DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
[SAMAN PEMULA NO.: WA-24NCC-551-12/2021]

Dalam Perkara s.346 Akta Syarikat 2016 dan Aturan 88 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam Perkara Minconsult Sdn Bhd (No. Syarikat: 58835-P)

Dan

Dalam Perkara Kaedah-Kaedah Syarikat (Penggulungan) 1972

Dan

Dalam Perkara Aturan-Aturan 7, 28 dan 88 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam bidangkuasa sedia ada Mahkamah

ANTARA

TRUDY RANJINI GANENDRA
(No. K/P: 740607-14-5454) ... PLAINTIF

DAN

1. DENNIS GANENDRA
(No. K/P: 651230-07-5497)

2. MINCONSULT SDN BHD
(No. Syarikat: 58835-P)

... DEFENDAN-DEFENDAN

JUDGMENT
(Enclosures 55 and 58)

[1] The Plaintiff had by way of Enclosures 55 and 58 applied:

i) to amend the Originating Summons dated 2.12.2021 and to add 2 new parties, Dato' Wan Razali Bin Wan Muda **("Dato' Wan Razali")** and Dato' Sri Roslan Bin Muhammad Tahar **("Dato Sri Roslan") ("Enclosure 55");** and

ii) for an interim injunction to essentially restrain the Defendants from giving effect to a resolution passed at the 23.6.2022 Annual General Meeting of the 2nd Defendant **("23.6.2022 AGM")** against the re-election of the Plaintiff as a director of the 2nd Defendant and its subsidiaries, until the disposal of the Originating Summons in Enclosure 1 **("Enclosure 58"**);

[2] After hearing the Plaintiff's and both the 1st and 2nd Defendants' counsel's submissions I allowed Enclosure 55 in part where the proposed amendments to the Originating Summons do not relate to the joinder of Dato Wan Razali or Dato Sri Roslan as parties. In other words, the joinder of parties application in Enclosure 55 **("Joinder Application")** was not allowed.

[3] After I allowed Enclosure 55 in part I then dismissed Enclosure 58. I set out below the reasons for my decisions in respect of Enclosures 55 and 58.

A] SALIENT BACKGROUND FACTS

[4] The Plaintiff and the 1st Defendant are sister and brother.

[5] The Plaintiff's action against the 1st Defendants is for oppression pursuant to section 346 of the Companies Act 2016 (**"CA 2016"**).

[6] Based on the report dated 28.9.2021 issued by the Companies Commission of Malaysia (**"SSM Report")** on the 2nd Defendant:

i) the Plaintiff owns **506,666** shares in the 2nd Defendant and was appointed director of the 2nd Defendant on 18.4.2019;

ii) the 1st Defendant owns **1,013,334.00** shares in the 2nd Defendant and was appointed director of the 2nd Defendant on 15.1.1997;

iii) Dato' Wan Razali owns **1,213,334.00** shares in the 2nd Defendant and was appointed director of the 2nd Defendant on 15.9.1998;

iv) Dato' Sri Roslan owns **1,226,666.00** shares in the 2nd Defendant and was appointed director of the 2nd Defendant on 3.5.2019;

v) Ros Shamsiah Binti Muda ("**Ros S**") owns **40,000.00** shares in the 2nd Defendant; and

vi) the 2nd Defendant has a total of 9 directors (not all have been mentioned above) and 5 shareholders.

[7] The Defendants' take the position that the above information in the SSM Report accurately reflects the current shareholders of the 2nd Defendant.

[8] However, this is denied by the Plaintiff who alleges that she is a 33% shareholder of the 2nd Defendant in which she holds

506,666 shares (12.65.%) in her name and 813,334 shares (20.3%) held in the name of her nominee, Dato' Wan Razali. The Plaintiff further avers that she is in the process of transferring the said shares held by Dato' Wan Razali to her name.

[9] The Plaintiff's complaints against the 1st Defendant are essentially as follows:

i) The 1st Defendant had removed the Plaintiff from the management and all executive functions in the 2nd Defendant.

ii) The 1st Defendant had caused all the Plaintiff's expense claims in 2020 to be delayed until 5.10.2020 and had rejected them in total save for the Plaintiff's son's education claim.

iii) The 1st Defendant had restricted the Plaintiff's contact with a staff of the 2nd Defendant.

iv) The 1st Defendant had restricted the Plaintiff from the accounts and financial information of the 2nd Defendant and its subsidiaries.

v) The 1st Defendant had countermanded and interfered with the Plaintiff's nominee, Dato' Wan Razali.

vi) The 1st Defendant interfered with the Plaintiff's 813,334 shares in the 2nd Defendant which were held by Dato' Wan Razali in his name.

vii) The Plaintiff had used the 2nd Defendant's funds to purchase Rosaline Ganendra's ("**Rose**") (a former shareholder of the 2nd Defendant and the sister of the Plaintiff and 1st Defendant) shares. This was done through an elaborate exercise by the 1st Defendant involving the

issuance of dividends to all of the 2nd Defendant's shareholders.

[10] The Defendants have denied the above allegations by the Plaintiff and between them have, inter alia, raised the following:

i) The 2nd Defendant was not established nor run as a family-owned company since its incorporation in 1980.

ii) The members of the 2nd Defendant's Board of Directors are and have always been entirely independent and consist of well-respected corporate leaders.

iii) From 2019 the 2nd Defendant strictly enforced the policy that only claims associated with the 2nd Defendant's work would be accepted (in addition to any claims allowed under the employees' respective terms of employment). Therefore, all claims raised by the Plaintiff which were not associated with the 2nd Defendant's work were accordingly rejected.

iv) The Plaintiff was also previously in the position and had authority to approve the 1st Defendant's claims.

v) The Plaintiff's assigned portfolio in the 2nd Defendant in information technology ("**IT**") was never objected by her. The Plaintiff had agreed to a limited role in the 2nd Defendant as Chief Technology Officer.

vi) The 1st Defendant did not restrict the Plaintiff's access to the 2nd Defendant's staff, business or financial information. At all material times the Plaintiff's request for business and financial information were complied with.

vii) Rose's shares were purchased by the 1st Defendant through the Share Purchase Agreement dated 31.1.2019 and was based on an independent valuation undertaken by Ernst &

Young. Full payment was made by the Plaintiff to Rose before dividends were paid out.

viii) The Plaintiff was relieved of the IT portfolio and her position as Chief Technology Officer following her breach of a "complaint settlement". The "compliant settlement" arose from a complaint raised by an employee of the 2nd Defendant against the Plaintiff.

ix) The 1st Defendant had never interfered in any dealings between Trudy and Dato' Wan Razali and is not privy to their private communications.

[11] The reliefs the Plaintiff seeks in the Originating Summons are essentially as follows:

i) A declaration that the 1st Defendant had assumed complete control of the affairs of the 2nd Defendant and has:

a) conducted the affairs of the 2nd Defendant in a manner which is oppressive of the Plaintiff and in utter disregard of the Plaintiff's interests as a minority shareholder of the 2nd Defendant; and/or

b) caused the 2nd Defendant to act in a way which unfairly discriminates and/or is prejudicial against the Plaintiff as a minority shareholder;

ii) An order that the management of the business and affairs of the 2nd Defendant be reorganised to place ultimate control in the hands of the legal and beneficial owners namely, the Plaintiff and 1st Defendant;

iii) An order for compulsory purchase of the Plaintiff's legal and beneficial shareholding by the 1st Defendant at a value of not less than RM46,000,000 or such other value as the Court deems just;

iv) An order to wind up the 2nd Defendant; and

v) Damages.

B] ENCLOSURE 55 - JOINDER APPLICATION

[12] I will only be dealing with the Joinder Application in Enclosure 55 and not the amendments which were allowed (for which no appeal was filed). The amendments that were allowed are additional reliefs in the Originating Summons (**"Additional Reliefs").** In this regard I must highlight that **none** of the Additional Reliefs were specific directed to Dato' Wan Razali or Dato' Sri Rosian personally.

[13] The Plaintiff applied for Enclosure 55 on the ground that it is necessary for Dato' Wan Razali and Dato' Sri Rosian to be made parties to the Originating Summons because of the following:

i) Dato' Wan Razali and Dato' Sri Rosian are both the registered shareholder of the 2nd Defendant when the Originating Summons was filed based on the SSM Report;

ii) At paragraph 2 of the Plaintiff's Affidavit In Support ("**Enclosure 2**"), the Plaintiff had pleaded that Dato' Wan Razali held 813,334 of the 2nd Defendant shares as her nominee.

iii) At paragraph 3 of Enclosure 2 the Plaintiff pleaded that Dato' Sri Roslan held 1,626,666 of the 2nd Defendant shares as the nominee of the 1st Defendant and that the Dato' Wan Razali held 400,000 of the 2nd Defendant's shares as the nominee of the 1st Defendant. That there appeared to be no denial to this by the 1st Defendant.

iv) A statement made for the first time by counsel for the Defendants at the Case Management on 2.6.2022 that the resolutions at the 23.6.2022 AGM would be decided by the

shareholders who had independent voting rights. This was a startling development to the Plaintiff whom had gone on the assumption that the 1st Defendant controlled the voting rights of Dato' Wan Razali and Dato' Sri Rosian. It therefore brings into question whether the 1st Defendant in fact then controls 66% of the 2nd Defendant's equity or whether he is a minority shareholder controlling only the shares registered in his name.

v) Similar assertions were made by 1st Defendant on 4 separate occasions following the above statement by the Defendants' counsel on 2.6.2022, namely in:

i) the 2nd Defendant's Board of Directors meeting of 8.6.2022 preceding the 23.6.2022 AGM;

ii) the 1st Defendant's solicitors' letter of 15.6.2022;

iii) paragraph 14 of the 1st Defendant's Affidavit In Reply No. 1 in respect of Enclosure 55 (**Enclosure 68**); and

iv) paragraphs 9 and 10 of Enclosure 71 (the 2nd Defendant's Affidavit In Reply No.1 in respect of Enclosure 55 (**Enclosure 71**).

[14] For clarity, the actual averments made by the 1st Defendant in Enclosure 68 are as follows:

"(a) The Proposed 3rd and 4th Defendants have always acted independently in the best interests of Minco; and

(b) I do not exercise any control over the rights of the Proposed 3rd and 4th Defendants to vote as shareholders."

Principles Applicable in a Joinder Application

[15] The law regarding the application for joinder of parties are trite and is governed by Order 15 Rule 6(2)(b) of the Rules of Court 2012 ("**ROC**") which provides as follows:

"(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court ***may*** *on such terms as it thinks just and either of its own motion or on application-*

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) ***order any of the following persons to be added as a party,*** *namely-*

i) *any person who ought to have been joined as a party or* ***whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon****; or*

ii) *any person between whom and any party to the cause or matter* ***there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court****, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."*

(own emphasis added)

[16] The Court of Appeal in *Mohamed Azmal Noor Naina Mohd Noor v. Arab-Malaysian Finance Bhd & Anor* [2003] 2 CLJ 505 had examined Order 15 Rule 6(2)(b) of the Rules of Court 1980 which is in pari materia with Order 15 Rule 6(2)(b) ROC and held as follows:

> *"It is dear to me from a reading of those provisions that the* ***purpose of adding a party*** *to a cause or matter* ***is to contribute to the effective, complete, and global disposal or determination of the dispute*** *in the cause or matter* ***or of the relief or remedy that is claimed in it****."*
>
> (own emphasis added)

[17] A party is added to an action when it is necessary and proper for the Court to do so (*Tajjul Ariffin bin Mustafa v. Heng Cheng Hong* [1993] 2 MLJ 143 (Supreme Court)).

The Plaintiff's pleaded case

[18] In paragraphs 26 and 27 of Enclosure 2, the Plaintiff had summarised her claim against the 1st Defendant as follows:

> "26. I respectfully state that since April 2019, **Dennis has assumed complete control of the affairs of Minco** and has:
>
> a. **conducted** the affairs of Minco in a manner which is oppressive of me and in utter disregard of my interests as a minority shareholder of Minco; and / or
>
> b. **caused Minco to act** in a way which unfairly discriminates and / or is prejudicial against me as a minority shareholder.

27. I respectfully state that **Dennis' oppressive and unfairly discriminatory conduct** may be summarised under 2 broad headings:

    a. **Dennis has acted** in breach and utter disregard of my legitimate expectations; and

    b. **Dennis has abused his control of Minco** to benefit himself in disregard of my interests;"

(own emphasis added)

[19] It is clear that the Plaintiffs claim hinges upon the **conduct** of the 1st Defendant and his management decisions. The shareholding of the 1st Defendant was **never** made an issue in the Plaintiffs pleaded case and specifically in Enclosure 2.

[20] Further, the Plaintiff had pleaded that she is a minority shareholder of the 2nd Defendant and this was never disputed by the Defendants. For learned counsel for the Plaintiff to now say, *"Fundamentally, it brings into question whether Dennis in fact then controls 66% of Minco's equity or whether he is a minority shareholder controlling only the shares registered in his name."* is tantamount to the Plaintiff changing her position or is otherwise unsure of the position that she herself has taken in this action.

[21] In this regard I agree with learned counsel for the 1st Defendant submission that if the Plaintiffs case was grounded on the exercise of the 1st Defendant's purported majority shareholding to effect the alleged oppressive conduct, then **all** necessary defendants and/or shareholders of the 2nd Defendant ought to have been joined from the outset.

[22] The Plaintiff is taking an inconsistent position by choosing to include the Dato' Wan Razali and Dato' Sri Rosian but had ignored Ros S, who is also a shareholder of the 2nd Defendant.

[23] As for Dato' Sri Rosian, he has ceased to be a director and shareholder of the 2nd Defendant since 24.6.2022 based on the 2nd Defendant's Corporate Information extracted from SSM on 18.7.2022.

[24] Therefore, I am in agreement with learned counsel for the 1st Defendant as well as the 2nd Defendant that the question of whether shares in the 2nd Defendant are held by nominees, and the identity of the true beneficial shareholders, are wholly irrelevant to the pleaded case of the Plaintiff.

[25] The Plaintiff is bound by her pleadings and as the Originating Summons is an oppression action the Plaintiff is bound by her pleaded case as set out in the Originating Summons and the Plaintiff's Affidavit In Support in Enclosure 2 (*Re Tecnion Investments Ltd [1985] BCLC 434; Re G&G Properties Ltd* [2019] EWCA Civ 204613).

[26] In dealing with an action for minority oppression the English Court of Appeal in **Re Tecnion** *(supra)* held, inter alia, as follows:

*"..... **It is very important that the allegations which a are being relied on in a petition of this nature should be property set out in the petition itself and not merely collected from various places in voluminous affidavit evidence. For my part**, I would emphatically endorse the comments and citations of Megarry J in Re Fildes Bros Ltd [1970] r All ER 92.3 at 92.7, [1970] r WLR 592. at 597-598. He there referred to statements by Plowman J in Re Lundie Bros Ltd [1965]2 All ER 69z at 699, [1965] 1 WLR 1051 at 1058:*

> *'It was suggested in the course of argument that it was really the evidence and not the allegations in the petition which was of importance in this matter. I entirely dissent from that proposition.* ***It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity.'***
>
> (own emphasis added)

Delay

[27] Notwithstanding that the issue the 1st Defendant's shareholding is irrelevant, from the time the Originating Summons was filed and Enclosure 2 was affirmed by the Plaintiff on **2.12.2021**, the Plaintiff had asserted that the 1st Defendant controls the majority shareholding of the 2nd Defendant. The Plaintiff also asserted in detail that there were shares in the 2nd Defendant that were held by Dato' Wan Razali and Dato' Sri Rosian as the nominee of the 1st Defendant (paragraph 3 Enclosure 2).

[28] Having made those assertions from the time the Originating Summons was filed, it does not stand to reason why the Plaintiff now considers it necessary to add Dato' Wan Razali and Dato' Sri Roslan as parties to this action.

[29] The statement made by the counsel for the Defendants on 2.6.2022 and similar assertions made by the 1st Defendant cannot be said to be a *"startling development"* to the Plaintiff when she had *"assumed"* from the commencement of this action that the Dato' Wan Razali and Dato' Sri Rosian held shares as nominees of the 1st Defendant.

[30] Notwithstanding the fact that this issue is irrelevant to the Plaintiff's claim, the Plaintiff had also failed to provide any credible reason as to why it took her over **6 months** after the Originating Summons was filed, to file this Joinder Application in Enclosure 55.

[31] If indeed the 1st Defendant was said to have been "silent" on this issue then if the Plaintiff truly considered it necessary for Dato' Wan Razali and Dato' Sri Roslan to be made parties she would have applied for the joinder application much sooner.

[32] Further and in any event, the 1st Defendant cannot be said to have been "silent" on this issue. As pointed out by learned counsel for the 1st Defendant, the 1st Defendant had addressed this issue several times in his Affidavit In Reply (**Enclosure 17**) in response to Enclosure 2 and the Originating Summons, as follows:

i) *"15. I state that the current shareholders of Minco are accurately reflected at page 131 of Exhibit "TRG-1" of Trudy's 1st Affidavit, …"*

ii) *"17. I wish to emphasise that Minco cannot in any way be characterized as a quasi-partnership. Its affairs have been conducted in accordance with Minco's Memorandum and Articles of Association ("**Minco's M&A**") and the Companies Act 1965 and its successor Companies Act 2016 ("CA 2016")."*

iii) *"71(b). I did not hold myself out to have control over Dato' Wan's voting rights and I did not have any authority to do so;"*

iv) *"72(c). Trudy's assumption that Dato' Wan was acting on my instructions is completely unfounded and Trudy is making baseless allegations against me."*

[33] The fact of the matter is that the purported involvement of Dato' Wan Razali and Dato' Sri Rosian as the nominees of the 1st Defendant's shares was never an issue to the Plaintiff and this can be seen from her pleaded case against the 1st Defendant.

[34] The Plaintiff's complaints were not grounded on the 1st Defendant using his so-called majority shareholding to effect the alleged oppressive conduct.

[35] It is thus for the Plaintiff to prove that the 1st Defendant's conduct was not justifiable as being reasonable management decisions, and was prompted by an *"oppressive"* exercise of his majority shareholding as alleged by the Plaintiff.

No Relief sought against the Proposed Defendants Personally

[36] In addition to the fact the 1st Defendant's shareholding in the 2nd Defendant was never an issue, there was also no relief in the Originating Summons or the Additional Reliefs in Enclosure 55 that was directed to Dato' Wan Razali and Dato' Sri Rosian personally. Whilst this alone may not in itself prevent a joinder of parties under Order 15 Rule 6(2)(b) ROC, however, it means that the second limb, sub-paragraph (ii) of Order 15 Rule 6(2)(b) ROC was not met and can be fatal to a joinder application.

[37] Since there is no relief sought specifically against Dato' Wan Razali and Dato' Sri Rosian personally, it therefore raises the question as to whether it is necessary for them to be made parties to the Originating Summons and in this regard whether there is any matter in dispute in the present action that concerns them (Order 15 Rule 6(2)(b)(i) ROC).

[38] The Court of Appeal in *Dato' Dr Hj Mohamed Haniffa Hj Abdullah & Ors v. Koperasi Doktor* [2008] 3 CLJ 323 had this to say on this issue:

"[6] RHC O. 15 r. 6(2)(b) has been considered in a number of cases. No useful purpose will be served by going through them all and I find it sufficient to quote from three authorities. The first is Vandervell Trustees Limited v. White & Ors where the issue arose as to whether the Inland Revenue Commissioners should be permitted to intervene and be added as a party to the action. Intervention was refused on the ground that ***neither limb of the rule applied*** *to the facts there. Lord Diplock said:*

> *A party to an action must be a person who claims in that action some relief against another party to the action or against who some relief is claimed by another party to the action.* ***There is, in my view, no jurisdiction to add as a party to an existing action a person by and against whom no relief which the court hasjurisdiction to grant can be claimed.****"*

(own emphasis added)

[39] **Dato' Dr Hj Mohamed** *(supra)* was applied in the case of *Imej Muhibah Sdn Bhd v. Pintar Asiamas Sdn Bhd (Didalam Likuidasi) & Ors; Chester Perak Holdings* [2017] 1 LNS 1055 where the High Court held as follows:

"[23] A plaintiff is prima facie entitled to sue any party he chooses and leave out any person as a defendant from an action as he wishes, (see Tajul Ariffin Bin Mustafa v. Heng Cheng Hong (supra); Abidin v. Doraisamy [1994] 1 MLJ 617, SC). The plaintiff cannot be compelled to proceed against other persons whom he has no desire to sue. The court nevertheless has the power to join a party as a defendant upon the application of the plaintiff. ***The court will generally not add a person as a defendant if the plaintiff claims no remedy from him.***

[24] In Dato' Dr Haji Mohamed Haniffa Bin Haji Abdullah And Anor v. Koperasi Doktor Malaysia Bhd & Ors [2008] 4 AMR 293; [2008] 3 MLJ 530, CA, Gopal Sri Ram JCA (delivering judgment of the Court of Appeal said:

> *"Order 15 r. 6(2)(b) of the Rules of the High Court 1980 permits intervention on two separate grounds. In sub-para (i) of the rule it enables intervention where the presence of a party before the court is necessary. In sub-para (ii) intervention is enabled where a party to an action claims relief or a remedy which will materially affect the non-party-intervener's rights. In such circumstances, the courtis empowered to permit intervention if it forms the view that to do so will be just and convenient."*

Unlike an application to add a plaintiff to an action, ***the court will not add a person as a defendant if the plaintiff claims no remedy from him:*** *(see Ang Eng Lee v. Lim Lye Soon (supra); Tajul Ariffin Bin Mustafa v. Heng Cheng Hong (supra)."*

(own emphasis added)

[40] In a more recent case cited by both learned counsel for the Plaintiff and the 1st Defendant, *Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors* [2021] 4 CLJ 721, the Federal Court dealt with the issue of whether third parties (not being shareholders of the company) can be made parties in an oppression action. A stringent test was laid down by the Federal Court before these third parties can be made parties to an oppression action:

"[128] To that extent I restate the legal test applicable as follows:

> *(a) firstly, there should be evidence of* ***deliberate involvement or participation*** *in, or a sufficiently*

dose nexus to the oppressive or detrimental or prejudicial conduct that the minority complains of, *to warrant the attribution of liability to a director or third party;*

(b) the imposition of liability should be fair or just in all the circumstances of the particular case;

(c) in assessing whether the imposition of such liability is fair orjust, the court should be satisfied that the ***remedy*** *results in fairness to the parties concerned as a whole. In this context, liability may well be more easily assessed and imposed where a director has breached his duties, acquired personal benefit or where his acts or omission will result in prejudice to other shareholders. However, the foregoing examples do not comprise conditions without which liability will not be imposed. Ultimately the facts and factual matrix of each particular case will determine whether or not the imposition of liability on directors and/or third parties is justified. Such an assessment is undertaken on an objective basis;*

(d) the attribution or imposition of liability should be circumspect, going no further than is necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct;

(e) such imposition of liability must be reasonable, and serve to alleviate the legitimate concerns of the shareholders of the company in question;

(f) in exercising its powers under s. 181 of the CA 1965 (now s. 346 of the CA 2016) the court should bear in mind general corporate law principles, such that

director liability does not become a substitute for other statutory reliefer under the common law; and

(g) *in summary,* ***the question for the court is whether in the context of s. 181 of the CA 1965 the defendant was so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability against him for such conduct.****"*

(own emphasis added)

[41] In the context of the present case the Plaintiff have not shown through her pleadings namely the Originating Summons and Enclosure 2 that:

i) Dato' Wan Razali and Dato' Sri Roslan were "***so connected*** *to the oppressive, detrimental or prejudicial conduct*" of the 1st Defendant as alleged "*that it would be fair and just* ***to impose liability****"* against them for such conduct; and

ii) in this regard that there was no remedy/relief that the Plaintiff sought against Dato' Wan Razali and Dato' Sri Rosian personally and as such there can be no issue of any liability being attached to them which is crucial and necessary in an oppression action.

[42] Hence, in summary there is no nexus between Dato' Wan Razali and Dato' Sri Rosian and the alleged oppressive conduct complained of by the Plaintiff.

[43] Though the requirements under Order 15 Rule 6(2)(b)(i) and (ii) ROC are to be read disjunctively, however, as the above cited cases show, in the absence of any relief prayed for against the proposed party intended to be joined as a defendant, it is unlikely that Order 15 Rule 6(2)(b)(i) would have been met. And

in the present case, the requirement of Order 15 Rule 6(2)(b)(i) was not met as the shareholding of the 1st Defendant is not an issue in the Originating Summons.

[44] It is my considered view that based on the principles of the cases cited and in particular **Auspicious Journey** *(supra)*, the absence of any relief or remedy sought against a third party defendant (not being shareholders of the company or the company itself) is fatal to a joinder application in a minority oppression action.

[45] In the circumstances, it is neither necessary nor proper for the Proposed Defendants, Dato' Wan Razali and Dato' Sri Rosian to be made parties to the Originating Summons.

C] ENCLOSURE 58 - INTERLOCUTORY INJUNCTION APPLICATION

[46] Through Enclosure 58 the Plaintiff sought to restrain the implementation of the resolution passed at the 23.6.2022 AGM against the re-election of the Plaintiff as a director of the 2nd Defendant and its subsidiaries.

[47] The Plaintiff's grounds in support of Enclosure 8 are summarised as follows:

i) There is a real need for the Plaintiff to remain in the management of the 2nd Defendant as director and to maintain oversight of its affairs. The Originating Summons is premised on a breach of the Plaintiff's legitimate expectation to participate in the management of the 2nd Defendant.

ii) Further, there is also a real need for the Plaintiff to maintain oversight of the 2nd Defendant's accounts and financial records given that the 2nd Defendant's latest

management accounts show a negative book value. This is necessary for the Plaintiff's main relief of return to management and for the alternative relief of a buy-out at a valuation.

iii) Further, the Defendants undertaking to Court given on 28.6.2022 not to hold any Board of Directors meeting pending determination of this application, is worthless. The undertaking was given as an assurance of maintenance of *status quo*.

iv) There is little or no prejudice to the Defendants in allowing the Plaintiff to remain as director of the 2nd Defendant as the Plaintiff controls the Board of Directors and the Plaintiff is a minority voice. Removing the Plaintiff as a director removes her right to participate in and have access to management and crucially removes her right to access information as a director.

v) The Defendants have not provided any sensible reason for her removal. They have (for the first time) asserted that her presence as director infringes the Engineering Regulations requirement that ⅔ of the Board of Directors must be qualified engineers. The Board of Directors can be reconstituted to maintain the quota given that there are other non-qualified engineers on the Board of Directors.

[48] The 1st Defendant's response to the Plaintiff's above grounds can be summarised as follows:

i) The Plaintiff was not "removed" as a director of the 2nd Defendant but had retired as part of an automatic process under 2nd Defendant's M&A. The issue of retirement and re-election of directors is a matter that is governed by the 2nd Defendant's M&A specifically Articles 95 and 96.

ii) The Plaintiff has acknowledged this and had stated in paragraph 29 of the Plaintiff's Affidavit In Support of Enclosure 58 (**Enclosure 56**) that under the 2nd Defendant's Articles of Association, the Plaintiff is obliged to retire at the next AGM.

iii) The Plaintiff has not alleged any irregularity or defect in the voting poll or the carrying of the resolution against her re-election as director. In fact, it was the Plaintiff who had called for the voting on her re-election to be done by way of poll.

iv) In any event, as noted above, an injunction would have the effect of overriding the requirements of law, namely the provisions of CA 2016 and the 2nd Defendant's M&A. Further, the injunction would have the effect of forcing the 2nd Defendant to breach of regulatory requirements under regulation 34B, Registration of Engineers Regulations 1990 read together with section 7A, Registration of Engineers Act 1967 which requires ⅔ the 2nd Defendant's Board to be a Professional Engineer with Practising Certificate ("**PEPC**"). The Plaintiff has not obtained her PEPC. Therefore, had she been re-elected as a director, the 2nd Defendant would be in breach of the said statutory requirements.

[49] The 2nd Defendant's response to the Plaintiff's grounds in support of Enclosure 58, is similar to that which were raised by the 1st Defendant and they are as stated below:

i) The 2nd Defendant will most definitely suffer prejudice if the Plaintiff remains on the Board of Directors of the 2nd Defendant, as the 2nd Defendant will be in breach of the law particularly, Regulation 34B of the Registration of Engineers Regulations 1990 read together with Section 7A

of the Registration of Engineers Act 1967. Failure to comply with the law as set out above exposes the 2nd Defendant to various sanctions, as set out in Section 7A(5) of the Registration of Engineers Act 1967.

ii) The 2nd Defendant would be in breach of the statutory laws as stated above if the Plaintiff was re-elected to the Board of Directors.

iii) The Plaintiff's only response to this is that the Chairman of the Board of Directors, Ahmad Jauhari bin Yahya and another executive director, Dato' Dr. Nadzri bin Yahaya, who also do not hold the PEPC could have been removed as a director, in order to make room for the Plaintiff on the Board. The said averment is completely non-sensical and narcissistic given the difference in qualification between all 3 individuals.

iv) Enclosure 58 is a complete non-starter due to the illegality that arises from allowing the Plaintiff to remain on the Board of the 2nd Defendant.

Principles Applicable in an Interlocutory Injunction Application

[50] Not unlike the Plaintiff's Joinder Application in Enclosure 55, the law and principles governing an interlocutory injunction application are also trite. The *locus classicus* case of *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396 provides the principles to be applied for the grant of an interlocutory injunction:

i) Whether there is a serious question or issue to be tried;

ii) Whether the balance of convenience lies in favour of the applicant; and

iii) Whether damages are an adequate remedy.

[51] The applicant's undertaking as to damages and the sufficiency of that undertaking are also considered by the Court in particular where the said undertaking is challenged.

i) Whether there is a Serious Question or Issue to be Tried

[52] While the parties had delved into the facts and merits of this case, nevertheless, in an interlocutory injunction application, the Court is not to embark on a factual finding of facts regarding facts in dispute nor does the Court determine the actual merits of either parties' case (*Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 CLJ 293).

[53] The 1st Defendant had earlier attempted to strike out the Originating Summons (**Enclosure 16**) but I had dismissed the said striking out application and no appeal was filed arising from that decision. Therefore, to say that there is no serious question to be tried would be inconsistent with the decision I made in which I decided that it was not plain and obvious for the Plaintiff's claim to be struck out.

[54] In determining whether there is a serious question to be tried, the Court must be satisfied that the Plaintiff's *claim* (in the main action) is not frivolous or vexatious (**American Cyanamid** *(supra)*).

[55] It suffices for me to say that the list of oppressive conduct alleged by the Plaintiff as stated earlier requires this action to be determined fully at the hearing of the Originating Summons.

ii) Whether the Balance of Convenience lies in favour of the Plaintiff

[56] My refusal to grant the interlocutory injunction in Enclosure 58 was centred upon the other 2 requirements of an interlocutory injunction application regarding where the balance of convenience lies and whether damages would be an adequate remedy.

[57] I accept the arguments raised by learned counsel for both Defendants in relation to the issue of where the balance of convenience lies. I summarise their arguments into 3 main parts as follows:

i) That the retirement of the Plaintiff as a director of the 2nd Defendant was required under the 2nd Defendant's M&A.

ii) That there is nothing improper about the Plaintiff's non re-election as a director and that the 23.6.2022 AGM proceeded in accordance with the 2nd Defendant's M&A and the law.

iii) The Plaintiff could not be appointed as a director of the 2nd Defendant as it would cause the 2nd Defendant to be in contravention of Regulation 34B of the Registration of Engineers Regulations 1990 read together with Section 7A of the Registration of Engineers Act 1967. The 2nd Defendant cannot be part of or be involve in an illegal act (*Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212).

[58] At this stage of the proceedings it is not necessary for me to make any final determination on the above issues raised by the Defendants. To determine where the balance of convenience lies, I need to consider the harm or prejudice that each party may suffer if the injunction is granted or refused.

[59] The issue of illegality is a serious issue and would have a grave impact on the 2nd Defendant. The 2nd Defendant could be

exposed to liability and sanctions under Section 7A(5) of the Registration of Engineers Act 1967. This is surely not what the Plaintiff would want since she commenced this action to preserve and assert her rights in the 2nd Defendant. This includes the Plaintiff's claim in respect of her legitimate expectations to, inter alia, jointly manage the 2nd Defendant and receive remuneration through her shareholding, salary and dividends. The sub-stratum of the Plaintiff's claim would be gone if anything untoward should befall the 2nd Defendant.

[60] The fact that there is a real risk or possibility of the 2nd Defendant breaching the abovementioned statutory provisions is enough to tilt the balance of convenience in favour of the Defendants.

[61] The injunction would cause greater harm or prejudice to the Defendants than it would to the Plaintiff, if any.

iii) Whether Damages are an Adequate Remedy

Maintaining *Status Quo*

[62] The adequacy of damages is not only viewed from the monetary aspect. The question here is whether the Plaintiff would be deprived of the reliefs the Plaintiff seeks in the Originating Summons if the injunction prayed for in Enclosure 58 is not granted.

[63] The short answer to this is in the negative.

[64] Learned counsel for the Plaintiff stated in paragraph 1 of the Plaintiff's Written Submissions (**Enclosure 96**) that Enclosure 58 is effectively to restrain the Plaintiff from being removed as a director of the 2nd Defendant and to preserve the *status quo ante*.

[65] First and foremost, it is not accurate to state that the Plaintiff was "removed" as a director of the 2nd Defendant. The Plaintiff was required to retire based on the 2nd Defendant's M&A which, as stated earlier, the Plaintiff had acknowledged in Enclosure 56.

[66] The Plaintiff was not re-elected at the 23.6.2022 AGM.

[67] The Plaintiff is primarily concerned with her directorship and wants to continue to be a director post the 23.6.2022 AGM.

[68] The 23.6.2022 AGM is a necessary process the 2nd Defendant has to legally undergo. Matters concerning the 23.6.2022 AGM were not something the Plaintiff had envisaged when the Originating Summons was filed. The 23.6.2022 AGM and events leading to the 23.6.2022 AGM did not occur until well after the Originating Summons was filed.

[69] I note that the Plaintiff had waited a day after the 23.6.2022 AGM had concluded before filing Enclosure 58. This is despite the fact that she would have been aware of:

i) Dato' Sri Rosian's decision to not offer himself for re-election as early as 8.6.2022, when the 2nd Defendant's Board of Directors' meeting was held; and

ii) The PEPC requirement that the 2nd Defendant must comply with.

[70] Through Enclosure 58, the Plaintiff sought to restrain the implementation of the resolution made at the 23.6.2022 AGM, after the fact.

[71] In other words, the Plaintiff waited until the outcome of the 23.6.2022 AGM before filing Enclosure 58.

[72] This does not work in the Plaintiff's favour. It is rather late in the day for the Plaintiff to now for ask for an injunction to restrain the enforcement of the resolution passed at the 23.6.2022 AGM against the re-election of the Plaintiff as a director of the 2nd Defendant and its subsidiaries. The only status quo which should be preserved is that which is **after** the 23.6.2022 AGM and not before it as prayed for by the Plaintiff.

[73] At this stage, the Plaintiff has also not stated or shown that the 23.6.2022 AGM was conducted unfairly, in breach of any laws or the 2nd Defendant's M&A. As pointed by learned counsel for the 1st Defendant, the Plaintiff participated in the 23.6.2022 AGM and had called for the voting on her re-election to be done by way of poll (paragraph 18, Plaintiff Affidavit In Support of Enclosure 55 (**Enclosure 57**).

The Injunction Sought and Adequacy of Damages

[74] If after the Originating Summons is finally determined and the Plaintiff is able to make out a case of minority oppression, the Court has wide powers under Section 346(2) CA 2016 to, inter alia, order that the Plaintiff be reinstated as a director of the 2nd Defendant or to reverse the decisions made at the 23.6.2022 AGM. Thus, the Plaintiff rights are preserved.

[75] I note that the reliefs prayed for by the Plaintiff in the Originating Summons (as amended) is quite extensive.

[76] I agree with the submissions of the learned counsel for the 1st Defendant that damages are not an adequate remedy for the Defendants, given that the 2nd Defendant would be at risk of losing its licence to operate as an engineering consultancy company if the Plaintiff, without her PEPC requirement, remains on the 2nd Defendant Board of Directors. This potential harm is not reversable.

[77] Further, the effect of granting the Plaintiff the injunctions sought in Enclosure 58 is tantamount to granting the Plaintiff final relief in the Originating Summons (as amended) when the balance of convenience does not lie in the Plaintiff's favour for the grant of the injunction (*Gibb & Co. v. Malaysia Building Society Bhd.* [1982] CLJ 185; [1982] CLJ (Rep) 99).

[78] As for the Plaintiff's undertaking as to damages, there was no challenge made by the Defendants regarding the said undertaking and therefore I did not consider this to be an issue in this Enclosure 58 application.

D] CONCLUSION

[79] For the reasons stated above, I allowed Enclosure 55 in part, i.e. prayer 1(b) (the amendments that do not relate to the Joinder Application) but dismissed the Joinder Application with costs in the cause, and I also dismissed Enclosure 58 with costs in the cause.

Dated: 22 DECEMBER 2023

(WAN MUHAMMAD AMIN WAN YAHYA)
Judicial Commissioner
High Court of Malaya,
Kuala Lumpur
(Commercial Division (NCC 3))

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Legislation / Rules referred to

Rules of Court 2012

- Order 15 Rule 6(2)(b)

Rules of Court 1980

- Order 15 Rule 6(2)(b)

Companies Act 2016

- Section 346

Registration of Engineers Act 1967

- Section 7A
- Section 7A(5)

Registration of Engineers Regulations 1990

- Regulation 34B

Cases referred to:

1. *American Cyanamid Co. v. Ethicon Ltd [1975] AC 396*
2. *Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors [2021] 4 CLJ 721*
3. *Dato' Dr Hj Mohamed Haniffa Hj Abdullah & Ors v. Koperasi Doktor [2008] 3 CLJ 323*
4. *Gibb & Co. v. Malaysia Building Society Bhd. [1982] CLJ 185; [1982] CLJ (Rep) 99*
5. *Imej Muhibah Sdn Bhd v. Pintar Asiamas Sdn Bhd (Didalam Likuidasi) & Ors; Chester Perak Holdings [2017] 1 LNS 1055*
6. *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah [1995] 1 CLJ 293*
7. *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212*

8. *Mohamed Azmal Noor Naina Mohd Noor v. Arab-Malaysian Finance Bhd & Anor [2003] 2 CLJ 505*

9. *Re Tecnion Investments Ltd [1985] BCLC 434*

10. *Re G&G Properties Ltd [2019] EWCA Civ 204613*

11. *Tajjul Ariffin bin Mustafa v. Heng Cheng Hong [1993] 2 MLJ 143*