the seemingly unseemly haste in which the JDA was entered into. Considering its dire situation, the position Ho Hup took is inexplicable. However after due scrutiny of the circumstances, the varied and varying interests of the parties involved may be better understood.

**[58]** As we understand it, Ho Hup was required to submit the Regularization Plan to Bursa by 4 April 2010 or face de-listing. Ho Hup had applied for and obtained several extensions.

**[59]** LC Sons, a substantial shareholder holding more than 25% of Ho Hup had objected to the proposed Regularization Plan. In view of the proposed capital reduction, the Regularization Plan required 75% shareholder's approval. Thus due to LC Son's objection, it was incumbent for the board to revise the proposed Regularization Plan to obtain the necessary shareholder's support.

**[60]** Bursa then granted an extension of time until 4 April 2010 although Ho Hup had requested for an extension until 4 May 2010. This rejection for extension until 4 May 2010 was significant.

**[61]** In our view, the defendant directors had every reason to believe that Bursa would not grant further extension after 4 April 2010.

**[62]** It was imperative therefore that all arrangements and transactions be completed in time for the Regularization Plan to be submitted by 4 April 2010. This meant that entering into the JDA is priority.

**[63]** Thus, at the meeting of 16 March 2010, the proposal for the JDA was put forth and recommended, based on the following salient terms:

(a) Bukit Jalil's entitlement from the joint development shall be 17% of Gross Development Value with a minimum entitlement of RM200 million;

(b) A deposit of RM500,000 shall be paid by Pioneer Haven to Bukit Jalil;

(c) Pioneer Haven shall assume the indebtedness of both Ho Hup and Bukit Jalil due to CIMB Bhd of about RM81 million;

(d) The proposed joint development shall be completed within ten days with an automatic extension of another five (5) years subject to market supply and demand conditions;

(e) The proposed joint development shall commence within six months from the date of approval of the development order; and

(f) A power of attorney is to be given to Pioneer Haven to facilitate development of the land into a mixed development project.

**[64]** From the documents before us, it can be seen that several concerns were raised by the Directors (defendants) at the said 16 March 2010 meeting.

**[65]** Some of the more critical issues raised relate to the status as regards the land. Lim Ching Choy D3, as the then Managing Director of Ho Hup and Director of Bukit Jalil informed the 4th to 8th defendants that Bukit Jalil would remain as the beneficial and registered owner of the land throughout the proposed joint development and that the land would not be charged as security to any financial institution to finance the development. It was also informed that Pioneer Haven would be solely responsible to meet and defray the development costs in the implementation of the project. In addition, Pioneer Haven would also assist in negotiations with CIMB to settle the debts owed by Ho Hup and Bukit Jalil to CIMB.

**[66]** As regards the minimum entitlement of RM200 offered to Bukit Jalil by Pioneer Haven under the JDA, this was met with reservation by D8 (Low Tiek Kien), who suggested it be increased. It was later agreed to be increased to RM265 million (being the minimum entitlement), in view of Ho Hup's PN17 status and the financial constraints that Ho Hup and Bukit Jalil were facing.

**[67]** D3 also presented to the board that under the proposal, the proposed development shall commence within six (6) months from the date of approval of the development order and that Bukit Jalil had already submitted the relevant application for the said order to the authority.

**[68]** A significant question which is crucial to this appeal was raised at the said board meeting. It relates to the issue of **whether the proposal required shareholders' approval**. D3's response was that the said approval was not required in the context of a joint development. This view was strengthened by a legal opinion prepared by Messrs Lee Hishamuddin Allen & Gledhill dated 3 February 2010 which confirmed the above view. The said legal opinion was circulated to the board members. (emphasis added).

**[69]** The board was quizzically asked as to why the directors were called upon to consider the proposal at the eleventh hour.

**[70]** It was explained by D3 that it was necessary to do so, for otherwise Pioneer Haven would withdraw from the proposal. This prospect would indeed be financially mortifying to Ho Hup and Bukit Jalil, given the circumstances.

**[71]** In any case, from the records, it would appear that the JDA did not happen overnight. It was the result of close to 24 months of negotiations. Two (2) other companies had withdrawn from the negotiations to develop the land. However, the Malton Group in which Pioneer Haven is a subsidiary was prepared to proceed with the JDA.

**[72]** Some queries were also made as to why the directors had to make a decision on the proposal post-haste, when the Extraordinary General Meeting (EGM) to remove some of the directors had been scheduled to be held the next day (17 March 2010).

**[73]** D3's response was that as long as they were directors of Ho Hup, they owed the company a duty to act in its best interest and cannot derogate from their duties, even if they would be removed the next day.

**[74]** As insouciant as this response might appear, we believe that it was as acceptable as it can get, under the circumstances.

## The Locus Point In Relation To s. 132C Of The Act

**[75]** Now once again, the issue of *locus standi* looms large. The question is:

(i) Whether Ho Hup could bring this suit in its own right against D2 to D8 for breach of fiduciary duties and duty of care under common law and for statutory breach under s. 132C of the Act, by virtue of loss to its shareholding in Bukit Jalil; and

(ii) Whether Ho Hup could bring this suit by way of a derivative action for the benefit of Bukit Jalil against D2 to D8 (as Directors of Ho Hup) and against D3, D9 and D10 as Directors of Bukit Jalil.

**[76]** Taking the first locus point ie, commencing this suit in its own right, these issues are to be considered contextually within the JDA and s. 132C of the Act. In other words, whether the JDA, PA and EU amount to a "disposal", pursuant to s. 132C(2) of the Act, and whether D2 to D8 had breached their fiduciary duties to Ho Hup by committing Bukit Jalil to the JDA, in breach of s. 132C without approval by the shareholders of Bukit Jalil.

**[77]** In our view, for Ho Hup to succeed in this first locus point, it must fall within s. 132C(2), which in itself, is a narrow and limited cause of action.

**[78]** It is relevant to now examine what is the effect of the JDA on the parties.

**[79]** After considering the terms of the JDA and its corollary documents, we found that in essence, the JDA contemplates a development of the land by Pioneer Haven and a division of the profits derived therefore between Pioneer Haven as developer and Bukit Jalil as land owner. Pioneer Haven is the vehicle of Malton to develop the land. Thus at all times, the JDA is a joint venture between Pioneer Haven and Bukit Jalil and is not a sale of the land as was suggested by Ho Hup (see ss. 3.1 and 24.1 of the JDA).

**[80]** It is common ground that Bukit Jalil is and continues to be the legal and beneficial owner of the land. There is no transfer of ownership of the land to Pioneer Haven, whether pursuant to the JDA or otherwise. The contracting parties are Bukit Jalil and Pioneer Haven.

**[81]** The entire costs of developing the land is funded solely by Pioneer Haven which is not entitled to charge the land for the purposes of securing financing for the development. Moreover Bukit Jalil is not required to contribute any funds towards the

development of the land. Irrespective of the commercial risks associated with the development of the land, Bukit Jalil's entitlement as land owner is 17% of the Gross Development Value ("GDV") of the land, which translates to the estimated sum of RM426 million, with RM265 million being the minimum guarantee which it will receive from the project.

**[82]** Pioneer Haven is an unrelated company to Bukit Jalil. Thus in so far as it is concerned, the JDA is a commercial arms-length transaction entered into *bona fide*.

**[83]** It is also crucial to note that the JDA was approved by the then existing and authorised board of directors of both Ho Hup and Bukit Jalil.

**[84]** On 16 March 2010 at the Bukit Jalil Board Meeting, D3, D9, D10 and Ivan Ho (the Chief Financial Officer) of Ho Hup approved a resolution for Bukit Jalil to enter into the JDA with Pioneer Haven.

**[85]** Immediately after the said Bukit Jalil Board Meeting, a meeting of Ho Hup's Board was held on the same day, ie, on 16 March 2010. There, D3 to D8 approved a resolution from Bukit Jalil to enter the JDA will Pioneer Haven on the same terms and conditions as approved by the Bukit Jalil Board, except that the guarantee was increased from RM200 million to RM265 million.

**[86]** On 17 March 2010, D2 to D7 were removed as directors of Ho Hup at the 2nd EGM, and new directors were appointed to replace them.

**[87]** On 26 April 2010 the new Board of Directors filed this action challenging the JDA.

**[88]** In our view, the JDA is a sound commercial deal for Bukit Jalil, since it afforded Bukit Jalil a minimum guaranteed entitlement of RM265 million, whatever the outcome of the development.

**Disposal**

**[89]** A corollary to this is whether the JDA amounts to a "disposal" within the meaning of s. 132C of the Act.

**[90]** Ho Hup contends that the terms of the JDA, or the JDA, read with the Power of Attorney (PA), tantamounts to a disposal of the land by Bukit Jalil pursuant to s. 132C.

**[91]** Ho Hup particularized the alleged hallmarks of the JDA and PA which purportedly bears the characteristics of a "disposal", in paras. 22.2 of its amended statement of claim and elsewhere in its written submission.

**[92]** The importance of whether the JDA amounts to a disposal cannot be understated, not least since it has a distinct connection to the issue of locus. If it is a disposal, then shareholder's approval in a general meeting must be obtained. The fact that no such shareholders approval was obtained would have a bearing as to whether Ho Hup's claim could fall within the narrow compass which this statutory regime under s. 132C provides.

**[93]** It is our view however, that Ho Hup's contention that the JDA falls within the purview of s. 132C of the Act is misplaced and misconceived, both in fact and in law.

**[94]** It is necessary to appreciate the context of the term "disposal" within the ambit of s. 132C of Act as is set out below.

**[95]** Section 132C reads:

> 132C(1) Notwithstanding anything in the memorandum or articles of association of the company the directors shall not carry into effect any arrangement or transaction for:
>
> (a) ...
>
> (b) the disposal of a substantial portion of the company's undertaking or property, unless the arrangement or transaction has been approved by the company in a general meeting.

**[96]** To put matters in perspective, it would be useful to indicate here the learned judge's findings on the issue of "disposal" under s. 132C of the Act, which is broadly summarized as follows:

(a) The JDA and power of attorney (PA) have vested *"de facto"* control over the land in Pioneer Haven and that Bukit Jalil has divested all its rights in the land and further under the PA, Pioneer Haven has unfettered powers to charge the land to intended financiers of the purchasers;

(b) that the JDA was akin to a sale and purchase of the land where the "price" is received through deferred payment; A

(c) that Bukit Jalil has effectively transferred "beneficial ownership" of the land to Pioneer Haven because Pioneer Haven has sole and exclusive rights to the development of the land; B

(d) that the test for the term 'disposal' under s. 132C of the Act is based on who has *'de facto'* control over the development of the land, instead of who has ownership of the land.

**[97]** With respect, we are of the view that the learned trial judge had misdirected himself and erred in law and/or in fact in making the said determinations. C

**[98]** Our reasons are manifold. We can begin by construing the interpretation to be given to the word "disposal" in s. 132C of the Act. D

**[99]** In this regard, statutory interpretation of the word 'disposal' can be seen in the authority of *Re: Margart Pty Hamilton v. Westpac Banking Corporation & Another* [1985] BCLC 314, where the NSW Supreme Court found that in legal terms, the word 'disposition' when used with reference to property normally connotes a change in the beneficial ownership of an asset by transfer or other type of dealing. Thus, it is clear that it would only be considered a "disposal" if there was in fact a transfer of or change in beneficial ownership. E F

**[100]** It is interesting to note that Australian Courts have consistently held that the term "disposition" should be construed as "transfer" or "alienate", whereby there must be some change that takes out of the company or transfers beneficial ownership in a corporate asset and passes it to someone else (See *Australian Trade Commission v. Film Funding and Management Pty Ltd* [87 ALR 49] and *Re: Loteka Limited* [1989] 15 ACLR 620. The Australian cases are persuasive in assisting us in determining this issue. G H

**[101]** In the context of the JDA and PA, was there in fact, a transfer of or change in the beneficial ownership of the land?

**[102]** A good starting point would be to look at the nature of the transaction embodied in the JDA. Section 3.1 clearly sets out the parties' intention, which is to "enter into a joint venture between themselves to develop the land." I

**[103]** Clause 22.6 of JDA states unequivocally that Bukit Jalil is to sign the sale and purchase agreement and documents of transfers to the persons who purchase units in the joint development project.

**[104]** Clause 24.1 of JDA expressly provides that nothing in the JDA shall be construed as the sale of the land or any part thereof by Bukit Jalil to Pioneer Haven.

**[105]** Clause 27.2 of the JDA provides that in the event Pioneer Haven is wound up, Pioneer Haven shall handover possession of the balance of the land not developed to Bukit Jalil.

**[106]** In fact, it is clearly provided in art. 5 of the JDA that Pioneer Haven's responsibility is to develop the land and it is to carry out the sale and marketing of the units to be constructed.

**[107]** As such the explicit terms of the JDA are clear as to the nature of the transaction. There is therefore no "transfer of or change in beneficial ownership" to the land to amount to a disposal as envisaged under s. 132C of the Act.

**[108]** In fact, Ho Hup's own witness Ivan Ho (PW5) concedes that under the JDA, the land is not transferred to Pioneer Haven but instead remains with Bukit Jalil.

**[109]** Interestingly the present wordings of s. 132C1(a) and (b) came into effect by way of amendment Act A1229/07. Prior to the said amendment, s. 132C(1) read as follows:

> Notwithstanding anything in the company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for –
>
> (a) ...
>
> (b) the disposal of a substantial portion of the company's undertaking or property.

**[110]** Section 132C as it is presently worded, does not expressly state that the directors or company shall not enter into any arrangement or transaction for the disposal of substantial asset without prior approval by the company at general meeting. Instead it says that the directors shall not carry into effect any such arrangement or transaction without approval of the company at general meeting.

**[111]** Thus the words "or execute" in the old section have been deleted. Clearly, the intention of the legislation is to restrict the operation of the section to a *situation where the directors are carrying into effect the impugned transaction, as opposed to merely entering into it by executing an agreement.* (emphasis added).

**[112]** "Carrying into effect" clearly meant the implementation of the JDA. The prohibition does not extend to the entering into or signing of the JDA. By contrast, s. 132C(2) allows an injunction to prevent the "entering into"; this creates a statutory exception, allowing a pre-emptive strike for acts preparatory to "carrying into effect".

**[113]** In the present appeal, all that was done was the signing of the JDA on 16 March 2010. The old board of directors was then removed on 17 March 2010. They took no further steps in the "carrying into effect" of the JDA. So there is no breach if at all, at least by the old board of directors. Assuming that the JDA was a disposal within s. 132C, it is up to the new board to call for the EGM under s. 132C if they consider that this section applies.

**[114]** One might ask: what is the mischief which s. 132C seeks to avoid? Reading the said section as a whole, it is clear that the mischief which s. 132C was enacted to prohibit, was the parting by the company of any of its substantial assets without approval of the shareholders at general meeting. Section 132C makes it incumbent upon the directors and the company to inform the shareholders of any intention to carry into effect any transaction whereby any substantial assets of the company was to be taken out of the company. This duty is indirectly imposed by requiring shareholders' approval before such transaction is carried into effect. The whole objective of s. 132C is designed to protect the interest of the company itself (in this case, Bukit Jalil) and not the interest of a shareholder, such as Ho Hup.

**[115]** In the instant appeal, seeing as how the land is still beneficially and legally owned by Bukit Jalil, we are unable to see how s. 132C is triggered. Section 132C is surely not intended to apply to any transaction where the legal and beneficial ownerships of the relevant assets are still being possessed by the company. Otherwise, companies may find it irksome to carry on its normal corporate activity, such as granting a floating charge or even charge any of its substantial assets to a bank or financier if they have to every now and then, scurry to the shareholders for

approval. As is commonly done, a floating charge is always granted together with a power of attorney which empowers the bank to sell the company's undertaking upon default. Surely this class of activity would not trigger s. 132C.

**[116]** Another jurisdiction which is similarly circumstanced is South Africa. The approach taken by the South African Courts in cases such as *Alexander and Another v. Standard Merchant Bank Ltd* [1974] (4) SA 730 (W) and *The Standard Chartered Bank of South Africa Ltd. v. Hunkydory Investments (188) Pty Ltd.* Case No. 15427/08 in the Western Cape High Court, Capetown determining whether the impugned transaction is a "disposal" and thus requiring shareholders approval under s. 70(2) of the old Companies Act or s. 228 of the new Act is persuasive. Section 228 of the new Act reads as follows:

> 228. Disposal of undertaking or greater part of assets of Company [(1)]
>
> Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save by a special resolution of its members, to dispose of (1) the whole or the greater part of undertaking of the company; or (b) the whole or greater part of assets of company.

**[117]** Generally, the South African Courts, in determining whether the impugned transaction is a "disposal" and so requiring shareholders approval under s. 228, would look at the substance of the transaction and determine whether:

(i) There was in fact no transfer of the property to the other party;

(ii) that the other party was not free to deal with the property as he wishes;

(iii) that there was a "reversionary right" which is akin to the common law right of redemption or right to redeem upon which the property was to be returned to the transferor or owner.

In such circumstances, the courts have held that such a transaction does not amount to a disposal under the section.

**[118]** We are inclined to favour the above approach since the decisions are in respect of a similar statutory regime with our s. 132C.

**[119]** In our view, in applying the same approach, it bears repetition and it is noted that:

(i) There is no transfer of the land to Pioneer Haven under the JDA;

(ii) Pioneer Haven is not at liberty to dispose off the land save in accordance with the JDA ie, for the purpose of selling the properties under the development to purchasers.

(iii) The power of attorney (PA) merely gives rights to Pioneer Haven to deal with the land, where the PA makes it clear that Pioneer Haven can only transfer the land or any part thereof in accordance with and for the purpose of the JDA.

(iv) Upon termination of the JDA, the land reverts to Bukit Jalil.

**[120]** Ho Hup sets great store by the lodgement of a private caveat by Pioneer Haven as being symptomatic of the latter having acquired a registrable interest in the land. The fact that Bukit Jalil could apply to remove it, in accordance with the National Land Code, does not therefore support Ho Hup's contention.

**[121]** In fact, even a clause in a contract allowing the lodgement of a caveat does not create an interest in the land (See Supreme Court in *Wong Kuan Tan v. Gambut Development Sdn. Bhd.* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441).

**[122]** In the first place, the entry of a private caveat cannot confer an interest in the land where none was granted under the JDA (See *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Tan Tien Chi & Anor* [1995] 3 CLJ 520).

**[123]** Ho Hup also relied on the power of attorney as evidence of Bukit Jalil having given its right to Pioneer Haven to sell off the land or part thereof. Ho Hup had obviously overlooked s. 2.2 of the JDA which in clear terms requires the granting of power of attorney for the purpose of the JDA only and not to give any absolute rights to Pioneer Haven to deal with the land.

**[124]** In connection with this is the power to transfer the land and execute any deed, documents or instruments for the purpose of the transfer of the land, which is not absolute, but merely to enable Pioneer Haven to enter into sale and purchase agreements and to generally give effect and act in accordance with the terms of the JDA.

**[125]** In other words, the true effect of the JDA is for the sharing of proceeds of sale of units in the development, between Bukit Jalil and Pioneer Haven.

**[126]** The truth is, the provisions as are found in the JDA are commonplace in joint venture agreements in this country, between the land owner and developer. They do not intend to transfer the beneficial interest of the land, but are simply contractual provisions, allowing the developer the right to develop the land without interference. This is commercially expedient as the developer or Pioneer Haven, in this case, has guaranteed a minimum return of RM265 million.

**[127]** Thus in such joint ventures, as in the JDA, the land owner commonly gives up rights to deal with the land to the developers. It is structured on the basis that the developer is the expert who develops the land and the land owner's participation is usually minimal. But the developer will require possession of the land with as little interference as possible from the owner. In such commercial arrangements, the obligation to develop and obtain funding lies with the developer. However the developer requires a power of attorney (PA) to charge the land. In the appeals before us the power given to Pioneer Haven in the PA is for the purpose of enabling the third party purchaser to obtain financing to complete the purchase of the unit.

**[128]** This court has repeatedly held that a joint venture where the developer is only entitled to sale proceeds (as in the JDA) does not create an interest in land.

**[129]** For example, in *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor & Another Appeal* [2003] 3 CLJ 339, in relation to a joint venture, it was held that:

> ... This is not a case of an agreement conferring an interest in Land ... It is established by authority that a joint venture agreement to develop land and to share proceeds of development does not confer a caveatable interest even if the agreement itself expressly provides for entry of caveat.

**[130]** In short, this is a typical arrangement for a profit sharing venture and is therefore not a transfer of an interest in the land. Obviously there is therefore no disposal. This is the exact situation in the JDA.

**[131]** Whilst it has been clearly established that there is no change in ownership of the land, Ho Hup however attempts to suggest that there exists a "disposal" because it claims that under the JDA, Bukit Jalil has ceded *de facto*, if not *de jure* control over the land to Pioneer Haven.

**[132]** The mere fact that Pioneer Haven has control over the development of the land, is in itself, insufficient to be considered a "disposal" of the company's property within the meaning of s. 132C of the Act. This is the position, even if Bukit Jalil does not retain any discretion with respect to the development of the land.

**[133]** As manifested in the terms of the JDA, there is not even the element of "control simpliciter" by Pioneer Haven over the land. At all times the rights and powers accorded to Pioneer Haven is not absolute but is instead, restricted to the exercise of powers to carry out their obligation under the JDA to develop the land in the context of the development.

**[134]** The commercial reality is that no developer will be in any position to develop a plot of land owned by a separate owner without the rights given the developer as under the JDA, EU and PA.

**[135]** We might add, for good measure, that the more critical clauses in the JDA (such as cls. 7, 18.2 and 27.1(a), make it doubly clear that Pioneer Haven did not acquire interest in the land, because a sale was expressly excluded and the property remains that of Bukit Jalil in the event Pioneer Haven "goes under" (becomes insolvent); and that should Pioneer Haven goes into liquidation, the land does not form part of Pioneer Haven's assets and in fact, Bukit Jalil would then have to take over possession of the land and continue with the construction of the development.

**[136]** It is not without significance too, that the consolidated income statement released by the current Board of Ho Hup for the quarter ended 30 June 2010, shows that the land was recorded as an asset of Ho Hup. Of course it is, because as is obvious, the land is Ho Hup's "crown jewel".

**[137]** In this connection, the testimony of Mr Ooi Ah Heong of Pioneer Haven is consistent with Pioneer Haven's position that certain rights have been given to Pioneer Haven for the purposes of development according to the JDA.

**[138]** Thus there is no co-relation or even synergy between the words "control" and "disposal" as put forth by Ho Hup. In fact one would be completely nonplussed if one were to take Ho Hup's suggestion to its bitter end, that the word "disposal" can be determined simply by reference to "control" (See paras. 56.3 and 53 of Ho Hup's written submission).

**[139]** In fact, case law suggests that the contrary position is true. In determining the phrase "any disposition of the property of the company" in the *Re: Margart Pty Hamilton v. Westpac Banking Corporation & Another (supra)*, Helsham CJ found that there is no "disposal" of the property of the company even when a 3rd party has control and deals with the property to the exclusion of the company.

**[140]** Thus, by a constructive analysis of the terms and the nature of the transaction, it is evident that the JDA, the power of attorney and the endorsement and undertaking **does not amount** to a "disposal" within the meaning of s. 132C of the Act. (emphasis added). In our view, the JDA and its accompanying documents, the PA and EU are all valid.

**[141]** In the light of the above, it is our view that Ho Hup is not entitled to sue in its own right pursuant to s. 132C not only because the JDA does not amount to a disposal, but also due to the following:

**[142]** Under s. 132C of the Act, the only provision which provides relief to a shareholder of the company (in this case Ho Hup), is s. 132C(2) of the Act which provides as follows:

> (2) The Court may, on the application of any **member** of the company, restrain the directors from **entering into a transaction** in contravention of subsection (1). (emphasis added).

**[143]** The provision in s. 132C(2) above is unambiguous. As alluded to earlier, it provides relief to restrain the entry into a transaction. In the present appeal, it is not disputed that the JDA has already been executed. In other words, the new or present Board of Ho Hup was faced with a *fait accompli*. Therefore, this subsection, which contemplates pre-emptory relief (to Ho Hup), is inapplicable. In any case, under this s. (132C(2)), the directors that Ho Hup can restrain (if at all) are the directors of Bukit Jalil only, not of Ho Hup itself as the asset in question ie, the land, is the asset of Bukit Jalil. But in this appeals, it appears to us that the complaint by Ho Hup is against the act of its own directors. That, to our mind, does not come within the ambit of s. 132C(2).

**[144]** The significance of the above legal position must have been lost on Ho Hup.

**[145]** As Ho Hup has failed to come within the purview of s. 132C(2) its right to commence this suit in its personal right naturally fails.

**[146]** It is of course trite that the cornerstone of company law is that a company is a separate legal entity from its shareholders. As such, a shareholder cannot claim any right to any asset of the company, for it has no legal or equitable interest therein. (See *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355).

**[147]** As has been made clear, Ho Hup has no right over the said land since it belongs to Bukit Jalil. Ho Hup is also not a contracting party to the JDA. In the absence of these rights, irrespective of whether there are any merits in Ho Hup's complaints, has Ho Hup the *locus standi* to seek relief in respect of the said land (including the nullification of the JDA)?

**[148]** In short, is Ho Hup the proper plaintiff in this suit?

**[149]** Even assuming for a moment that the JDA is invalid, in the event of any loss or injury suffered by the contracting company (ie, Bukit Jalil), can Ho Hup step into Bukit Jalil's shoes and commence this suit against the Directors (of both Ho Hup and Bukit Jalil) and Pioneer Haven, with Bukit Jalil as nominal defendant?

**[150]** Or putting it in another way, has Ho Hup the right to sue in its own right if a loss or injury is suffered by Bukit Jalil?

**[151]** The learned trial judge took the view that it has. This was how His Lordship puts it:

> ... No doubt the Plaintiff does not have a proprietary right as it is not the registered owner of the Land but any real or even perceived loss suffered or to be suffered by the 1st Defendant will give rise to a cause of action to Plaintiff as it is a majority 70% shareholder of the 1st Defendant. In other words, it is a right limited to its shareholding.

**[152]** Based on the above, the learned trial judge held that Ho Hup had a cause of action in its own right on the ground of a common law personal cause of action based on its shareholding, being a loss in value to its shareholding.

**[153]** With respect we found that the learned trial judge's finding above to be erroneous. Our reasons are as follows:

**[154]** Firstly, the learned trial judge found that the common law cause of action is based on the damage to its shareholding, in that the loss to Bukit Jalil (due to damage to the land), gives rise to a loss to Ho Hup's shareholding in Bukit Jalil. In our view, this finding offends the proper plaintiff rule.

**[155]** Thus the question is: Who is the proper plaintiff in a corporate action?

**[156]** Bearing in mind that the company being a legal person is distinct from its members, whose individual identities are substantially merged in the corporate structure, the rights and liabilities arising out of the company's affairs are channelled through the company.

**[157]** For example, if there are liabilities, the company's creditors are not able in general to sue the members for the company's debts.

**[158]** Likewise, as far as rights were concerned, where wrongs were done to the company, in general, the cause of action belonged to the company (ie, Bukit Jalil, in this case) and an individual member (such as Ho Hup), has no standing to enforce it. Moreover, members were in general, bound by the decision of the majority of their number.

**[159]** The above principle embodies the "proper plaintiff rule", as articulated in *Foss v. Harbottle* (1843) 2 Hare 461 (Vice-Chancellor's Court, England) ie, that the proper plaintiff in a suit for the enforcement of a corporate right, is the company itself.

**[160]** Flowing from this, a member may not sue to enforce a company's rights (See *Prudential Assurance Co. Ltd. v. Newman Industries Ltd (No. 2)* [1989] 1 All ER 387, for only the company can do so. The rationale is of course, to prevent a multiplicity of suits brought on by members on behalf of the company. In any case, a company is a separate entity from its members and because of this a member may not sue to enforce a company's rights. However a member can do so if it is a wrong not to the company but an injury to a member personally. Say for example, if the member's rights are infringed, the member may sue for a personal remedy. An example would be where the company is threatening to breach or actually breaches a contract with a member. It would apply where a member is complaining of a tort committed against him by the company.

**[161]** In the instant appeal, whilst there is no doubt that Ho Hup holds the majority shareholding at 70% of the entire issue and paid up capital of Bukit Jalil, Bukit Jalil however, is the registered owner of the land, not Ho Hup. It needs to be stressed here that under the National Land Code, unless and until the land is registered in the name of Pioneer Haven, the land remains the property of Bukit Jalil, who has indefeasible title over the land. This simply means that Ho Hup as a shareholder, cannot sue for loss (if any) suffered by the company (ie, Bukit Jalil).

**[162]** Lord Millet in *Johnson v. Gore Wood and Company* [2001] 1 All ER 481, sets out the legal position in relation to the cause of action which may be had by any party arising from various breaches of duties against a company or a shareholder or both.

**[163]** His Lordship begun by saying that:

> ... A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholder. If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at

A the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in the name of the company and recover damages on its behalf ... (See *Prudential Assurance Co. Ltd. v. Newman Industries Ltd (No. 2)* (1982) Ch. 204.

B **[164]** Thus if a wrong is done to Bukit Jalil, only Bukit Jalil can utilise that chose in action. No one else could.

**[165]** Lord Millet went on further to say that:

C ... Where the company suffers loss as a result of wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has
D suffered personal loss caused by the Defendant's actionable wrong.

**[166]** Thus in our view, it is clear that Ho Hup would, *prima facie*, have a cause of action if it suffers loss "as a result of an actionable wrong done to it". In this appeal, where is the
E actionable wrong done by any of the defendants to Ho Hup?

**[167]** No evidence has been adduced to show that Ho Hup has in any way suffered any kind of loss or that there is a diminution in the value of Ho Hup's shares in Bukit Jalil. Although we are aware that there is a general averment that the defendants had
F acted in "reckless disregard to the interests of Ho Hup and Bukit Jalil" at para. 26 of its amended statement of claim, Ho Hup had failed to show in what manner exactly have the defendants acted in that way and what interests actually do Ho Hup have in the land or the JDA.

G

**[168]** In fact we find no particulars either in the pleadings or evidence which reflect that Ho Hup has a personal cause of action against the defendants in respect of the land and the JDA.

H **[169]** One can only surmise that Ho Hup's commencement of action in its personal right is related to its perceived diminution in value of its shares as a result of the JDA.

**[170]** However this does not entitle Ho Hup this action in its personal right.

I

**[171]** On this point, this is what Lord Millet had to say: A

> It is of course correct that a diminution in the value of the Plaintiff's shares was by definition a personal loss and not the company's loss, **but that is not the point**. The point is that it merely reflected the diminution of the company's assets. The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of company. If so, such reflected loss is recoverable by the company and not by the shareholders. (emphasis added). B C

**[172]** Ho Hup would, *prima facie*, have a cause of action if it suffers loss as a result of an actionable wrong done to it.

**[173]** We are unable to comprehend as to how Ho Hup had suffered such that it is entitled to commence this suit in its personal right. Even if Ho Hup took the position that the entering into the JDA had caused diminution in the market value of its shares, we are unable to see how this can overcome the corporate impediment, reinforced over and over again, in various authorities, that of the "proper plaintiff rule". In a well-known passage in *Prudential v. Newman (supra)*, the court observed that: D E

> ... But what the shareholder cannot do is to recover damages merely because the company in which he is interested has suffered damages. Its cannot recover a sum equal to be diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a loss is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only loss is through the company, in the diminution of the value of net assets of the company, in which he has (say) a 3 percent shareholding. The Plaintiff's shares are merely a right of participation in the company on the terms of articles of association. F G
>
> The shares themselves, his right of participation are not directly affected by the wrongdoing. The Plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the Plaintiff does not affect the shares; it merely enables the Defendant to rob the company ... H

**[174]** In our view, the commencement of this action by Ho Hup in its personal right is tantamount to Ho Hup misappropriating Bukit Jalil's chose in action, namely, any cause of action which Bukit Jalil has against the defendants. I

**[175]** Ho Hup's problem is compounded by the relief they sought. For a start, the wording of s. 132C(2) is clear and unambiguous. It provides relief to restrain the entry into a transaction. In these appeals, it is not disputed that the JDA has already been executed. Thus this subsection which contemplates pre-emptory relief is not applicable.

**[176]** Furthermore, the prevailing subsection to void a transaction is s. 132C(3).

**[177]** Unlike sub-s. (2) of s. 132C, this subsection does not provide that a member of the company (Ho Hup) may void the transaction. It can therefore be construed that the legislature did not intend to provide an individual member ie, a shareholder such as Ho Hup, with the power to invalidate a transaction entered into by a company. This is in keeping with authorities such as *Law Kam Loy v. Boltex (supra)* which draws a clear distinction that a shareholder has no legal or equitable right to an asset of a company.

**[178]** In view of the position we have taken earlier that there is no provision in s. 132C of the Act which allows Ho Hup to claim the reliefs sought, Ho Hup therefore has no maintainable cause of action in its own right to commence the suit therein.

**Ho Hup's Derivative Action**

**[179]** Ho Hup maintains that it has both a personal and derivative right to commence action.

**[180]** The basis for the claim for the derivative action is the wrongful disposal of the land within the meaning of s. 132C of the Act.

**[181]** The High Court had held that the derivative action is flawed. We agree with him for so holding. The defect flows from the proper plaintiff rule, that as the injury is suffered by Bukit Jalil for the wrongful disposal of its land, Bukit Jalil should be the proper plaintiff. However Ho Hup pleads that it commences this action for the benefit of Bukit Jalil.

**[182]** A derivative action is an action which is commenced by a shareholder to redress a wrong done to the company. Such an action is thus, an exception to the proper plaintiff rule.

**[183]** Clearly then, for all its notoriety, the rule is actually quite prosaic, for it allows the shareholder to bring an action to redress a wrong done to the company if the wrongdoers are in a position to defeat any proposed resolution of the directors or shareholder that the company (as opposed to the shareholder) initiate proceedings against the wrongdoers.

**[184]** It is of course axiomatic that the shareholder is disentitled to commence such derivative action if the said wrongdoing is ratifiable or waivable by the members in a general meeting.

**[185]** As authorities such as *Johnson v. Gore Wood (supra)*, *Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2) (supra)* and *Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors* [1995] 4 CLJ 551 had propounded, if a wrong is done to a company, then only the company is the proper plaintiff in an action brought to redress the wrong. We now look to the exception of this rule.

**[186]** As was succinctly expressed by Gopal Sri Ram JCA in *Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors supra*:

> We now turn to consider the one exception with which this case is concerned. It is the derivative action; an ingenious procedural device created by Courts of equity; by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-marking organs and will not, for the reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the others shareholders of the company, other than the defendants. The wrongdoers must be cited as Defendants. So too must the company.

**[187]** Ho Hup's purported basis for commencing a derivative action is that they claim not to have control of Bukit Jalil at the time of commencement of the suit, despite being the majority shareholder of Bukit Jalil.

**[188]** Instead, by its pleaded case, Ho Hup claims that "at that time", Bukit Jalil was under the control of D3, D9 and D10. There is also mention that Zen Courts, which holds 30% of shares in Bukit Jalil also supports the JDA.

**[189]** Essentially what Ho Hup claimed was that it does not have *de facto* control of Bukit Jalil for two (2) reasons:

(i) that D3, D9 and D10 being the alleged wrongdoers, were in control of Bukit Jalil; and

(ii) that Zen Courts is not a friendly party in that it posed problems for Ho Hup.

**[190]** The question before us is: Who has control? Firstly, the test is not whether the "wrongdoer-directors" are in control of the Board of Bukit Jalil, but whether the "wrongdoers" control the general meeting.

**[191]** As the learned author Loh Siew Cheang and William F Wong in *"Company Law, Powers of Accountability"* at p. 1256 had stated:

> Generally, the right to litigate in the name of company is vested in the board of directors. However the concept of "control" in the context of *Foss v. Harbottle* means or refers to control of general meetings and not control over the right to litigate in the name of company. The necessity to determine who has control over the general meeting is the result of the rule established in *Mac Dongall v. Gardiner* that is, if a wrong is capable of being cured or ratified by the majority in general meeting, then there is no basis of a derivative action.

**[192]** The High Court correctly asked the question whether Ho Hup had effective control over Bukit Jalil. It is undisputed that Ho Hup holds 70% of Bukit Jalil and is therefore the majority shareholder, capable of appointing directors to Bukit Jalil. The remaining 30% was held by Zen Courts.

**[193]** The question which arises is this: were the "wrongdoers" in control of Bukit Jalil?

**[194]** This is a question of fact. Prior to the commencement of the suit and shortly after the EGM on 17 March 2010 which removed the existing "wrongdoer' directors, D2, D3, D4, D5, D6 and D7 in control of Ho Hup, new Board of Directors of Ho Hup were appointed.

**[195]** At the shareholders meeting held on 10 May 2010, the resolutions for D3, D9 and D10's removal as directors and the appointments of Ho Hup's nominees as directors were passed.

**[196]** On 12 May 2010, Zen Court's nominated directors were passed.

**[197]** Thus, as at 12 May 2010, the Board of Bukit Jalil comprised solely of directors nominated by Ho Hup, which meant that Ho Hup was in control of the general meeting of Bukit Jalil (they were free of the "wrongdoer directors").

**[198]** However Ho Hup alleged that there was an impediment to their securing *de facto* control of Bukit Jalil because Zen Courts stood in its way.

**[199]** After perusing the records, we are of view that Ho Hup's contention about Zen Courts being the obstruction was merely illusory. Firstly the alleged "bad blood" between them was due to, *inter alia*, Zen Court's approval of the JDA. Ho Hup also gave the excuse that it had faced obstacles from Zen Courts with regard the removal of the three (3) "wrongdoers" (D3, D9 and D10) and that Zen Courts is aligned to D2, D3, D9 and D10. The fact that Zen Courts had issued a letter agreeing to the JDA does not of itself shows any alignment. But this averment was not pleaded in Ho Hup's amended statement of claim and so Ho Hup is estopped from relying on this.

**[200]** In any case, it must not be lost sight of, that the resolutions of Ho Hup to appoint six (6) new directors nominated by LC Sons were passed. The ability of Ho Hup to rid itself of the "wrongdoers" was undisputed, as confirmed by M Dorairaj, (Ho Hup's 1st witness).

**[201]** Although D3, D9 and D10 were removed initially merely by issuing letters to them dated 9 April 2010, Zen Courts did not object to their "removal" nor objected to their replacements. So Ho Hup's alleged "deadlock" with Zen Courts seems fanciful.

**[202]** D3, D9 and D10 were no longer in control after 9 April 2010. More significantly, the new directors appointed by Ho Hup were in control and exercised powers as directors from 9 April 2010. There are evidences of exercise of such powers by the new directors, such as the approved resolutions of Bukit Jalil to change the company secretary and registered office on 9 April 2010. Several meetings of the Bukit Jalil Board were held after 9 April 2010, to approve transactions for the sale of pieces of land on 29 October 2010 and on 20 October 2010.

**[203]** In view of these, Ho Hup's excuse that the wrongdoers were in control prior to the filing of the action on 24 April 2010 therefore does not hold water.

**[204]** If there were wrongdoers in control prior to the filing of the action on 24 April 2010, we are unable to see evidence of any attempt by Ho Hup to remove the board; nor do we see any evidence showing that Zen Courts had prevented the removal of such wrongdoers.

**[205]** In fact, Ho Hup's claim that there was an extreme urgency to prevent further dealings with the land is misleading.

**[206]** Thus the irresistible conclusion is this: that not only was there no wrongdoer control to warrant the filing of derivative action, the irony is that, Ho Hup's nominees were in fact, in control of Bukit Jalil right after the 17 March 2010 EGM.

**[207]** Thus it does not now lie in Ho Hup's mouth to suggest that they were compelled to commence a derivative action by reason of a purported lack of *de facto* control over Bukit Jalil.

**[208]** The absence of a wrongdoer control to prevent the company from bringing action in its own name, disentitles Ho Hup from maintaining this derivative action.

**[209]** Furthermore, if the "wrong" can be cured or ratified by the majority in general meeting, the basis of a derivative action no longer exists.

**[210]** Ho Hup ratified the JDA on 9 February 2011. Although this was subsequent to the filing of the suit, the fact remains that by having ratified the JDA, Ho Hup (being the 70% shareholder) has also ratified the decision of the defendant directors for Bukit Jalil to enter into the JDA. Ho Hup cannot now sue for the entry into the JDA. (See *Prudential Assurance Company Ltd v. Newman Industries Ltd (supra)*). Vinelott J held that where the wrongdoers are not in control, the acts are not *ultra vires* or illegal transactions, ratification is available regardless of the character of the transaction.

**[211]** Moreover there is no "wrongdoer control" where the holding company holds more than 50% of the subsidiary.

**[212]** It is clear that after 17 March 2010 EGM, Ho Hup was firmly, legally and factually in control of Bukit Jalil. By the events after 17 March 2010 EGM, Ho Hup has failed to provide cogent and tangible reasons for commencing this purported derivative action and maintaining it as such.

**[213]** Ho Hup has failed to establish both its right to commence this action in its own right and as a derivative action. As had been said earlier, on this ground alone, the appeals should fail.

**[214]** However for completeness we shall consider the other claims ie, that:

(i) in causing Bukit Jalil/Ho Hup to enter into the JDA, PA and EU, D2, D3, D4 to D8 (directors of Ho Hup at the material time) and D3, D9 and D10 (directors of Bukit Jalil at the material time), had breached their duties to the respective companies.

(ii) that Pioneer Haven had knowingly assisted the said defendants in their breaching of their duties for the reasons set out below and were accessories.

**[215]** As regards (i) above, we agree with the findings of the learned trial judge who decided without considering the merits of those claims, that there was no breach of duties as against D3, D9 and D10. (Directors of Bukit Jalil).

**[216]** In fact, Ho Hup did not appeal this finding by the learned trial judge.

**[217]** However the learned trial judge agreed with Ho Hup insofar as breach of duties by directors of Ho Hup were concerned.

**[218]** As regards (ii) above, the learned trial judge allowed the claim for knowing assistance after having evaluated the documentary and oral evidence tendered during the trial.

**Breach Of Duties Of Directors Of Ho Hup**

**[219]** We have considered the submissions of counsel of the respective defendant directors and will state our views accordingly.

**[220]** In respect of this cause of action, the learned trial judge emphasized two main factual issues:

(i) Bad Faith on the part of directors (of Ho Hup only) for not having acted in the interests of Bukit Jalil, this includes both shareholders at that time and prospective shareholders; and

(ii) An improper purpose ie, for D2 to D10 having exercised their power to enter into the JDA, PA and EU for a purpose other than for the benefit of Bukit Jalil.

**[221]** The complaint as against D2, D3, D9 and D10 by Ho Hup is that they breached their fiduciary duties to the respective companies. Their individual breaches of the business judgement rule also formed an element of Ho Hup's case against them for breaches of fiduciary duties. Thus there is an overlap of issues against these directors.

**[222]** The complaint as against D4 to D8 is that they had breached their statutory duties to Ho Hup ie, the business judgement rule.

**Findings By The High Court**

**[223]** The learned trial judge considered the actions of D2 with regard to the negotiation and entry into the JDA. His Lordship found that the terms of the JDA were entered "not for a proper purpose" but for D2's self-interest; that D2 was the unseen hand acting behind the scene. The learned trial judge also made a finding that D3 together with the other directors had colluded with D2 to finalise the JDA late into the evening of 16 March 2010 and that the grant of the PA on 17 March 2010 and the support shown for the EU all go to show that D2 had not acted *bona fide* in the best interests of Ho Hup. The learned trial judge stated in clear terms that although he was mindful that he must not concern himself with whether the deal was good or bad, he has a duty to perform and that is to determine whether the deal amounted to a disposal of the land without the requisite shareholders' approval at a general meeting.

**[224]** The learned trial judge went on to say that the unholy haste in which the JDA was entered into by D2 with the other directors amounted to a breach of their duties.

**[225]** The learned trial judge in short, viewed D2 as being the villain of the piece.

**[226]** The learned judge also found D3 to be in breach of his duties in particular in breach of the business judgement rule, as a director of Ho Hup when he failed to comply with the provisions of s. 132C(1)(b).

**[227]** The learned judge also found lack of good faith on the part of both D2 and D3 where they decided to pay themselves termination benefits of RM1 million before they were removed as directors and that D3 had colluded and acted in complicity with D2 in their procurement of the JDA.

## Our View

*Duty to Act in Good Faith and in the Best Interest to the Company*

**[228]** The prior provision of s. 132(1) requires a director to act honestly. The current s. 132(1) of the Act, requires a director to act in good faith in the best interest of the company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old s. 132(1) and the new s. 132(1) are the same. Thus the old case laws relating to the duty to act honestly continues to be relevant. (See *Cheam Tat Pang v. PP* [1996] 1 SLR 541).

**[229]** It is also recognised that the duty to act in the best interest of the company means different things, depending on the factual circumstances.

**[230]** Consequentially, depending on the type of dispute or issue, the directors must place a higher priority on the interest of the persons who are truly affected.

**[231]** In these appeals, who are the persons truly affected by the actions of the directors? In view of Ho Hup's imminent de-listing, it stands to reason that the directors were motivated to rescue Ho Hup from being de-listed. Thus in this scenario, the shareholders are most affected, not so much the company. As such, the directors must act for the best interest of the shareholders.

**[232]** What then, is the test whether there is breach of such duty? Or putting it in another way in order for the decision of the directors to be challenged, what is the test?

**[233]** The test is nicely condensed in Ford's Principles of Corporations Law (para. 8.060), that there will be a breach of duty if the act or decision is shown to be one which no reasonable board could consider to be within the interest of the company.

**[234]** This test is adopted in *Charterbridge Corporation Ltd v. Lloyds Bank Ltd* [1970] Ch 62 at 74, in that, to challenge a decision of the directors, the test is whether:

> ... an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company.

**[235]** The above principle is often referred to as the "Charterbridge Principle".

**[236]** Thus it boils down to this: that whether in all the circumstances that existed on 16 March 2010, there were grounds upon which a reasonable board could have considered that the JDA was in the best interest of the shareholders.

**[237]** It is important to note, following high authority, such as *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821, that the court does not substitute its own decision with that of the directors, since the decision of the directors to enter into the JDA is a management decision.

## The Evidence

**[238]** There were grounds upon which a reasonable board would have come to such a finding. The five (5) critical issues illustrated in the earlier part of this judgment were uppermost in the minds of the directors. AmInvest and Newfields Advisors Sdn Bhd had advised that the proposed regularization plan must involve the sale or development or the entry into a joint venture arrangement to develop the land.

**[239]** Against the five (5) critical issues, there really was only one viable option and that option was the joint venture. We have already given the reasons why this is so, but we might add that the option to develop the land by Ho Hup was not feasible since financing could not be secured. Sabah Development Bank required the personal guarantees of all present and future directors and a

cash deposit of RM10 million. The directors were not agreeable to give their personal guarantees as such, and Ho Hup was not able to raise the RM10 million cash deposit.

**[240]** Thus the option to proceed with the joint venture must be seen in the light of the circumstances prevailing at the time. The timelines set by Bursa, the banks, the purchasers and creditors were compelling reasons why the directors had to finalize the arrangements without delay.

**[241]** What Ho Hup did not articulate is this crucial fact: that the companies were at breaking point, with monthly salaries and expenses amounting to more than RM1 million without an equivalent amount of revenues to meet the expenses.

**[242]** Bursa's requirements under the regularization plan were that funding to develop the land must be available and the accumulated losses of RM110 million had to be eliminated with the necessary profit streams to be in place. LC Sons objected to the regularization plan. The board had no option but to revise the regularization plan to meet 4 April 2010 deadline.

**[243]** As the defendant directors saw it, the JDA was, in a manner of speaking, a solution made in heaven. It would solve the five (5) critical issues in one fell swoop. The 17% GDV of RM425 million is more than the returns if Ho Hup disposed of the land which according to the consolidated statement as at 30 June 2010 is valued at RM119,521,000. This would solve the problem of the accumulated losses and the funding to develop the land.

**[244]** D8, a director of LC Sons, a major shareholder in Ho Hup, voted in favour of the JDA. The directors were entitled to consider the views of the shareholders which made up over 50% of Ho Hup. Given that the persons truly affected by the decisions are the shareholders, their views are an important consideration.

**[245]** The fact that Ho Hup has not been able to attack the commercial justification of the JDA is indeed telling.

**[246]** In fact even PW5, the CFO of Ho Hup had admitted that the defendant directors had acted reasonably in entering into the JDA.

**[247]** Even the attack on the purportedly dubious cashflow had been explained by D9, which was then updated and presented to the new directors on 30 March 2010. However the willingness of D9 to provide information on the cashflow came to naught, since the new directors of Ho Hup chose not to ask D9 about it.

**[248]** At the end of the day, the JDA cannot be said to be a bad deal, since the projected revenues are more than the market value for the Land estimated at RM197 million by Henry Butcher and Hakimi Associates. The projected revenues is also more than the profits to be generated by Bukit Jalil should it develop the Land from its own resources or funding.

**[249]** It was against this background that the Board entered into the JDA.

**[250]** The Board took the position that there was a real risk and the dreadful prospect that the delay and any failure to act will cause Ho Hup to be delisted (the Bursa deadline of 4.4.2010 was less than three (3) weeks away), Bukit Jalil wound up, the Land foreclosed by CIMB Bank to the purchasers, outweighed all other considerations, if any. Under those circumstances it was reasonable for the defendant directors to act the way they did in entering into the JDA.

**[251]** Ho Hup alleged that D2 to D8 were required to take on the role of a caretaker board, pending the 2nd EGM. Ho Hup also alleged that the JDA was entered in haste to pre-empt the outcome of the 2nd EGM.

**[252]** Given the track record of LC Sons, as only the defendant directors were privy, it was hardly surprising that the defendant directors were keen to sign in favour of the JDA.

**[253]** As was colourfully described, the barbarians were indeed at the gate and any delay would imperil the company.

**[254]** As it were, LC Sons' attack on the Regularization Plan was baseless and its alternative Regularization Plan could not hold up to scrutiny. In fact the new board took all of seven (7) months to propose a reorganization plan based on the JDA being completed. Thus, in the circumstances, it was hardly surprising that the previous board (the defendant directors) had not much faith that the new board could resolve Ho Hup's wretched financial position in good time.

**[255]** Thus as regards D3, D9 and D10, there is no breach of their duties mainly on two grounds: A

(i) That s. 132C requires that approval be obtained at a general meeting of Bukit Jalil, the owner of the asset in question. On this ground alone, the claim as found in para. 1`4.2 of the amended statement of claim should fail. B

(ii) That the JDA does not amount to a disposal of land under s. 132C of the Act.

**[256]** As it were, it is recognized that directors must exercise their discretion *bona fide* in what they (and not the court) consider is in the best interest of the company. C

**[257]** The scope of the duty to act *bona fide* in the best interests of the company is best propounded in the judgment of Kirby P in *Darvall v. North Sydney Brick and Tile Co* [1989] 16 NSWLR 260 pp. 281-282, where His Lordship puts across in clear terms the exercise of the director's powers. His Lordship *inter alia*, said that: D

> … In considering whether the actions of directors were *bona fide* in the best interests of the company as a whole, the court is not obliged to look at the company as in some way disembodied from its members. The phrase "*bona fide* for the benefit of a company as a whole" is derived from Lord Lindley's comments in *Allen v. Gold Reefs of West Africa Ltd* [1990] 1 Ch 656 at 671 … It tends, by overuse without fresh reflection to become a "cant expression" (See Brennan J in *New South Wales Rugby League Ltd v. Wade)*. In the present as in other contexts, the best interest certainly included the interest of the shareholders as the corporators with a direct state in takeover offer. E F
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> Honest behavior on the part of directors is expected. However it is not, in itself, enough to sustain their conducts if their conducts is otherwise determined to have been carried out for an improper of collateral purpose: *Howard Smith Ltd v. Ampol Petroleum (supra)*. G
>
> Similarly, statements by directors about their subjective intentions, or beliefs, are not conclusive of their *bona fides* or for the purposes for which they acted as they did (*Advance Bank Australia Ltd v. FAI Insurance Ltd* at page 485). Even though the motives for exercising a fiduciary power are substantially altruistic, if those altruistic motives were actuated by an ulterior or impermissible purpose or were carried out in an improper manner, they will be set aside. This is so in order to ensure the integrity of the actions of the fiduciary and to require that the fiduciary's decisions are made *bona fide* and for proper and relevant purposes. H I

> Nevertheless, although not conclusive, the court can look at the deterred intentions, of directors in order to test their assertions (which will often be self-protective) against the assessment by the court of what, objectively, was in the best interests of the company at the relevant time … So long as they act *bona fide* and in the interests of the company and its members, the law will uphold them. The directors may indeed be activated by the fact that a takeover offer has been made by a stranger. It may propel them into taking steps which, otherwise, they would not have taken or would not have taken so quickly.
>
> …
>
> It has been suggested, in exceptional cases, where an offer is made which is not in the interest of the company as a whole, directors may be authorized actually to frustrate a takeover offer.

**[258]** It is uncanny how closely *Darvall*'s case above resembles the position in this appeal.

**[259]** In *Darvall v. North Sydney Brick and Tile Co (supra)*, the company's shares traded at 87 cents per share. The plaintiff made a cash takeover offer for all the issued shares in the defendant company at $10 per share. If the bid succeeded, the shareholders stood to gain a hefty premium of $9.13 per share. However the directors found the offer to be grossly inadequate. This was because the company's main asset, a large parcel of land, had, since the previous dealing in the company's shares, change in character from rural land and had acquired great development potential with a corresponding exponential appreciation in value. In fact, prior to the plaintiff's bid, the directors had already explored options of developing the land and had applied for the re-zoning of the land and started negotiations with potential financiers.

**[260]** According to the directors, the plaintiff's bid placed the company's value at far less than its net worth. According to the evidence available to them a majority of the shareholders were keen to accept this offer. The directors took the view that unless they acted quickly to stop this, the accepting shareholders would receive a lot less than what their shares were worth and the company would be in the invidious position of being forced to part with its most valuable asset at a substantial discount.

**[261]** The directors then entered into a joint venture agreement with a financier to develop the land. The land was then transferred to a joint venture company, formed for the purpose, consisting of that financier and a wholly owned subsidiary of the defendant.

**[262]** The plaintiff filed an action challenging the validity of the directors' action and sought an order to set aside the joint venture agreement, on the ground that the joint venture agreement was to frustrate the plaintiff's takeover offer and in the process, preventing him from acquiring control and company.

**[263]** Interestingly, the learned judge found that "the substantial purposes of the directors were to provide the existing shareholders with alternatives which were more advantageous to them than the plaintiff's offer to demonstrate to shareholders that it was not in their interest to accept the plaintiff's offer, and to advance the commercial interests of the company in relation to the development of the land". He also found that "the directors purpose was not to maintain themselves in power or merely to prevent the plaintiff's bid from succeeding". If the directors had not believed that that the joint venture agreement was in the commercial interests of the company, they would not have entered into it simply to persuade the shareholders not to accept the plaintiff's offer. The judge declined to set aside the joint venture agreement. In so holding, he re-affirmed the principle that directors may act to advance the interests of company and protect the interests of shareholder, even if their actions ultimately lead to the scuttling of a takeover offer, provided they are not actuated by irrelevant purposes.

**[264]** On appeal, by a majority decision, the decision of trial judge was upheld. The Court of Appeal held, *inter alia* that:

> … In circumstances where a take-over offer made by a minority shareholders was countered by a take-over offer by the managing director in conjunction with entry into of a joint venture agreement, a finding that the directors honestly believed that the entry into of the joint venture agreement was in the best interests of company should not be disturbed. (Per Mahoney JA). The obligations of directors in the context of take-over operations suggest that they now have functions and in some respects, duties in regard not merely to the company as a whole, but also to, at the least, the general body of shareholders, and circumstances may involve an obligation to make an alternative take-over offer.

**[265]** In essence, the court acknowledge that there may be situations where a decision made by directors are motivated by multifarious purposes and intentions. The court then distinguishes between a transaction which was entered into for the purpose of defeating a take-over offer and a transaction which was prompted by a take-over offer.

**[266]** Thus, in relation to the JDA what was the defendant directors' motivation in entering into the JDA? Was it solely to defeat the EGM dated 17 March 2010 or pre-empt the outcome of EGM or whether it was for what in their judgment, the best interest of Bukit Jalil and/or Ho Hup?

**[267]** One should not ignore the circumstances leading to the entry into the JDA, which began in early 2009. The commercial rationale which goes towards the making of the business judgment of the directors, particularly by D3 and D9 are clearly set out in their respective witness statements.

**[268]** The fact that Ho Hup has not, till today given any tangible evidence of the JDA being bad for either Bukit Jalil or Ho Hup, does nothing to help support Ho Hup's contention that the defendant directors have acted in bad faith and not in the interests of their respective companies.

**[269]** In fact as had been alluded to earlier, PW5, Ivan Ho in cross-examination admitted that he thought it was not unreasonable for the directors to have entered into the JDA. This statement coming as it were, from Ho Hup's own financial officer speaks volume.

**[270]** If what the defendant directors did was to advance the interests of the company and if they had such power, and there was nothing improper in that entry, we fail to see any impropriety on their part.

**[271]** In our view, impropriety only arises where the entry is dictated by an improper purpose. After scrutinizing the appeal record, we are clear on one thing: that despite intense cross-examination by counsel for Ho Hup, D3, D9 and D10 were resolute that the JDA just had to be finalized and they entered into as there was no other way for Bukit Jalil to develop the land by itself.

**[272]** The fact that despite wresting control of Ho Hup and Bukit Jalil after March 2010, neither party has managed to produce any viable alternative plans for the land, showed that entering into the JDA was a correct judgment. Thus the claim by Ho Hup that they had acted in bad faith and not in the best interests of the company must therefore fail.

**[273]** As regards D4 to D8, it has been shown how independently, honestly and in good faith they had acted in carrying out their duties with reasonable care, skill and diligence in the best interest of Ho Hup.

**[274]** D4 to D7 were at all material times the Independent Non-Executive Directors of Ho Hup until their removal on 17 March 2010. D8 was at all material times the Non-Independent Non-Executive Director of Ho Hup.

**[275]** When D3 reminded the Board of Directors that as long as they were directors of Ho Hup they owed the company a duty to act in its best interest and that they cannot derogate from their duties even though some of them may be removed the next day, it was under those circumstances that they considered for themselves in good faith what was best for Ho Hup. Thus, in exercising their powers as directors, what they were making was a business judgment for Ho Hup to agree to Bukit Jalil agreeing to proceed with the proposal to jointly develop the Land with Pioneer Haven but on condition that Bukit Jalil's minimum entitlement from the project shall not be less than RM265 million as opposed to the initial lower amount of RM200 million.

**[276]** In view of it being a business judgment within the deeming provision of s. 132 (1B) of the Act which they made at Ho Hup's board meeting on 16 March 2010, the court should be slow to interfere with it. This deeming provision is a statutory recognition of the common law principle that courts are reluctant to pass judgment on the merits of business decision taken in good faith or to substitute such decisions with their own. It must also not be lost sight of that none of the said directors (D4 to D8) had any personal interest in the JDA. There was neither any allegation nor proof whatsoever that they had acted in collusion with the other defendants to act to the detriment of Ho Hup.

**[277]** This business judgment deeming provision finds support in Australian High Courts. The following authority supports this principle:

**[278]** In *Harlowe's Nominees Pte Ltd v. Woodside (Lakes Entrace) Oil Co NL* [1968] 121 CLR at p. 493, the court said that:

> Directors in whom are vested the right and duty of deciding where the company's interest lie and how they are to be served may be concerned with a wide range of practical consideration and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review by the Courts.

**[279]** The allegations against D4 to D8 that "they did not exercise due care and diligence in that they could not be said to have informed themselves of all material reasonably available to them, and that they abdicated their functions to the management", were nothing more than bare averments. The evidence before us, pointed otherwise.

**[280]** It was clear from the evidence before us that D4 to D8 made queries of management on the JDA proposed before them and had independently assessed the information and advice they were given in arriving at their decision that the proposed JDA would be in Ho Hup's best interest.

**[281]** They were informed by D3 that Lee Hishamuddin had been retained to advise Ho Hup and Bukit Jalil on the JDA. They had no reason to doubt the veracity of the said advice. They said that they were entitled to rely on the deeming provision of s. 132(1B) of the Act to have exercised reasonable care, skill and diligence in the exercise of their power as Ho Hup direction, since their business judgment in providing conditional consent to the JDA with Pioneer Haven was based on the JDA:

(i) being made in good faith and for a proper purpose;

(ii) not involving D4 to D8 in any material personal interest;

(iii) being a business judgment to the extent that they reasonably believed to be appropriate under the circumstances, and

(iv) being a business judgment and was in the best interest of Ho Hup.

**[282]** We fail to find evidence of the defendant directors acting in a manner contrary to good faith and for irrelevant purposes in this appeal. Ho Hup has also not shown that the defendant directors had acted improperly.

**[283]** As was stated by the court in *Mills v. Mills* [1938] 60 CLR 150 p. 163: A

> … But before the exercise of a discretionary power by directors will be interfered with by the court, it must be proved by the complaining party that they have acted from an improper motive or arbitrarily and capriciously … B

**[284]** Even if the defendant directors' (D4 to D8) were to be liable for breach of their directorial duties, they could rely on the protection afforded them under s. 354 of the Act to relieve them of their liabilities. C

**[285]** Our s. 354 (1) of the Act is in *pari materia* with s. 365(1) of the Australia Companies Act 1961. Both these statutory provisions have their roots in the UK Judicial Trustees Act 1896.

**[286]** Section 354(1) of the Malaysian Companies Act 1965 states that: D

**[287]** Section 354. Power to grant relief.

(1) If in any proceeding for negligible, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonable and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit. E F

**[288]** The word "Honestly" in the context of s. 365(1) of the Australian Companies Act 1961 (which is in *pari material* with our s. 354(1) of the Act) was discussed in a couple of Australian cases. One such case is *Dominion Insurance Co of Australia Ltd (in liquidation) and Anor v. Finn* [1989] 7 ACLC 25, where the word "Honestly" is stated to suggest "a subjective state, free from any intention to deceive or defraud". G H

**[289]** As regards the word "reasonably" in the context of s. 365(1) of Australian Companies Act 1961 (which is in *pari material* with s. 354(1) of our Companies Act), courts in Australia I

had discussed the construction to be given thereto. One such authority is *Maelor Jones Investments (Noarlunga) Pty Ltd and Ors v. Heywood-Smith* [1989] 7 ACLC 1232 where the term "Reasonably" was stated to suggest that it is:

> ... unlimited except by relevance and therefore the inquiry is whether in relation to their duty or circumstances relevantly connected with their breach of duty. The relevance of reasonableness is in a context of being excused for fault. Many of the considerations going to whether the defendants acted reasonably also comprise circumstances of the case to be taken into consideration on the question of whether the discretion to excuse should be exercised ...

**[290]** Thus s. 354 of Act could be invoked too, if need be, to relieve the defendant directors from the alleged liabilities since they had acted honestly and reasonably at all material times.

**[291]** Thus in view of our finding that the terms of the JDA, PA and EU do not amount to a disposal of the land in contravention of s. 132C, the issue of the breach of fiduciary duty by the directors of Bukit Jalil does not arise. The fact that the directors who can be restrained from entering into a transaction such as the one which is the subject of the appeals, are the directors of Bukit Jalil, not the directors of Ho Hup, any decision of the directors of Ho Hup with regard to the JDA does not come within the prohibition under s. 132C (1) and therefore the claim against them for breach of fiduciary duty does not arise and must therefore fail.

**[292]** Consequently too, there can be no issue of Pioneer Haven having "knowingly assisting" the former directors of Ho Hup (ie, D2-D8), in breaching their duties to Ho Hup.

**[293]** At the end of the day, what can be discerned is that Ho Hup's grouse with the JDA is not so much that it has flown in the face of s. 132C of the Act or that it has flouted any statutory or common law duties, as much as the fact that it gnaws at Ho Hup's vitals, since the unhappiness it felt is essentially a commercial one and the fact that it was struck by the outgoing board. The evidence of PW6 and PW1 in cross examination clearly bore this out.

**[294]** The learned judge, in all but one of the issues raised (ie, the derivative action) had clearly misdirected himself, for it is clear that Ho Hup's claims are misconceived. We find nothing sinister in the JDA and nothing adduced in evidence is sufficient to nullify the said JDA. Ho Hup cannot fault the defendant directors and Pioneer Haven for having struck a bargain which Ho Hup feels does not sufficiently address its restructuring concerns.

**[295]** We reiterate our finding: That we find the JDA to be valid and enforceable and that the defendant directors and Pioneer Haven bear no accessory liability in respect of the alleged breaches of duty.

**[296]** We therefore unanimously allow the appeals and dismiss the cross appeal with cost.

**[297]** Cost: For the appellant in each appeal: RM100,000 here and below.

**[298]** Deposit to be refunded to each of the appellants.