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Wahbunga Realty Sdn Bhd & Ors v Dato' Sri Andrew Kam Tai Yeow and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-2007–10 OF 2017, W-02(IM)(NCC)-2008–10 OF 2017, W-02(IM)(NCC)-2009–10 OF 2017, W-02(IM)(NCC)-794–04 OF 2018, W-02(IM)(NCC)-795–04 OF 2018 AND W-02(IM)(NCC)-803–04 OF 2018

C

AZIZAH NAWAWI, RAVINTHRAN AND CHE MOHD RUZIMA JJCA

30 DECEMBER 2022

Civil Procedure — Injunction — Setting aside — Whether there were serious

D

issues to be tried — Whether injunctive orders ought to be set aside

Civil Procedure — Striking out — Application to strike out action — Plaintiff and first defendant entered into shareholders' agreement — Plaintiff filed action

E

against defendants based on shareholders' agreement — Claim for entitlement to shares in company and first right of refusal to purchase remaining shares — Defendants filed application to strike out plaintiff's action — Doctrine of privity of contract — Company as separate legal entity — Trust created on shares — Whether there were triable issues — Whether plaintiff could sue companies

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which were not privy to shareholders' agreement — Whether plaintiff could rely on trust created on shares to file action — Whether company took cognizance of trust in respect of shares — Whether plaintiff's claim obviously unsustainable — Rules of Court 2012 O 18 r 19

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Dato' Sri Andrew Kam Tai Yeow ('the plaintiff') was the son of Tan Sri Dato' Kam Woon Wah ('the first defendant'). Both the plaintiff and the first defendant were the shareholders of the second defendant and the fourth to 11th defendants. The third defendant was the subsidiary of the second defendant. The first defendant held 87.79% of shares in the second defendant

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under his own name as well as via his shareholdings in the fourth to the 11th defendants ('the other defendants'). In the main action, the plaintiff's claim against the defendants was premised on the shareholders agreement entered between the plaintiff and the first defendant. Under the said agreement, the plaintiff was entitled to 50% of the first defendant's interest in the second

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defendant and plus, the plaintiff was also entitled to the right of first refusal or option to purchase from the first defendant the remaining 50% of the first defendant's interest in the second defendant and the other defendants. Pending further trial of the main action, the defendants filed several applications at the High Court, the decisions of which led to the appeals at hand. There were six

appeals altogether in the present case. Appeal No 2007 (appeal by the fourth defendant to 11th defendant), Appeal No 2008 (appeal by the first defendant) and Appeal No 2009 (appeal by the second defendant and third defendant) were against the High Court's decisions in dismissing the defendants' striking out applications. Appeal No 794 was an appeal by the second and third defendants against the fortification of damages in respect of the interlocutory injunction for RM500,000 instead of RM20m as prayed for. Appeal No 795 was an appeal by the first to the 11th defendants against the learned judge's decision in dismissing their application to set aside the ad interim injunction dated 6 September 2017. Lastly, Appeal No 803 was an appeal against the learned judge's decision in allowing the plaintiff's application for an interlocutory injunction until the final disposal of the main action. In Appeal No 2008, the first defendant submitted that the shareholders agreement was void and unenforceable under s 26 of the Contracts Act 1950 ('the CA'). With respect to Appeal Nos 2007 and 2009, the plaintiff submitted that: (a) the plaintiff was entitled to sue the second to the 11th defendants by reason of the first defendant's shareholding in second to 11th defendants; and (b) the first defendant held the shares in the second defendant, whether directly or indirectly through the fourth to the 11th defendants, in trust for the plaintiff, based on the shareholders agreement.

Held, allowing Appeal Nos 2007, 2009, 795, and 803 with costs; dismissing Appeal No 2008 with costs; and striking out Appeal No 794 with no order as to costs:

(1) It was trite that the court should only exercise its power to strike out a claim or defence under O 18 r 19 of the Rules of Court 2012 in cases where it was plain and obvious that the claim or defence was obviously unsustainable. Therefore, so long as the claim or defence disclosed some ground of action and raised some questions fit to be tried, the claim or defence should not be struck out (see para 20).

(2) With respect to Appeal No 2008, the court agreed with the findings of the learned judge that there were triable issues in relation to: (a) the interpretation of the shareholders agreement; (b) the alleged breaches of the agreement; (c) whether there was a valid consideration; and (d) whether the said agreement was void and unenforceable pursuant to s 26 of the CA (see para 22).

(3) In relation to Appeal No 2007 and Appeal No 2009, the court found that the plaintiff's action against the second to the 11th defendants was obviously unsustainable and ought to be struck out. The court agreed with the defendants that the second to the 11th defendants were not parties to the shareholders agreement, as such, they were not bound by the agreement because of the doctrine of privity of contract. Further the fourth to the 11th defendants' shareholding in the second defendant

belonged to them and not the first defendant. A company was a separate entity distinct from its shareholders and therefore the property owned by the company belonged to it and not to its shareholders. Since the first defendant had no ownership rights in the shares in the fourth to the 11th defendants, he therefore had no rights to enter into an agreement in relation to the transfer of those shares. Consequently, the plaintiff could not sue the fourth to the 11th defendants for the purpose of enforcing the terms of the shareholders agreement between the plaintiff and the first defendant against them (see paras 27–28, 32, 36–37 & 41).

(4) The plaintiff had failed to show if the memorandum or articles of the second to 11th defendants allowed the recognition of trusts. Even if the same was allowed, it must be read with s 110(4) of the Companies Act 2016. Based on the said provision, a company did not take cognisance of trusts in respect of its shares. It only recognised its registered shareholders. As such, the court agreed with the defendants that it was not the concern to the fourth to the 11th defendants as to whether the first defendant held any of their shares registered in his name on trust for the plaintiff (see paras 38–39).

(5) The court must apply the following principles in hearing an application for an interlocutory injunction: (a) whether there was a bona fide serious question to be tried; (b) if there was a serious issue to be tried, the court must go on to decide where the justice of the case lay; and (c) the judge must have in the forefront of his mind that the remedy he was asked to administer was discretionary, intended to produce a just result for the period between the date of the application and the trial proper. In the present appeals, in view of the court's decision to strike out the plaintiff's claim against the second to the 11th defendants on the basis that the plaintiff's action was obviously unsustainable, the court therefore allowed the defendants' appeals in Appeal No 795 and Appeal No 803 with costs, as there were no serious issues to be tried (see paras 44–45).

(6) In relation to Appeal No 794, since the injunctive orders had been set aside, the issue of fortification of damages did not arise. Appeal No 794 was therefore struck out with no order as to costs (see para 46).

[Bahasa Malaysia summary

Dato' Sri Andrew Kam Tai Yeow ('plaintif') merupakan anak kepada Tan Sri Dato' Kam Woon Wah ('defendan pertama'). Kedua-dua plaintif dan defendan pertama adalah pemegang saham dalam defendan kedua dan defendan keempat hingga ke-11. Defendan ketiga adalah anak syarikat defendan kedua. Defendan pertama memegang 87.79% saham dalam defendan kedua di bawah namanya sendiri serta melalui pegangan sahamnya dalam defendan keempat hingga ke-11 ('defendan-defendan lain'). Dalam tindakan utama, tuntutan plaintif terhadap defendan-defendan adalah berdasarkan perjanjian pemegang

saham yang dimeterai antara plaintif dan defendan pertama. Di bawah perjanjian tersebut, plaintif berhak mendapat 50% kepentingan defendan pertama dalam defendan kedua dan tambahan lagi, plaintif juga berhak mendapat hak penolakan pertama atau pilihan untuk membeli daripada defendan pertama baki 50% daripada kepentingan defendan pertama di dalam defendan kedua dan defendan-defendan lain. Sementara menunggu perbicaraan lanjut mengenai tindakan utama, defendan-defendan memfailkan beberapa permohonan di Mahkamah Tinggi, yang keputusannya membawa kepada rayuan semasa. Terdapat enam rayuan kesemuanya dalam kes ini. Rayuan No 2007 (rayuan oleh defendan keempat hingga defendan ke-11), Rayuan No 2008 (rayuan oleh defendan pertama) dan Rayuan No 2009 (rayuan oleh defendan kedua dan defendan ketiga) adalah terhadap keputusan Mahkamah Tinggi yang menolak permohonan pembatalan tindakan oleh defendan-defendan. Rayuan No 794 adalah rayuan oleh defendan kedua dan defendan ketiga terhadap pengukuhan ganti rugi berkenaan dengan injunksi interlokutori sebanyak RM500,000 dan bukannya RM20 juta seperti yang dimohon. Rayuan No 795 adalah rayuan oleh defendan pertama hingga defendan ke-11 terhadap keputusan hakim yang bijaksana yang menolak permohonan mereka untuk mengenepikan injunksi ad interim bertarikh 6 September 2017. Akhir sekali, Rayuan No 803 adalah rayuan terhadap keputusan hakim yang bijaksana dalam membenarkan permohonan plaintif untuk injunksi interlokutori sehingga pelupusan akhir tindakan utama. Dalam Rayuan No 2008, defendan pertama berhujah bahawa perjanjian pemegang saham tersebut adalah terbatal dan tidak boleh dikuatkuasakan di bawah s 26 Akta Kontrak 1950 ('AK'). Berkenaan dengan Rayuan No 2007 dan Rayuan No 2009, plaintif berhujah bahawa: (a) plaintif berhak untuk menyaman defendan kedua hingga ke-11 atas alasan pegangan saham defendan pertama dalam defendan kedua hingga ke-11; dan (b) defendan pertama memegang saham dalam defendan kedua, sama ada secara langsung atau tidak langsung melalui defendan keempat hingga ke-11, sebagai amanah untuk plaintif, berdasarkan perjanjian pemegang saham tersebut.

Diputuskan, membenarkan Rayuan No 2007, 2009, No 795 dan No 803 dengan kos; menolak Rayuan No 2008 dengan kos; dan membatalkan Rayuan No 794 tanpa perintah berkenaan kos:

(1) Sudah menjadi undang-undang yang mantap bahawa mahkamah hanya perlu menggunakan kuasanya untuk membatalkan tuntutan atau pembelaan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 dalam kes-kes yang jelas dan nyata bahawa tuntutan atau pembelaan tersebut jelas tidak mampan. Oleh itu, selagi tuntutan atau pembelaan mendedahkan beberapa alasan tindakan dan menimbulkan beberapa persoalan yang sesuai untuk dibicarakan, tuntutan atau pembelaan tersebut tidak seharusnya dibatalkan (lihat perenggan 20).

(2) Berkenaan dengan Rayuan No 2008, mahkamah bersetuju dengan

dapatan hakim yang bijaksana bahawa terdapat isu-isu yang boleh dibicarakan berhubung dengan: (a) tafsiran perjanjian pemegang saham tersebut; (b) dakwaan pelanggaran perjanjian tersebut; (c) sama ada terdapat balasan yang sah; dan (d) sama ada perjanjian tersebut adalah terbatal dan tidak boleh dikuatkuasakan menurut s 26 AK (lihat perenggan 22).

(3) Berhubung dengan Rayuan No 2007 dan Rayuan No 2009, mahkamah mendapati bahawa tindakan plaintif terhadap defendan kedua hingga ke-11 adalah jelas tidak mampan dan sepatutnya dibatalkan. Mahkamah bersetuju dengan defendan-defendan bahawa defendan kedua hingga ke-11 bukan pihak dalam perjanjian pemegang saham tersebut, oleh itu, mereka tidak terikat dengan perjanjian tersebut berdasarkan doktrin priviti kontrak. Selanjutnya pegangan saham defendan keempat hingga ke-11 dalam defendan kedua adalah kepunyaan mereka dan bukan defendan pertama. Syarikat adalah entiti berasingan yang berbeza daripada pemegang sahamnya dan oleh itu harta yang dimiliki oleh syarikat adalah miliknya dan bukan milik pemegang sahamnya. Oleh kerana defendan pertama tidak mempunyai hak pemilikan dalam saham dalam defendan keempat hingga ke-11, dia tidak mempunyai hak untuk membuat perjanjian berhubung dengan pemindahan saham tersebut. Akibatnya, plaintif tidak boleh menyaman defendan keempat hingga ke-11 untuk tujuan menguatkuasakan syarat perjanjian pemegang saham antara plaintif dan defendan pertama terhadap mereka (lihat perenggan 27–28, 32, 36–37 & 41).

(4) Plaintif telah gagal menunjukkan sama ada memorandum atau artikel defendan kedua hingga ke-11 membenarkan pengiktirafan amanah. Walaupun perkara yang sama dibenarkan, ia mesti dibaca dengan s 110(4) Akta Syarikat 2016. Berdasarkan peruntukan tersebut, sesebuah syarikat tidak mengambil tahu tentang amanah berkenaan sahamnya. Ia hanya mengiktiraf pemegang saham berdaftarnya. Oleh itu, mahkamah bersetuju dengan defendan-defendan bahawa tidak menjadi kebimbangan bagi defendan keempat hingga ke-11 berkenaan sama ada defendan pertama memegang mana-mana saham mereka yang didaftarkan atas nama defendan pertama sebagai amanah untuk plaintif (lihat perenggan 38–39).

(5) Mahkamah perlu menggunakan prinsip-prinsip berikut dalam mendengar permohonan untuk injunksi interlokutori: (a) sama ada terdapat persoalan serius yang bona fide untuk dibicarakan; (b) jika ada isu yang serius untuk dibicarakan, mahkamah perlu meneruskan untuk memutuskan di mana keadilan kes berada; dan (c) hakim perlu sentiasa beringat bahawa remedi yang dimohon untuk diberikan adalah mengikut budi bicara, bertujuan untuk menghasilkan keputusan yang adil bagi tempoh antara tarikh permohonan dan perbicaraan penuh.

Dalam rayuan-rayuan semasa, mengambil kira keputusan mahkamah untuk menolak tuntutan plaintif terhadap defendan kedua hingga ke-11 atas dasar bahawa tindakan plaintif jelas tidak mampan, maka mahkamah membenarkan rayuan-rayuan defendan-defendan dalam Rayuan No 795 dan Rayuan No 803 dengan kos, kerana tiada isu-isu serius untuk dibicarakan (lihat perenggan 44–45).

(6) Berhubung dengan Rayuan No 794, memandangkan perintah injunksi telah diketepikan, isu pengukuhan ganti rugi tidak timbul. Oleh itu, Rayuan No 794 telah dibatalkan tanpa perintah mengenai kos (lihat perenggan 46).]

Cases referred to

Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd [2015] 1 MLJ 284; [2014] 5 CLJ 533, CA (refd)

Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal [2008] 3 MLJ 530; [2008] 3 CLJ 323, CA (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170; [1967] 1 LNS 67, PC (refd)

Mega Forest Plantation Management Sdn Bhd v Pengarah Perhutanan Negeri Selangor & Ors [2021] 4 MLJ 323; [2021] 7 CLJ 561, CA (refd)

Perkins Re, ex parte Mexican Santa Barbara Mining Co (1890) 24 QBD 613, CA (refd)

Scruttons Ltd v Midland Silicones Ltd [1962] AC 446, HL (refd)

Soo Hoi Ling & Ors v Khoh Keow Bok & Ors [2019] MLJU 1569, HC (refd)

Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240; [1979] 1 LNS 130, FC (refd)

Legislation referred to

Companies Act 2016 s 110, 110(4)
Companies Act 1965 (repealed by Companies Act 2016) s 163
Contracts Act 1950 s 26
Rules of Court 2012 O 18 r 19

Appeal from: *Dato' Sri Andrew Kam Tai Yeow v Tan Sri Dato' Kam Woon Wah & Ors* [2022] MLJU 845 (High Court, Kuala Lumpur)

Gopal Sri Ram (with Wong Yee Chue, Ho Hui Ying, Jean Aw Yuen Hui, Yasmeen Soh Sha-Nisse and Phoon Mei Ee) (YC Wong) for the appellant.

Malik Imtiaz Sarwar (with Mathew Thomas Philip, Mark Ho, Voon Su Huei, Ivan Aaron Francis, Khoo Suk Chyi and Ahmad Iyas Husni) (Thomas Philip) for the respondent.

Azizah Nawawi JCA:

INTRODUCTION

[1] There are six appeals before this court. Three appeals are in relation to the striking out applications filed by the defendants that have been dismissed by the learned High Court judge:

(a) Appeal No 2007 — is an appeal by the fourth to the 11th defendants;

(b) Appeal No 2008 — is an appeal by the first defendant; and

(c) Appeal No 2009 — is an appeal by the second and the third defendants.

[2] The other appeals are Appeals No 794, 795 and 803, which arise from the High Court order dated 29 March 2018:

(a) Appeal 794 is an appeal by the second and third defendants against the fortification of damages in respect of the interlocutory injunction for RM500,000 instead of RM20m as prayed for;

(b) Appeal 795 is an appeal by the first to the 11th defendants against the learned judge to dismiss the first to 11th defendants' application to set aside the ad interim injunction dated 6 September 2017; and

(c) Appeal No 803 is an appeal against the learned judge decision to allow the plaintiff's application for an interlocutory injunction until the final disposal of the action.

[3] Having read the appeal records and considered all the submissions by the parties, we had dismissed Appeal No 2008 and allowed Appeal No 2007 and Appeal No 2009. Consequentially, we allowed Appeal No 795 and Appeal No 803 and struck out Appeal No 794. For the purpose of these appeals, the parties will be referred to as they were in the High Court.

THE SALIENT FACTS

[4] The plaintiff is a son of the first defendant, Tan Sri Dato' Kam Woon Wah. The second defendant, Raub Mining & Development Co Sdn Bhd, is a private limited company and its core business is in the oil palm industry, and owns, among others, approximately 4,219 acres of plantation land in Raub Pahang.

[5] The third defendant, Raub Oil Mill Sdn Bhd is a wholly-owned subsidiary of the second defendant. It owns and operates a palm oil mill situated on the plantation land owned by the second defendant.

[6] The fourth to the 11th defendants hold shares in the second defendant. It is also not in dispute that both the plaintiff and the first defendant are the shareholders of the second, fourth to 11th defendants. The second defendant's shares that are held by the fourth to the 11th defendants are as follows:

Shareholders	Shareholding (%) in second defendant
Fourth defendant	32.07
Fifth defendant	26.55
Fifth defendant (via ninth defendant)	26.55
Sixth defendant	19.84
Seventh defendant	7.39
Eighth defendant	0.24
Ninth defendant	0.30
Tenth defendant (via Ninth defendant)	13.36
Tenth defendant (via 11th defendant)	13.36
Individuals	0.25

[7] The plaintiff also contends that the first defendant holds the majority of shares in the fourth to the 11th defendants in the following manner:

Company/Group	Shareholding (%)
Fourth defendant	97.80
Fifth defendant	82.20
Fifth defendant (via ninth defendant)	6.77
Sixth defendant	98.08
Seventh defendant	66.67
Eighth defendant	75.00
Ninth defendant	66.67
Tenth defendant (via ninth defendant)	10.00
Tenth defendant (via 11th defendant)	49.05
Individuals	58.33

[8] Based on the above shareholding structure, the plaintiff contends that the first defendant's entire interest in the second defendant amounts to approximately 87.79% of its shares, whether directly or indirectly, through the fourth to 11th defendants.

[9] The plaintiff was appointed as a director of the second defendant 1986. During the financial crisis in the 1980s, the plaintiff had agreed to stay on with the first, second and third defendants to rehabilitate the poor financial position of the second and the third defendants, on the understanding that the first defendant's entire interest in the second and third defendants would belong to

A the plaintiff and would be held by or on behalf of the first defendant for the benefit of the plaintiff until subsequently transferred to the plaintiff ('the underlying agreement').

B **[10]** The plaintiff claimed to have managed to turn the business of the second and third defendants around by 1997, therefore upholding his end of the bargain under the underlying agreement. The plaintiff did not demand for the first defendant to transfer his 100% interest in the second defendant to him, inter alia, due to the close relationship of father-son and there were no reason for the plaintiff not to distrust his own father.

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[11] However, around 2010, the plaintiff claimed that the first defendant has failed to honour the underlying agreement. Eventually, as a compromise and for the sake of peace in the family, the plaintiff agreed to vary the underlying D agreement by entering into a shareholders agreement with the first defendant.

[12] The plaintiff and the first defendant then entered into a shareholders agreement dated 16 January 2017 ('the shareholders agreement'). The salient terms of the shareholders' agreement are as follows:

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(1) Fifty (50) per cent of the Father's entire interests in Raub Mining & Development Company Sdn Bhd ('RMDC') (Company No: 4708-A) — which includes the Father's entire interests in Raub Oil Mill Sdn Bhd ('ROM') (Company No: 26175-P), a wholly-owned subsidiary of RMDC belongs to the Son (the 'Son's Portion');

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(2) *In the event of a complete sale of the material assets of RMDC (including the palm oil estate and the palm oil mill) (the 'Material Assets of RMDC'), any monies that may be owed by the Son to the Father may be deducted from the Son's Portion, but the amount of any such deduction shall be determined at a later date by the Father and the Son;*

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(3) In the event of a complete sale of the Material Assets of RMDC, the Son is to have the first or priority option to purchase the remaining fifty (50) per cent of the Father's entire interests in RMDC at a price equivalent to the highest tender when the assets of RMDC are put up for public auction in 2017 (the 'First or Priority Option'). If such a sale does materialise and if the Son does wish to exercise his First or Priority Option, the Son shall pay fifty (50) per cent of the purchase price of the H assets sold in order to purchase the said assets in full;

(4) In the event of a complete sale of the Material Assets of RMDC, RM40.0 million will be released (being RM20.0 million) from each fifty (50) per cent portion of the said assets for the Father's personal use and expenditure during his lifetime;

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[13] Based on the shareholders agreement, the plaintiff is now claiming 50% of the first defendant's interest in the second defendant and the right of first refusal or option to purchase the balance 50% of the first defendant's interest in the second defendant. The plaintiff took the position that the first

defendant owns nearly 87.79% of the shares in the second defendant, whether directly or indirectly through the fourth to the 11th defendants.

[14] The mechanism to determine the price of the said remaining 50% interests was stipulated in cl 3 of the shareholders agreement where it was agreed that the price was to be determined by conducting a public tender of the assets of the second defendant in 2017. The price of the remaining 50% shares shall be half the highest tender price obtained at the public tender.

[15] From the public tender exercise, the highest tender price for the assets of the second defendant was RM140m.

[16] However, the plaintiff claimed that the second and third defendants, under the control of the first defendant, then attempted to sell the assets of the second defendant, despite the terms of the shareholders agreement. A letter of intent dated 18 July 2017 was executed and a board meeting was convened on 28 July 2017 to update the progress of the sale.

[17] On 7 August 2017, the plaintiff received notices of a meeting requisitioned by the first defendant for the removal of the plaintiff as a director and to sell the assets of the second and the third defendants. The meetings were scheduled to take place on 6 September 2017.

[18] The above events led to the plaintiff filing the present suit. The reliefs, inter alia, sought by the plaintiff in the statement of claim are:

(a) a declaration that the shareholders agreement dated 16 January 2017 between the plaintiff and the first defendant provides, inter alia, that 50% of the first defendant's entire interest in the second defendant, belongs to the plaintiff;

(b) a declaration that the first defendant holds in trust for the plaintiff, 50% of the total paid up and issued shares in the second defendant in which the first defendant has an interest, pursuant to the shareholders agreement;

(c) a declaration that the plaintiff is the beneficial owner of 50% of the total paid up and issued shares in the second defendant in which the first defendant has an interest pursuant to the shareholders agreement;

(d) a declaration that the entire interest of the first defendant in the second defendant is held through the interests of the first defendant in the fourth to the 11th defendants as well as held personally by the first defendant in the second defendant and that therefore, the 50% of the first defendant's entire interest in the second defendant includes 50% of the interests held by the first defendant in the fourth to the 11th

defendants as well as 50% of the interest held by the first defendant personally in the second defendant;

(e) a declaration that the plaintiff has the right of first refusal or option, to purchase from the first defendant the balance 50% of the first defendant's entire interest in the total paid up and issued shares in the second defendant, pursuant to the shareholders agreement;

(f) a declaration that the option referred to in prayer (v) above extends to the right of first refusal or option to purchase from the first defendant the balance 50% of the first defendant's interest in the fourth to 11th defendants as well as 50% of the interest held by the first defendant personally in the second defendant;

(g) a specific performance of the shareholders agreement between the plaintiff and the first defendant;

(h) an order that the 12th and 13th defendants take all necessary steps to ensure that the transfer of shares of the second and the fourth to the 11th defendants, consequent upon prayer (vii) above is effective and regular;

(i) the defendants, whether by themselves, their officers, representatives, servants and/or agents, where applicable, be restrained and an injunction be granted to restrain the defendants whether by themselves, their officers, representatives, servants and/or agents, where applicable, from directly or indirectly acting on, implementing, carrying out or otherwise taking any steps and/or doing anything to act on, implement and/or carry out any members' resolution passed at any meeting of shareholders of the second to the sixth and the 11th defendants with a view to the removal of the plaintiff as director of the second to the 11th defendants;

(j) declaration that any removal of the plaintiff as a director of the second to the 11th defendants which may have been resolved and/or effected by the defendants is null and void;

(k) an order that any removal of the plaintiff as a director of the second to the 11th defendants which may have been resolved and/or effected by the defendants and which is declared as null and void by this court be set aside and the plaintiff be reinstated as a director of the second to the 11th defendants and that consequential thereto, all records, registers and documents be rectified accordingly;

(l) an order that the defendants take such steps as are necessary and as are required of them by law, regulation and/or by the relevant authorities to cancel, set aside or reverse any steps taken pursuant to any members' resolution passed at any meeting of shareholders of the second to sixth and 11th defendants with a view to the removal of the plaintiff as

director of the second to the 11th defendants and/or with a view to the sale of the assets of the second and/or third defendants;

(m) the defendants, whether by themselves, their employees, agents, representatives, nominees and/or howsoever, be restrained and an injunction do hereby be issued to restrain the defendants, whether by themselves, their employees, agents, representatives, nominees and/or howsoever, from disposing, pledging, encumbering and/or dealing with in any manner whatsoever, all the shares in the second to the 11th defendants, including restraint upon the dilution of the shares thereof;

(n) the second defendant, whether by themselves, their directors, their officers, representatives, servants and/or agents be restrained and an injunction be granted to restrain the defendants whether by themselves, their directors, their officers, representatives, servants and/or agents, from disposing, pledging, dealing in any manner whatsoever, all or any assets of the second and/or third defendant, including all the shares in the third defendant and the following:

(i) a piece of land with an area measuring approximately 4215.5198 acres held under HS(D) 10803, Lot No PT 23120 Mukim Gali, District of Raub, Pahang;

(ii) a piece of land with an area measuring approximately 4.2732 acres held under HS(D) 10940, Lot No PT 22468 Mukim Gah District of Raub, Pahang; and

(iii) the palm oil mill located at HS(D) 10803, Lot No PT 23120, Bukit Koman, Mukim Gali, 27600 Raub, Pahang.

[19] The defendants then filed several applications to strike out the plaintiff's claim and these applications have been dismissed by the learned High Court judge. The learned judge had also granted an interlocutory injunction, dismissed the defendants' application to set aside the interim injunction and allowed fortification of damages in the sum of RM500,000 only. Hence the aggrieved parties have filed these appeals before this court.

OUR FINDINGS

[20] It is trite that the court should only exercise its power to strike out a claim or defence under O 18 r 19 of the Rules of Court 2012 in cases where it is plain and obvious that the claim or defence is obviously unsustainable. Therefore, so long as the claim or defence discloses some ground of action and raises some questions fit to be tried, the claim or defence should not be struck out.

Appeal No 2008

[21] In respect of Appeal No 2008, in the High Court, the first defendant had applied to strike out the plaintiff's claim on the grounds, inter alia, that the shareholders agreement is merely a family arrangement, lacking in intention to create a legal and binding contract and that the shareholders agreement is without any consideration, and is therefore void and unenforceable under s 26 of the Contracts Act 1950.

[22] We are of the considered opinion and we agree with the findings of the learned judge that there are triable issues regarding the interpretation of the shareholders agreement dated 16 January 2017, on the alleged breaches of the agreement, on the issue of whether there is a valid consideration and whether the said agreement is void and unenforceable pursuant to s 26 of the Contracts Act 1950. As such, Appeal No 208 is dismissed with costs.

Appeal No 2007 and 2009

[23] Appeal No 2007 is an appeal by the second and the third defendants, whilst Appeal No 2009 is an appeal by the fourth to the 11th defendants, against the decision of the learned judge in dismissing their applications to strike out the writ and statement of claim.

[24] As against the second and third defendants, the learned judge held that the suit against them must proceed, because even though the second and third defendants are '... not parties to the shareholders agreement, their assets, which is currently held by the first Defendant either directly or indirectly, is the subject matter of the Shareholders' Agreement'.

[25] As against the fourth to the 11th defendants, the learned judge dismissed the applications to strike out on the following ground:

> [67] The plaintiff is also seeking declaratory relief against the fourth to the 11th defendants. It is not disputed that the fourth to the 11th defendants are not parties to the shareholder agreement. However as evident from the result of the CCM searches (encl 4 exh 'A-2') the first Defendant holds substantial shares (majority shareholder) in the fourth to the 11th defendants which in turn holds shares in the second defendant. The defendant's entire interests (either directly or indirectly) in the second and third defendants is the subject matter of the shareholders' agreement. On the face of the shareholders' agreement as pleaded in paragraph 29 of the statement of claim, the first defendant has agreed that 50% of his entire interest in the second and third defendants belongs to the plaintiff.
>
> While the balance 50% is subject to the plaintiff exercising the option as stipulated in cl 4 of the shareholders' agreement. Thus on the pleaded facts there is a trust created over the balance 50% of the first defendant's entire interest in the second and third defendants where the defendant is holding the said 50% interests in trust

for the benefit of the plaintiff. As such, as a trustee, the first defendant is obliged not to act in any manner that is prejudicial or detrimental to the plaintiff's interests.

[26] Therefore, the learned judge's decision to dismiss the second to the 11th defendants' application is predicated on the fact that the first defendant is a majority shareholder in the fourth to the 11th defendants, which in turn own the majority of shares in the second defendant. The learned judge made this finding despite acknowledging the fact that the second to the 11th defendants are not privy to the shareholders agreement.

[27] We are of the considered opinion and we agree with the defendants/appellants that since the second to the 11th defendants are not parties to the shareholders agreement between the plaintiff and the first defendant, they are therefore not bound by the said agreement because of the doctrine of privity of contract. The second to the 11th defendants are an entirely distinct and separate juristic entity and personality, and were not parties to the shareholders agreement.

[28] When the second to the 11th defendants are not parties to the shareholders agreement, the plaintiff cannot rely on the shareholders agreement to enforce it on the second to the 11th defendants, on the basis that the first defendant, being a signatory to the shareholders agreement, owns the majority shares in the second defendant, directly and indirectly, through the fourth to the 11th defendant. The plaintiff has no privity whatsoever with the second to the 11th defendants with regard to the shareholders agreement, with any resulting right of direct enforcement by him against them, as they owe no contractual or other obligation to him.

[29] In *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, which dealt with the English position on the doctrine of privity, Lord Reid said (at pp 472–473):

> In considering the various arguments for the appellants, I think it is necessary to have in mind certain established principles of the English law of contract. Although I may regret it, I find it impossible to deny the existence of the *general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him.* That rule appears to have been crystallised a century ago in *Tweddle v Atkinson* (1861) 1 B & S 393 and finally established in this House in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847. (Emphasis added.)

[30] In *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170; [1967] 1 LNS 67, the Privy Council held that the doctrine of privity applies in Malaysia. In delivering the judgment of the Board, Lord Wilberforce said (at p

174):

> It is true that section 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. *On the contrary paragraphs (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue*. (Emphasis added.)

[31] In *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284; [2014] 5 CLJ 533, this court held as follows:

> [63] The law is clear. *A person who is not a party to a contract has no right to sue on a contract* (see *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170; [1967] 1 LNS 67 (PC); and s 2(d) of the Contracts Act 1950 *Oversea Chinese Banking Corporation Ltd v Woo Hing Brothers (M) Sdn Bhd* [1992] 2 MLJ 86; [1992] 2 CLJ 1050 (HC); and *Badiaddin Mohd Mohidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 (FC). (Emphasis added.)

[32] Added to that, we also find that the fourth to the 11th defendants' shareholding in the second defendant belonged to them and not the first defendant. A company is a separate entity distinct from its shareholders and therefore the property owned by the company belongs to it and not to its shareholders. The shareholders have no legal nor equitable rights in the assets of the company.

[33] In *Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal* [2008] 3 MLJ 530; [2008] 3 CLJ 323, this court held as follows at para 9 of the judgment:

> ... This cardinal principle of company law was established in *Salomon v Salomon & Co Ltd* [1897] AC 22 and exemplified in *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619, where Lord Buckmaster said:
>
> > *Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.* (Emphasis added.)

[34] In *Soo Hoi Ling & Ors v Khoh Keow Bok & Ors* [2019] MLJU 1569 at para 22, this court held as follows:

> The property owned by a company belongs to it and not to its shareholders. *The shareholders have no right to any property owned by the company but are only entitled to share dividends while the company continues and a share in the distributions of the surplus in the event the company is wound up* (*Law Kam Loy & Anor v Boltex Sdn Bhd*

& Ors [2005] 3 CLJ 355 following the established principle in *Macaura v Northern Assurance Co Ltd* [1925] AC 619). (Emphasis added.)

[35] The above principles have been reaffirmed by this court in *Mega Forest Plantation Management Sdn Bhd v Pengarah Perhutanan Negeri Selangor & Ors* [2021] 4 MLJ 323; [2021] 7 CLJ 561:

> [83] *The principle that shareholders have no legal interest in the assets of the company in which shares are held, is trite.* In this regard it was established by the seminal case of *Macaura v Northern Assurance Co Ltd* [1925] AC 619; [1925] All ER 51 (HL) that shareholders have no interest in a company's property. Lord Wrenbury's speech at p 633 is instructive. He said that 'the corporator even if he holds all the shares is not the corporation ... *neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation.*
>
> [84] For completeness, we think that it is also relevant to refer to *Pioneer Haven Sdn Bhd v Ho Hup Construction Company Bhd & Anor And Other Appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169 (CA), where the Court of Appeal (per Zainun Ali JCA as she then was) enunciated:
>
> > [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). (Emphasis added.)
>
> As such, *as a matter of law, the appellant as the majority shareholder of MNSB has no legal right to the assets of MNSB.* Thus, whether the assets are in the form of the Sentang trees or other vegetation which had been planted on the subleased land, or whether the asset is in the form of a chose in action, the right to sue for the asset lies with MNSB. This appear to be the real intent and grievance of the appellant'. (Emphasis added.)

[36] In view of the fundamental principle that a company is a separate entity distinct from its shareholders, and that the property owned by a company belongs to it and not its shareholders, we find that the learned judge has erred in law when she failed to give effect to the said principle.

[37] The fourth to the 11th defendants' shareholdings in the second defendant belong to them and not to the first defendant. As such, we agree with the defendants that since the first defendant has no ownership rights in those shares, he therefore has no rights to enter into an agreement dealing with the transfer of those shares. Consequently, we find that the plaintiff cannot sue the fourth to the 11th defendants for the purpose of enforcing the terms of the shareholding agreement between the plaintiff and the first defendant against them.

[38] It is also the submission of the plaintiff that the first defendant holds the

shares in the second defendant, whether directly or indirectly through the fourth to the 11th defendants, in trust for him, based on the shareholders agreement. However, the plaintiff has failed to show if the Memorandum of Articles of the second to 11th defendants allow the recognition of trusts. Even if the same is allowed by the articles, the same must be read with s 110(4) of the Companies Act 2016, which reads:

> 110 Limitation of liability of trustee, etc., registered as owner of shares
>
> ...
>
> (4) *Except as provided in this Act, no notice of any trust expressed, implied or constructive shall be entered on a register or branch register or be receivable by the Registrar* and no liabilities shall be affected by anything done under subsection (1), (2) or (3) or under the law of any other place which corresponds to this section and the corporation concerned shall not be affected with notice of any trust by anything so done. (Emphasis added.)

[39] Therefore, a company does not take cognizance of trusts in respect of its shares. It only recognises its registered shareholders. As such, we are of the considered opinion and we agree with the defendants that it is not the concern to the fourth to the 11th defendants as to whether or not the first defendant holds any of their shares registered in his name on trust for the plaintiff.

[40] The Federal Court decision in *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240; [1979] 1 LNS 130, said that while a company does not take cognisance of trusts, s 163 of the Companies Act 1965 (now s 110 of the Companies Act 2016) should be read with conjunction with its articles of association which doesn't comply with this provision. The Federal Court followed the principle stated in *Re Perkins, ex parte Mexican Santa Barbara Mining Co* (1890) 24 QBD 613 at p 616 which states:

> ... *companies have nothing whatever to do with the relation between trustees and their cestuis que trust in respect of the shares of the company.* If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register. (Emphasis added.)

[41] The dispute between the plaintiff and the first defendant over the shares in the second defendant based on the shareholding agreement does not concern the other shareholders, the fourth to the 11th defendants. The shareholders of the second defendant only recognised the registered shareholder of the shares, not the alleged trust created by the shareholders agreement. As such, the plaintiff has no claim against the second to the 11th defendants. This is therefore a proper case to strike out the statement of claim as the plaintiff's action is obviously unsustainable. Appeal No 2007 and Appeal 2009 are

therefore allowed with costs, the decision of the learned judge in respect of these appeals are set aside. The plaintiff's claim against the second to the 11th defendants are hereby struck out.

Appeal No 795 and 803

[42] Appeal No 795 is the defendants' appeal against the decision of the learned High Court judge in dismissing their application to set aside the ad interim injunction, whilst Appeal No 803 is against the decision of the learned High Court judge to allow the interlocutory injunction.

[43] The injunctive reliefs sought by the plaintiff against the defendants are as follows:

(a) an injunction against the defendants restraining them from holding and/or convening the meeting of shareholders of the second to sixth and the 11th defendants on sixth September 2017;

(b) an injunction against the defendants from implementing and/or carrying out any members' resolution passed at any meeting of shareholders of the second to sixth and 11th defendants;

(c) an injunction against the defendants from taking any steps or doing anything to remove the plaintiff as a director of the second to 11th defendants;

(d) an injunction against the defendants from disposing, pledging, dealing in any manner whatsoever, all the shares in the second defendant; and

(e) an injunction against the defendants from disposing, pledging, dealing in any manner whatsoever, all or any assets of the second defendant and/or the third defendant, in particular, all the shares in the third defendant and/or the related assets.

[44] This court in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293, had summarised the correct approach to be adopted in hearing an application for an interlocutory injunction. In summary, the court must apply the following principles:

(a) whether there is a bona fide serious question to be tried;

(b) if there is a serious issue to be tried, the court must go on to decide where the justice of the case lies; and

(c) the judge must have in the forefront of his mind that the remedy he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper.

[45] In view of our decision above to strike out the plaintiff's claim against the second to the 11th defendants on the basis that the plaintiff's action is obviously unsustainable, we therefore allow the defendants' appeals in Appeal No 795 and Appeal No 803 with costs, as there are no serious issues to be tried. In Appeal No 795, the decision of the learned judge is set aside and the defendants' application to set aside the ad interim injunction is allowed. Appeal No 803 is allowed and the decision of the learned judge granting the interlocutory injunction is also set aside.

Appeal No 794

[46] With regard to Appeal No 794, since the injunctive orders have been set aside, the issue of fortification of damages no longer arises. Appeal No 794 is struck out with no order as to costs.

CONCLUSION

[47] For the foregoing reasons, except for Appeal No 2008 and Appeal No 794 which was struck out, the other appeals are therefore allowed with costs.

Appeal No 2007, Appeal No 2009, Appeal No 795, and Appeal No 803 allowed with costs; Appeal No 2008 dismissed with costs; Appeal No 794 struck out with no order as to costs.

Reported by Dzulqarnain Ab Fatar