DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO: W-02(NCC)(W)-736-04/2014

ANTARA

PETRA PERDANA BERHAD …PERAYU
[NO. SYARIKAT: 372113-A]

DAN

1. TENGKU DATO' IBRAHIM PETRA BIN TENGKU INDRA PETRA

2. WONG FOOK HENG

3. TIONG YOUNG KONG

4. LEE MEE JIONG …RESPONDEN-RESPONDEN

[Dalam Mahkamah Tinggi Kuala Lumpur
(Bahagian Dagang)
No. Guaman Sivil: D-22NCVC-1057-2011]

Antara

Petra Perdana Berhad é Plaintif
(No. Syarikat: 372113-A)

Dan

1. Tengku DatoôIbrahim Petra Bin Tengku Indra Petra
2. Wong Fook Heng
3. Tiong Young Kong
4. Lee Mee Jiong
5. Ta Securities Holdings Berhad
   (No. Syarikat: 14948-M)

6. Yap Hock Seng

7. Ta First Credit Sdn Bhd é Defendan-Defendan
(No. Syarikat: 29009-A)

KORUM:

ABDUL AZIZ BIN ABD. RAHIM, HMR
ROHANA BINTI YUSUF, HMR
DR. PRASAD SANDOSHAM ABRAHAM, HMR

Keputusan: 25 Ogos 2015

GROUNDS OF JUDGMENT

[1] This appeal arises from a decision of the High Court Kuala Lumpur on 21st of March 2014, dismissing the appellantôs claim against the respondents. The appellants filed an appeal to the Court of Appeal on the 18th of April 2014 and a cross appeal was filed on the 19th of June 2014.

[2] The facts material to this appeal are now set out below. For purposes of convenience, in this judgment we will refer the appellant as the plaintiff and for the respondents as the defendants in their respective numbers.

Facts Germane to this Appeal

[3] The plaintiff is a public listed company. Petra Energy Berhad (ñPEBò) is also a public listed company and was a subsidiary of the plaintiff. PEB was the ñjewel in the crownò of the plaintiff contributing an income of approximately RM2.34 million annually (cash flow as in the Board Mandate on 18.11.2009) to the plaintiff (a fact not in dispute). Due to the financial situation of the plaintiff i.e. repayment to bond holders

or/and restrictive cash flow, the directors of the plaintiff (1st, 2nd and 3rd defendants) decided to take certain commercial measures to ease the financial difficulties the plaintiff faced. The only marketable asset that the plaintiff could use to raise funds was its shares in PEB. As PEB was pivotal for the income base of the plaintiff and any disposal of shares of PEB would have a material effect on the financial position of the plaintiff, the directors decided to put their proposals to an EGM of shareholders for the said shareholdersô approval.

[4] Prior to its listing, PEB was a wholly owned subsidiary of the plaintiff. The 1st to 3rd defendants (now referred to as ñboard of directorsò) were the previous directors of the plaintiff (up to the time of the Third Divestment), and were also the directors of PEB. The 4th defendant was the executive director of PEB and had resigned as a director of PEB sometime on or around 18.6.2010. (See page 356 Rekod Rayuan Jilid 1(2) Bahagian A).

[5] Pursuant to an extraordinary general meeting (ñEGMò) convened on 26.2.2007, the shareholders of the plaintiff resolved amongst others that a general mandate be given to the plaintiff to divest up to 19.5 million shares (equivalent to 10%) in PEB after its listing on the Main

Board of Bursa Malaysia (see pages 2172-2173 Rekod Rayuan Jilid 2(9) Bahagian C).

[6] The Shareholdersô Divestment Mandate was subject to an announcement by the plaintiff to Bursa Malaysia on 26.2.2007. This Shareholdersô Divestment Mandate was also renewed on an annual basis by the shareholders of the plaintiff in general meeting and such renewals were also the subject matter of various announcements by the plaintiff to Bursa Malaysia (see pages 2174-2178 Rekod Rayuan Jilid 2(9) Bahagian C).

[7] On or about 10.12.2007, the plaintiff through its board of directors divested 9 million ordinary shares which it held in PEB to Lembaga Tabung Haji (ñFirst Divestmentò). The plaintiffôs shareholding in PEB was reduced from 64.62% to 60% by reason of this divestment.

[8] At a board of directorsômeeting on or about 26.8.2009, the board of directors of the plaintiff resolved to divest further of the plaintiffôs shares in PEB to meet the cash requirements of the plaintiffôs group and authorised the 1st defendant to negotiate and finalise the price and sale of such shares. (See pages 2795-2801 Rekod Rayuan Jilid 2(12) Bahagian C).

[9] It was pursuant to the Second Divestment that the plaintiff divested 10.5 million ordinary shares in PEB to TA First Credit on 10.9.2009 ("Second Divestment") on the terms negotiated by the 1st defendant. (See page 2807 Rekod Rayuan Jilid 2(12) Bahagian C). The plaintiff's shareholding in PEB was reduced further to 54.62% by reason of this divestment. TA First Credit had in turn disposed of these shares under the Second Divestment to a company known as Shorefield Resources Sdn Bhd ("Shorefield Resources"). Shorefield Resources is and was controlled by Datuk Bustari Yusof who is related to the 1st defendant by marriage (see page 1340 Notes of Proceedings dated 23.1.2013).

[10] At a board of directors meeting of the plaintiff that was convened on 18.11.2009, it was resolved that the plaintiff divests its remaining 54.62% shareholding in PEB to meet the Plaintiff's cash flow requirements upon terms which included as follows (Third Divestment):-

a. The shares would be sold en bloc;

b. By way of an open tender;

c. Through the appointment of placement agents or advisors;

d. Subject to the availability of an independent valuation of the PEB shares in question;

e. Procuring a minimum net proceeds of RM1.80 per PEB share;

f. In compliance with the rules and regulations required;

(See pages 2938-2956 Rekod Rayuan Jilid 2(13) Bahagian C).

[11] On 22.12.2009 ("December Board Meeting"), the board of directors resolved that 29.59% shareholding in PEB be disposed of in 2 tranches (Fourth Divestment). However this divestment was never proceeded with as an injunction was obtained by Encik Shamsul bin Saad (a shareholder, as well as an executive director of the plaintiff) to restrain dealings with the said shares. (See pages 569 Rekod Rayuan Jilid 1(3) Bahagian A).

[12] The resolution of the shareholders passed at the EGM dated 26.4.2007 remains in effect and has been renewed on 26.6.2008 and 25.6.2009. (See pages 103-117 Ikatan Teras Bersama (Ikatan Dokumen) Jilid 1).

The Plaintiff's Claim

[13] The plaintiff takes issue with regards to the two particular divestments of the plaintiff's shares in PEB i.e the Second and Third Divestment.

[14] In this regard, the plaintiff contends that: -

a) in causing the plaintiff to undertake the Second Divestment and the Third Divestment, the 1st to 3rd defendants had acted in breach of their statutory duties as set out in section 132(1) of the Companies Act (CA);

b) further and/or in the alternative, the 2nd and 3rd defendants had dishonestly assisted the 1st defendant in the various breaches of duty owed by 1st defendant to the plaintiff, and were accessories thereto;

c) further and/or in the alternative, the 4th defendant as director of PEB, had dishonestly assisted the 1st to 3rd defendants in the various breaches of duty owed by 1st to 3rd defendants to the Appellant, and was accessory thereto;

d) 1st Defendant to 4th Defendant had conspired, whether by lawful and/or unlawful means, to injure the plaintiff vide the Second Divestment and the Third Divestment; and

e) as a result of the aforesaid acts or omissions, the plaintiff had suffered loss and damage in relation to both the Second Divestments and the Third Divestment.

Defendants' Reply

[15] The defence of the 1st to 3rd Defendants is that they did, in authorising and effecting the two impugned divestments of shares in PEB, had acted at all material times pursuant to the mandates of the board of directors collectively arrived at in August and November 2009. They maintain that they did, at all times act bona fide in the interests of the plaintiff when effecting such divestments which were duly authorised by the board. In essence they point to the fact that the dominant purpose of such divestments was to meet the urgent liquidity needs of the plaintiff and to assuage its dire cash flow position because:

(i) The plaintiff was at the time in a tight liquidity position;

(ii) There was threatened litigation by creditors, particularly one Shin Yang Shipyard;

(iii) The plaintiff had, for the first time in its corporate history, made a loss of approximately RM8.9 million in the 3rd quarter of 2009; and

(iv) The plaintiff was unable to obtain funds expeditiously through other means.

[16] The 1st to 3rd defendants maintain that they duly discharged their fiduciary and statutory duties as directors of the plaintiff with regards to these disputed divestments. They point to the fact that they relied on professional advisors in carrying out these transactions.

[17] As for the plea of conspiracy, the 1st to 3rd defendants and the 4th defendant deny the same absolutely, maintaining that there was never at any point of time any agreement arrived at between them and/or others to injure the plaintiff. They deny the existence of any scheme designed to injure the plaintiff by causing the divestment of its "crown jewel", namely PEB.

Issues to be dealt by the Court

[18] The company is made up of 2 main components i.e. the board of directors and members in general meeting. The general principle is where matters are entrusted by the Articles to the directors, it is not a matter where shareholders can intervene. The effect of the demarcation of powers between the board of directors and members in general meeting has been well illustrated in the case of **Automatic Self-**

Cleansing Filter Syndicate Company Limited v Cunningham [1906] 2 Ch 34. There, the articles of the company expressedly empowered the directors to sell any property of the company on such terms and conditions as they might think fit. A resolution was passed by the company directing the board to sell the company's property to a new company formed for that purpose. It was held that the directors were not bound to carry into effect the resolution passed by the general meeting. The Court of Appeal was urged to use the analogy of principal and agent, in that it would be absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him, instead of his managing the agent. The argument was rejected by Collins M.R., where the Master of the Rolls stated that such an analogy did not strictly apply to that case, and added:

> **"**No doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purposes of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves.**"**

The main reason for the division of powers between directors and members was explained by Buckley L.J. in **Gramaphone and Typewriters v. Stanley [1908] 2 KB 89,** at p. 105-6 in this way:

> **"**é even a resolution of a numerical majority a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the companyôs affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles.**"**

[19] However the classical position as set out above has been varied by legislation, for instance section 132(1) of the CA; and it is our view that under certain given circumstances the shareholders would be empowered to seek that decision of the board be made justiciable when it was just to do so. In this case it is not the resolution of the board or the members in the EGM which is being challenged per se but **the conduct of the directors** in acting the way that they did in flagrant breach of the membersôresolution and whether this constituted a breach under section 132(1) of the CA. In **Australian Growth Resources Corp Pty Ltd v Van Reesema (1988) 13 ACLR 261,** the South Australian Supreme Court in considering the Australian equivalent to section 132, held that

the statutory duty to act honestly encompassed in it the fiduciary duties of acting in the interests of the company and to act for proper purposes.

[20] The main argument by the plaintiff in that Australian case was that the Shareholdersô Mandate prevails over the Boardôs Mandate. Article 115 (1) of the plaintiffôs Articles of Association in the instant appeal provides as follows: -

> **"**The business of the Company shall be managed by, the directors who may exercise all such powers of the Company, and do on behalf of the Company all such acts as are within the scope of the Memorandum and Articles of Association of the Company and as are not, by the Act or by these regulations, required to be exercised by the Company in general meeting, subject, nevertheless to any of these regulations, to the provisions of the Act, and to such regulations, **being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the Company in general meeting,** but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.**"** (Emphasis added)

[21] The learned High Court Judge ruled (at page 232 of the Rekod Rayuan) that:

> **"**347. As such the General Shareholdersô Mandate is not a ñregulationô within the meaning of Article 115 and cannot limit the existing power of the directors as provided under Article 115. Put another way, the reference in Article 115 to ñregulationsò therefore means regulations as envisaged

under the Companies Act, and not resolutions passed in general meeting.**"**

[22] Whilst the unfettered powers of the directors is encompassed in Article 115, it is our view that that the shareholdersô mandate at the EGM provides a barometer as to what the shareholders gauge as being the best interest of the company. This would be relevant when the directorsô conduct is put under the microscope to ascertain whether they had breached section 132(1) of the CA.

[23] The plaintiff had referred to us the case of **Credit Development Pte Ltd v IMO Pte Ltd [1993]1 2 SLR 370** where the shareholder of the plaintiff company sent written requisitions to the plaintiff setting out 7 resolutions it wanted moved at the next annual general meeting of the plaintiff. The plaintiff however, declined to include the resolutions in the agenda of the next annual general meeting on the basis that the matters in the resolutions came within the purview of the directors and a general meeting was not the proper forum to deliberate on them. **Article 88(1) of the Articles of Association of the Company**, is almost identical with **Article 115(1)** of the plaintiffôs Articles of Association.] The learned Judge, Lim Teong Qwee JC had at page 377 and 378 of the report stated that and we agree: -

> **"**Ií subject nevertheless to the provisions of the statutes, these articles and to **such regulations . . . as may be prescribed by the company in general meeting** (Emphasis added)ô

> **"**These words of limitation come after the vesting of the management of the business in the directors and granting to them the powers and I think it means that both the management of the companyôs business and the exercise of the companyôs powers are subject to the condition. **In the management of the business and the exercise of the powers the directors must comply with the statutes and the articles for the time being in force. They must also comply with such regulations as may be prescribed by the company in general meeting. This means that although the directors are to manage the company's business and may exercise all the company's powers yet the company in general meeting may at any time prescribe regulations which the directors must comply with.** Such regulations can only be prescribed by passing resolutions which would include resolutions for the appointment of accountants and solicitors for the purposes set out in the requisition of IMO. When such resolutions are passed, what the company in general meeting is saying to the directors is óAppoint accountants and solicitors for these specific purposes. Subject to that you manage the companyôs business and exercise all the companyôs powersô**"** (Emphasis is ours)

[24] The abovementioned case had distinguished the cases referred to by the learned trial Judge in our instant appeal wherein the cases must be read in the context of the articles of association of the company in question. The shareholders may by special resolution direct the directors to take or refrain from taking specified action.

[25] Based on the abovementioned case, the articles of association of a company are the regulations of the company. As been prescribed by the plaintiffôs articles of association by virtue of Art. 115 i.e. ñé being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the Company in general meetingò, the terms that were provided by the Shareholdersô Mandate during the EGM are the regulations that has been prescribed by passing resolutions and thus the directors must comply with the mandate as prescribed by the companyôs articles of association.

[26] The Shareholdersô Mandate was subsequently renewed by the shareholders during the plaintiffôs annual general meeting held on 26.6.2008 and 25.6.2009 respectively. Therefore, the alleged Boardôs Mandate could not override the specific authority of the Shareholdersô Mandate.

[27] The defendants on the other hand stated that the Shareholdersô Divestment Mandate does not deprive the plaintiffôs board of directors of its power to deal with the plaintiffôs shares in PEB in accordance with the law and the plaintiffôs Memorandum and Articles of Association.

[28] A valid resolution i.e. the Shareholdersô Mandate was given to the board of directors during the extraordinary general meeting of the plaintiff allowing the board of directors to dispose up to 10% shares held in PEB, upon the following terms (ñShareholdersô Divestment Mandateò):-

i. That the divestment is for cash consideration through the open market and/or placement/s at such time/s as Petra Perdanaôs directors may in their discretion deem fit provided that the price/s shall not be more than 10% discount of the 5-day weighted average market price/s (WAMP) of the ordinary shares of par value RM0.50 each in PEB preceding the relevant date/s of the divestment/s;

ii. **That the board of directors of Petra Perdana would endeavour to, inter alia, secure the best possible price/s for the PEB shares after taking into consideration the prevailing equity market conditions and sentiments in the best interests of Petra Perdana.** (Emphasis added)

[29] The rationale for the Shareholderôs Divestment Mandate was to enable the plaintiff to effect the divestment of 19.5 million ordinary shares in PEB (representing 10% of PEBôs shareholding) or any part

thereof at the opportune time in the event of improving equity market conditions and to eliminate the need to convene separate general meetings whenever applicable to obtain shareholdersôapproval for the divestment of such shares. The Shareholderôs Divestment Mandate would enable the plaintiff to raise additional funds expeditiously as and when it was required without having to obtain approval at a General Meeting.

[30] In this case the regulatory aspect of the same were the mode of selling and that the divesting of the plaintiffôs shares in PEB would not exceed 10%. These regulations were made by way of extraordinary resolutions at the EGM, so they would constitute regulations under article 115 and we therefore are not in agreement with the learned judge on the point. In the case of **Marshall's Valve Gear Company**, **Limited v. Manning**, **Wardle & Co. Limited [1908] 1 Ch. 267,** Justice Neville J took this approach (and we agree) and we quote at p. 268 and 273-274:-

> **"**The powers of the directors were regulated by art. 55 of Table A, which provides: ñ The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by

the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meetingé **"**

é

"If I am right in this conclusion, it is obvious, I think, **that I ought not to interfere with the progress of the present action, because it is brought with the approval of the majority of the shareholders in the company, and, upon the decisions which I have referred to, they are the persons who are entitled to say, aye or no, whether the litigation shall proceed.** In the present case there is no difficulty about the articles of association, because there is no unusual contract between the members of the company with regard to the powers of the directors, although there is with regard to the continuation of their office; but **the powers of the directors are regulated by art. 55 and simply state the relation existing between the directors and the company as a general body, and I think that under art. 55 the majority of the shareholders in the company at a general meeting have a right to control the action of the directors, so long as they do not affect to control it in a direction contrary to any of the provisions of the articles which bind the company.** I think, therefore, the motion in the present case fails and must be dismissed with costs.**"** (Emphasis added)

[31] Despite the regulations set out by the shareholders in the mandate with regards to the discount in respect of the shares not exceeding 10% in the Second Divestment, the 1st defendant had caused 10.5 million ordinary PEBõs shares at par value RM0.50 each to be transferred to TA First Credit who in turn on 27.10.2009 disposed of 9.7 million shares out of the 10.5 million ordinary shares of PEB shares at RM1.80 per share making a profit of approximately RM2,600,000.00 in favour of TA First Credit. The end buyer in the Second Divestment was Shorefield Resources. Bearing in mind that the purpose of this Second Divestment was to improve the liquidity position of the Plaintiff, could it be then said disposing of PEB shares at par value under the Second Divestment, be acting in the best interest of the Plaintiff taking into account the profit TA First Credit made in selling the said shares to Shorefield Resources?

[32] In respect of the Third Divestment it was very clear that it had breached the mandate of the EGM in that the Plaintiffõs controlling interest in PEB would be completely divested despite the stipulation in the said mandate against such divestment. However by the board of directors meeting convened on 18.11.2009 it was resolved that the Plaintiff divest its remaining 54.62% shareholding in PEB (see pages 142-160 Ikatan Teras Bersama (Ikatan Dokumen) Jilid 1). In this regard we find that the Third Divestment was not bona fide and/or in the best

interest of the plaintiff as it was conducted by the directors in breach of section 132(1) of the CA, which must be examined based on the following facts:-

1) The relationship between Shorefield Resources and the 1st defendant. This fact may be extracted from the evidence given by the 1st defendant in the course of the trial:-

Q: You look at Answers to Questions 12,13,14. Very clear — Shorefield Resources; due diligence. And this was evidence of the Plaintiff's witnesses. Now, Tengku, Shorefield Resources, do you know- is controlled by Datuk Bustari Yusof?

A: Yes

Q: Datuk- Bustari Yusof, in your witness statement DW4, is related to you by marriage.

A: Related distantly, My Lady My nephew is married to Tan Sri Mohd Kamal's daughter. And Datuk Bustari's daughter is married to – Tan Sri's son. So that's how I said by in-law.

Q: Sure. You've explained the relationship. Now, I'm going to ask you this question for formality. You agree with me you know of this relationship before- Ernst and Young conducted- the due diligence- before May 2009, yes or no?

A: What relationship are you referring to?

Q: The one you explained

A: Yes

(Notes of Proceeding dated 23.1.2013)

This evidence clearly point to the fact of the relationship between the 1st defendant and Datoô Bustari who is the shareholder of Shorefield Resources.

2) Who advice the plaintiff to enter into the divestment despite the Shareholderôs special resolution?

On or about 18.11.2009, the 1st defendant, issued a letter (see page 251 Ikatan Teras Bersama (Ikatan Dokumen) Jilid 1) on behalf of the plaintiff appointing TA Securities as an exclusive placement agent of the shares which the plaintiff held in PEB (ñPlacement Agent Appointmentò) to ascertain the ñfair valuation of PEB sharesò. TA Securities had in return furnished the ñFairness Consideration Reportò dated 30.11.2009 to the 1st Defendant. Nevertheless this report was not extended to the board of directors of the Plaintiff for deliberation and discussion. On 11.12.2009, TA Securities confirmed that 25.3% of the PEB shares had been sold to Shorefield Resources at RM1.91 per share through a direct business transaction (see pages 3045 Rekod Rayuan Jilid 2(14) Bahagian C).

[33] The disposal of shares was not bona fide in the interest of the plaintiff and the series of emails between PW7 (agent of TA Securities) and 1st defendants showed that they never intended to adhere the interest of the shareholders especially during the Third Divestment. The emails indicating this are as follows:

a) On 22.11.2009, the conversation between PW7 and the 1st defendant that took place vide e-mails showed that the sale of the PEB shares would be conducted by way of a direct approach and negotiation method. He said this in his email and we quote:

> **"***Richard,*
>
> *Point taken.* ***I supposed if you show and prove that several genuine parties were invited to negotiate and put in their bids, that itself constitute a "tender".*** *What we want to avoid is to be accused that the shares were placed out proportionately to two or three parties without any kind of "bids". In this case you must invite a minimum of 6 to 8 parties for the process to work…am I right?*
> ***Thanks for the positive kick ass attitude Richard!!***
> *…*
>
> *All your board members including your goodself are fully covered as the placement mandate clearly gives me the discretion as to what is the best placement method to use I stress that you and your board members cannot be accused of not using the tender process since the responsibility solely lies on me.***"**

(see pages 7500 Rekod Rayuan Jilid 2(36) Bahagian C)

b) On 22.11.2009, the 1st defendant replied PW7 via email. He was worried about being accused of rigging the tender and of having placed the shares. Hence the 1st defendant instructed PW7 to make sure that the process must appear to be through an open tender: -

> ***"…I supposed if you show and prove that several genuine parties were invited to negotiate and put in their bids, that itself constitute a 'tender'"***

(see pages 7500 Rekod Rayuan Jilid 2(36) Bahagian C)

On 22.11.2009, PW7 replied via email: -

> ***"…****Pricing is not the sole criteria as speed is equally crucial. Thus the fastest bidder has a good chance of beating the highest bidder. Those who insist on doing due diligence will be first to be knocked out.****"***

(see pages 7498 Rekod Rayuan Jilid 2(36) Bahagian C)

On 28.11.2009, PW7 said this in his email: -

> *"…****We will impose a closing date of 12pm 4th Dec. for responses to the invitation-let them scramble to meet this dateline. If they can't meet this timeline, I will simply abort the "tender" and then directly place out the shares to DB (Dato' Bustari).*** *I doubt anyone else can respond by 4th Dec so there will be a good reason to abort the "tender" and resort to direct placement. As for the smaller block, I've arranged for 54% financing but if DB (Dato' Bustari) is unable to*

fund the 46% balance, what do you think of using an Aussie listed company as a nominee?...."

(see pages 7503 Rekod Rayuan Jilid 2(36) Bahagian C)

On 30.11.2009, PW7ôs emailed:

"*A possible solution is to reduce the deposit to 5% and ask DB (Dato' Bustari) to pay himself by this Friday.... We also get him to bid for 25% and then we deal with the balance of 6% at a later stage.... I recall Zaidee saying that DB has more than RM10 million cash reserved for this deal. Please let me know what you think of this strategy. It would be good if you or Robert (R4) can persuade DB to agree. I can also call him direct to convince him if you like. You can call DB on this directly.*"

(Emphasis added)

(see pages 7502 Rekod Rayuan Jilid 2(36) Bahagian C)

[34] The emails showed that there was a concerted effort to divest PEB shares to DatoôBustariôs company i.e. Shorefield Resources. The board of directors in particular the 1st defendant in deciding to approve the Third Divestment and push it through, smacks of a case of impetuosity and a total disregard of relevant facts and in particular the divestment mandate. The board of directors had not acted bona fide in the interest of the plaintiff but were driven to take steps that place Shorefield Resources, the principal beneficiary of these arrangement.

It appeared that strict terms were imposed so as to eliminate potential bidders and yet terms would be adjusted to favour DatoôBustari.

[35] It is clear that despite the terms and conditions imposed under the board mandate dated 18.11.2009, there was no intention to conduct a sale en bloc. The intention was to divest only a substantial portion of shares to Shorefield Resources. They have never intended to adhere to the interest of the shareholders and eventually the party who benefited was Datoô Bustari and Shorefield Resources. All these arrangements were put into place not for the purposes of improving the liquidity of the company of the plaintiff but instead it was an elaborate scheme to ensure that Shorefield Resources acquired a controlling interest of PEB, coming at a time when PEB had been given a lucrative new contract from Shell by Sarawak Shell Berhad and Sabah Shell Petroleum Company Ltd (see pages 64-66 1st Respondentôs Core Bundle). Thus there was a breach of duty on the part of the board of directors in allowing the controlling interest of the plaintiff in PEB to be virtually stripped and the benefit of it to be passed on to Shorefield Resources.

[36] Furthermore DW3, the Head of Corporate Finance in Affin Investment Bank Berhad testified that he was not given the exact terms of the conditional mandate of the board dated 18.11.2009 (see page

1289 Rekod Rayuan Jilid 2(4) Bahagian C). He was told that the cash was required urgently (see pages 1282 ï 1283 Rekod Rayuan Jilid 2(4) Bahagian C). He was also not informed that PEB shares were pledged and the amount of loan underlying thereto. The evidence of DW3 are as follows:-

"Q187. So you were, so you were briefed as to these terms and conditions? I want to be clear, what itôs you were told and what itôs you were not told. This is the actual Board mandate.

A: Yes. I didn't see the mandate but I was basically informed on what were the conditions imposed by the Board.

Q188. So you knew that the Board mandated a sale en bloc basis? And you were told that?

A: Yes, en bloc by way of tender or by way of tender, yes I was told that.

Q189. You were told that, but your advice goes in to say that you can sell staggered basis, options 2. So if you knew the Board only mandated the sale en bloc, how come your advice got two options? Itôs contrary to the Board minute

A: To be clear, I wasn't present in the Board meeting, so whether I fully understood.

Q190. No, that not what Iôm saying Encik Johan, Iôm just trying to make away out to say what was it told to you. You said you were told en bloc, you knew

A: The meeting was few years ago, I cannot remember the exact you know. But I think what I'm trying to say, to make very clear. I was given certain perimeters and asked to comment on it, that is. But you are trying to bill in other factors.

…

DW3: So basically my recollection was that Dl and D2 told me that the Board had basically approved to proceed basically with the sale of the shares and I think the option that they are looking at were either a sale on en bloc basis or in tranches. What I do recall is that there was also a mention about valuation to be done. I believe it was done by TA Securities in that sense. And of course I think the one about any disposal must be in compliance with any of the rules which is where I suppose to come in, in relation to my input.

Q193. But you confirm that D2 and D3 told you that Board resolution list out they could either do it en bloc or tranches.

A: No, I think I was told the Board resolute itself and the options that were open to them were actually to sell it en bloc or tranches and we were asked to look at the..

Q194.Correct, and that was told to you by D2 and D3, correct?

A: Yes yes

é

Q196. And basically this was told to you at this second meeting you confirm D2 and D3 on 20th November 2009?

A: Yes.

Q197. Encik Johan, you also didnôt ask the D2 and D3 what were the specific terms or ask for a copy of the Board resolution?

A: I did not think it was necessary because we are just asked to provide some initial view to the compliance.

Q198. Encik Johan, would you agree with me that the terms and conditions of the Board resolution, mandating the proposed disposal of the PEBôs shares is a material and relevant factors for you to formulate your views and advise?

A: I will not say that it's actually a very material factor. I think because we were only asked to comment on the options, we were not asked to comment on process meaning you should have gotten whatever approval or complied with whatever conditions by the Board. So I think, I look at it as in that sense. Then no, it would not be something relevant for us.

Q199. No at that time, you didn't think it was relevant because you were told specifically by D2 and D3, correct? The Board resolved, these are the options, there are two options either to sell it en bloc or in tranches, can you please tell us which is the better one? Correct, that was essentially what was D2 and D3 told you, am I correct?

A: Yes."

(Notes of Proceeding dated 22.1.2013)

[37] Whilst the evidence shows also a conspiracy between the board of directors and 6th and 7th defendants, to divest the plaintiff's shares in PEB to Shorefield Resources by causing it to become the single largest, majority and controlling shareholder of PEB, but as the present appeal is not being proceeded with against the 6th and 7th defendants, the matter rests there. We also find no evidence linking the 4th defendant in respect of alleged conspiracy, and the ingredients of conspiracy had not been made out against the 4th defendant. And we are therefore of the view the appeal against the 4th defendant should be dismissed. To prove the act of conspiracy there must be two or more to do an unlawful act, or to do a lawful act by unlawful means. **Halsburys Laws of England (4th Ed) at para 1527**, states that the essential ingredients of

conspiracy are (1) an agreement between two or more persons, (2) an agreement for the purpose of injuring the plaintiff, and (3) that acts done in execution of that agreement resulted in damage to the plaintiff. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose though it is not necessary that each conspirator should have been in communications with each other (11 *Halsburys Laws* (4th Ed) para 58). In **Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd [2001] 8 CLJ** the learned Judge Justice James Foong (as he then was) held at page 296 and 297 as follows:

> **"**In order for this claim to succeed, [the claimant] must establish:
>
> (a) a combination of the defendants; (b) to effect an unlawful purpose; (c) resulting to the damage to the plaintiff (*Crofter Hand Woven Harris Tweed Co Ltd v. Veitch* per Lord Simon LC). The classic definition of conspiracy is that in *Mulcahy v. R* :
>
> A conspiracy consists not merely of the intention of two or more, but in agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.
>
> I have used the word 'combination' rather than the word 'agreement' used in that definition and by Lord Simon LC, because the word 'agreement' in this context does not mean an agreement in any contractual sense but a combination and common intention to do the act which is the object of the alleged conspiracy.'-- per Buckley LJ in *Belmont Finance v. Williams Furniture (No 2)* [1980] 1 All ER 393 at p 403.

> Thus, in the tort of conspiracy there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means, resulting in damage to the plaintiff.**"**

Wan Suleiman FJ in **Kok Wee Kiat v. Kuala Lumpur Stock Exchange & Ors [1979] 1 MLJ 71** define conspiracy as **"**A conspiracy consistsé in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.**"**

[38] For the reasons in law and on the facts stated above, the appeal against the 4th defendant should stand dismissed. As for the appeals against the 2nd and 3rd defendants as they were the directors of the plaintiff as at the Third Divestment, liability would be imputed on them being in breach of section 132(1) of the CA and it would follow that the appeals against the 1st, 2nd and 3rd defendants would be allowed.

[39] The board of directors contended that they have properly exercised their duties and have acted in its best interest to the company. They had addressed their mind to inter alia the following matters in coming to a decision to dispose substantially the Plaintiffôs shareholding in PEB in:-

a) That the Plaintiff group was faced with a threatened lawsuit by Shin Yang Shipyard Sdn Bhd in respect of the failure to pay for the balance sum of the vessel, ñPetra Galazyò;

b) That the Plaintiff group had no surplus cash to pay for ñPetra Galazyò;

c) That the Plaintiff group was operating under very tight cash flow condition;

d) That it was difficult for the Plaintiff group to obtain alternative financing given the circumstances at the time; and

e) That the disposal would address the loans taken by the Plaintiff.

(See pages 2795-2801 Rekod Rayuan Jilid 2(12) Bahagian C).

[40] The question to be asked and should have been asked by the learned trial Judge was whether the Second and Third Divestment was in the best interest of the Plaintiff. The plaintiffôs shares in PEB has been reduced to 29.59% from 54.62% after the Third Divestment thus ceased to be the single largest and controlling shareholder of PEB.

[41] The learned High Court Judge had concluded that the Second and Third Divestments were in fact effected or transacted for a proper purpose and there is no breach of fiduciary duties by the defendants, i.e., *bona fide* in the best interests of the Plaintiff (at page 222 of the Rekod Rayuan):-

> "325. As such the finding of this Court is that both the Second and Third Divestments were undertaken by, *inter alia*, Tengku Ibrahim, Lawrence Wong and Tiong as directors of the Plaintiff at the material time, for a proper purpose. To that extent therefore they acted *bona fide* in the best interests of the company. I am satisfied that with respect to each of these directors, there is insufficient evidence to show that there was a clear consciousness on their part that what they were doing was not in the interests of the Plaintiff and that they nonetheless acted deliberately to sell the PEB shares in disregard of that knowledge. As the full scope of the facts reveals, if their plan to sell the entirety of the PEB shares had been allowed to come to fruition, the Plaintiff would have resolved its cash flow problems. However this was not to be as Shamsul injuncted the further sale of the PEB shares. The purpose of the sale was therefore never achieved. In these circumstances it cannot be said that these three directors had acted to the detriment of the Plaintiff. On the contrary they genuinely believed that they were acting in the best interests of the company."

[42] What is the meaning of the phrase 'bona fide for the benefit as a whole'? The (then) Supreme Court had occasioned to observe on the meaning of 'bona fide for the benefit of a company as a whole in **Paidiah Genganaidu v Lower Perak Syndicate Sdn Bhd & Ors**

[1974] 1 MLJ 220. Ali FJ, delivering the judgment of the court said, at pg 221:

> **"**The expression ñbona fide for the benefit of the company as a wholeò in the context stated would seem to mean something more than writing off bad debts as in this case. **What is beneficial to the company as a whole is usually a matter for the shareholders decide**. Largely it is a matter of opinion. Where opinions differ, as might well be the case here, the opinion of the majority must, of course, prevail. This is because the minority have by their contract with the company agreed to submit, to the will of the majority. In the instant case and other similar cases it is not always easy to know a fact whether or not a particular resolution is or is not bona fide for the benefit of the company as a whole in order to establish that it is fraud on the minority.**"** (Emphasis added)

[43] In **Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits (supra)** where Justice James Foong J (as he then was) at p. 288 sets out the primary duty of a director:

> **"**a director shall at all times act honestly and use reasonable diligence in the discharge of his duty of his office" and this is "in addition to and not in derogation of any other written law or rule of law relating to duty or liability of directors or officers of a company." Section 132 of the Companies Act.
>
> Regarding the extent of the meaning of "honesty" the case of *Multi-Pak Singapore Pte Ltd v. Intraco Ltd* [1994] 2 SLR 282 explains that this does not mean that the director had not acted fraudulently; **it means that he must act *bona fide* in the interest of the company and that in exercising his discretion, the director should act only to promote and advance the interest of the company.**

Elaborating on this, Cohen J of the New South Wales Supreme Court in the case of *Blackwell v. Moray* [1991] 5 ACSR 255, expresses that:

A mere general sense of honesty of purpose is not in my view sufficient to satisfy the requirements that a director act *bona fide* for the benefit of the company**. It requires at least a consideration of the views or of relevant material in order that he may act in a *bona fide* way. The abandonment of any proper consideration of relevant facts, the admitted failure to exercise an independent discretion and the mere doing of what was thought that the majority shareholder wanted cannot in these circumstances have amounted to the *bona fide* exercise of discretion required of a director.**

Justice Judith Prakash in the Singapore High Court case of *Rajabali Jumabhoy v. Ameerali R Jumabhoy* [1997] 3 SLR 802 @ 847, followed this up with:

"the abandonment of any proper relevant consideration of relevant facts; the fact of being rushed into a meeting; ignorance and the lack of detail explanation of the implication of the issues under consideration; **failure to exercise an independent discretion and the mere doing of what was thought a third party wanted cannot amount to the *bona fide* exercise of a director's discretion**.**"** (Emphasis added)

[44] Both of the cases cited above clearly state that *'for the best interest of a company'* is for a majority to decide and also proper consideration of relevant facts in which a director must take into account to promote and advance the interest of the company.

[45] As a matter of law, a director is required to take into account the shareholdersôview. Therefore any sale of more than the 10% mandated by the shareholders especially a sale which results in PEB no longer being a subsidiary or the plaintiff losing its status as the single largest and controlling shareholder would have required shareholdersôapproval, which they failed to do. The learned High Court Judge at page 143 of the Rekod Rayuan stated that:

> **"**155. A further announcement in relation to the Third Divestment was made on 15 December 2009 to provide additional information. In this detailed announcement, details were provided in respect of the utilisation of the sale consideration, the valuation report and the pricing of the disposed shares, the original cost of investment, financial information in relation to PEB, details pertaining to the purchaser, the rationale for the divestment which was to pare down borrowings and gearing etc. **It was clarified that no approval from the shareholders was required. It concluded by stipulating that the Board of the Plaintiff, after careful deliberation, was of the opinion that the Third Divestment was in the best interests of the Plaintiff."** (Emphasis added)

[46] With regards to section 132(1) of the CA it is settled law that the duty to act honestly required by statute includes the duty to act in the best interest of the company. The test which the court has applied in determining whether directors have acted in breach of section 132(1) of the CA is an objective one, in that in the absence of separate

consideration ñwhether an honest and intelligent man in position of a director of a company concern could, in the whole of material circumstances have reasonably believed that the transaction were for the benefit of the companyò We refer to the case **Intraco Ltd v Multi-Pak Singapore Pte Ltd [1994] 3 SLR(R) 1064, at p. 1077 to 1078** where it set out the test to ñact in the best interest of the companyò-

> **"**We were referred to the decision of Pennycuick J in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] 2 All ER 1185. There, the plaintiffs sought a declaration that a legal charge and a guarantee given by a company known as Castleford to secure the debts of another company, Pomeroy, were *ultra vires* as being outside the powers of Castleford. The two companies were part of the same group of companies and had common directors. The basis of the claim was two-fold, firstly, that it was *ultra vires* Castleford, ie outside the corporate powers, to give the guarantee and legal charge, and, secondly, that the charge and guarantee were created for purposes not for the benefit of Castleford. The learned judge decided that Castleford was carrying out the purposes authorised by its memorandum and that the transactions were effected pursuant to the express power conferred by the memorandum and were not *ultra vires*. He then proceeded further and said, at 74:
>
> > That is sufficient to dispose of the action: but in case I am wrong on my view of the law, I must proceed to express a conclusion upon the contention that in creating the guarantee and legal charge, the directors were not acting with a view to the benefit of Castleford. That is a question of fact, and the burden of proof lies on the plaintiff company. As I have already found, the directors of Castleford looked to the benefit of the group as a whole and did not give separate consideration to the benefit of Castleford. Mr Goulding contended

> that in the absence of separate consideration, they must, *ipso facto*, be treated as not having acted with a view to the benefit of Castleford. That is, I think, an unduly stringent test and would lead to really absurd results, ie unless the directors of a company addressed their minds specifically to the interest of the company in connection with each particular transaction, that transaction would be *ultra vires* and void, notwithstanding that the transaction might be beneficial to the company. Mr Bagnall for the bank contended that it is sufficient that the directors of Castleford looked to the benefit of the group as a whole. Equally, I reject that contention. Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company had separate creditors**. The proper test, I think, in the absence of actual separate consideration, must be whether an honest and intelligent man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.**

Counsel for the appellants relied on this *dicta* and submitted that the circumstances here were not such as to lead to an inference of dishonesty on the pan of the directors of the respondents, but were such that a reasonable man could have inferred that the transactions were entered into *bona fide* by the directors in the interests of the respondents. He contended that as the directors of the respondents were also the directors of City Carton, they had considered the group as an economic entity and therefore acted for the benefit of the group as a whole. At the same time, he submitted that the directors would have reasonably regarded the equity participation of the appellants as beneficial to the respondents. We accepted this submission. **We were of the opinion that an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the respondents.** There was

clearly no evidence that the directors of the respondents had acted in breach of their duties to the respondents.

We have dealt with the commercial purpose and reasons of the transactions and it is unnecessary for us to repeat them here. Suffice it here to say that the decision to purchase the debts in return for the appellants subscribing for the shares and advancing the loan was a management decision taken by the directors which turned out, in retrospect, to be a poor decision. It did not appear to us that this decision was not arrived at bona fide. In this respect, we found most apposite the following passage from the speech of Lord Wilberforce in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832: [1974] All ER 1126:

> **Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management decision on such a question, if *bona fide* arrived at.** There is no appeal on merits from management decisions to courts of law: nor will courts assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.**"** (Emphasis added)

[47] In our present case, the learned judge should have examined the conduct of the board of directors to determine whether they had satisfied the duty imposed on them in law in terms of their conduct that has been referred to in this case. We are of the view the board of the directors had failed to give consideration to the following facts:-

a) To consider and take into account that the Second and Third Divestment of shares in PEB led to the plaintiff ceasing to be the majority shareholder of PEB, which was a loss of substantial income for the plaintiff.

b) To weigh the need to raise funds by sale of these PEB shares would not improve (at all) the liquidity position of the plaintiff. All it did was to settle the bond holders. On the other hand the plaintiff had lost a valuable investment in PEB as the plaintiff no longer controlled PEB.

c) At the end of the day the beneficiary of the scheme referred to the aforesaid was Shorefield Resources which was linked to the 1st defendant through DatoôBustari.

In our view these are the factors that should have been considered by the court before it could hold that all these were done in the best interest of the plaintiff. To our mind, failure to do so, constitutes a misdirection in law and fact on the part of the learned trial Judge which warrants appellate intervention.

[48] We have given due consideration to the cross appeal of the 1st defendant and we are in agreement with the learned trial Judge and the

view expressed in para 491 of her Grounds of Judgment at page 223. We therefore accordingly dismissed the cross appeal with costs.

Findings

Accordingly, we hereby find as follows:-

1. The appeal against the 1st, 2nd and 3rd defendants is allowed with costs.
2. Order in terms of prayers 104.1, 104.2, 104.6, 104.7 and 104.10 of the Statement of Claim.
3. The appeal against the 4th defendant is dismissed with costs.
4. In relation to the 1st defendantôs cross appeal, the same is dismissed with costs.

Costs

After hearing parties on the issue of costs, and after due deliberation, we ordered:

(a) The 1st, 2nd and 3rd defendants to each pay costs to the plaintiff in the sum of RM50,000;

(b) The plaintiff to pay costs in the sum of RM50,000 to the 4th defendant;

(c) The 1st defendant to pay the plaintiff a sum of RM15,000 costs for the dismissal of the 1st defendantôs cross appeal.

Dated: 27th August 2015

Signed

[DATUK DR. PRASAD SANDOSHAM ABRAHAM]
Judge
Court of Appeal Malaysia
Putrajaya

Peguamcara bagi pihak Perayu

Chris Lim Su Heng
Lim Kian Leong
Tan Wei Wei
Nur Khidmah Huzaisham

é Tetuan Chris Lim Su Heng

Peguamcara bagi pihak Responden Pertama

Datuk Ben Chan
Yap Boon Hau
Philip Koh Tong Ngee
Loh Mei Ching

é Tetuan Mah-Kamariyah & Philip Koh

Peguamcara bagi pihak Responden-Responden Kedua dan Ketiga

Alex De Silva
Gajendran Balachandran

é Tetuan Bodipalar Ponnudurai De Silva

Peguamcara bagi pihak Responden Keempat

Brendan Siva
Anita Krishna é Tetuan Brendan Siva

Cases Referred To:

1. Automatic Self-Cleansing Filter Syndicate Company Limited v Cunningham [1906] 2 Ch 34 (referred)

2. Gramaphone and Typewriters v. Stanley [1908] 2 KB 89, at p. 105-6 (referred)

3. Australian Growth Resources Corp Pty Ltd v Van Reesema (1988) 13 ACLR 261 (referred)

4. Credit Development Pte Ltd v IMO Pte Ltd [1993]1 2 SLR 370 (referred)

5. Marshallûs Valve Gear Company, Limited v. Manning, Wardle & Co. Limited [1908] 1 Ch. 267, Justice Neville J (referred)

6. Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd [2001] 8 at page 296 and 297 (referred)

7. Kok Wee Kiat v. Kuala Lumpur Stock Exchange & Ors [1979] 1 MLJ 71 (referred)

8. Paidiah Genganaidu v Lower Perak Syndicate Sdn Bhd & Ors [1974] 1 MLJ 220. Ali FJ (referred)

9. Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits (supra) James Foong J (referred)

10. Intraco Ltd v Multi-Pak Singapore Pte Ltd [1994] 3 SLR(R) 1064, at p. 1077 to 1078 (referred)

Legislation and Textbooks Referred To:

1. Halsburys Laws of England (4th Ed) at para 1527
2. Section 132(1) of the Companies Act