DALAM MAHKAMAH TINGGI DI ALOR SETAR
DALAM NEGERI KEDAH DARUL AMAN, MALAYSIA
[GUAMAN SIVIL NO. 22NCVC-4-1/2015]

ANTARA

PROGRESSIVE OCEAN SDN BHD
(NO. SYARIKAT: 898105-K) ("POSB") **... PLAINTIF**

DAN

NORTHERN CORRIDOR IMPLEMENTATION AUTHORITY ("NCIA") **... DEFENDAN**

JUDGMENT

CHOO KAH SING
Judicial Commissioner
High Court, Alor Setar

Dated: 12.6.2016

Introduction

[1] The plaintiff sought, *inter alia*, an order for specific performance to compel the defendant to continue to perform its part in an agreement entered into between the parties; in the alternative, the plaintiff claimed damages against the defendant for losses arising from the defendant's alleged breach of the said agreement.

[2] At the end of the full trial, this Court dismissed the plaintiff's claim as well as the defendant's counter claim. The plaintiff was not satisfied with the decision of this Court dismissing its claim and appealed to the Court of Appeal. As regards to the defendant's counter claim, the defendant did not file a cross-appeal against the decision of this Court dismissing its counter-claim. Hence, this judgment only serves to set down the reasons for dismissal of the plaintiff's claim.

Background Facts

[3] The plaintiff is a private limited company formed on 12.4.2010. The plaintiff was and still is managed by one of its directors, Azhar Bin Mohamad Yusoff (PW2).

[4] On 26.7.2010, the plaintiff, through PW2, entered into a tripartite agreement (hereinafter refer to as the "Tripartite Agreement") with the defendant and Jabatan Perikanan Negeri Kedah (hereinafter referred to as "JPK").

[5] The Tripartite Agreement was a result of a collaboration between the defendant and JPK to establish and promote the business of cultivating salt water fishes in cages in the State of Kedah Darul Aman for national and international consumption of seafood products.

[6] The Tripartite Agreement relates to a programme known as *Program Akuakultur Sungai Menghulu, Kedah* (hereinafter referred to as the said "Programme"). The Programme was to promote the cultivation of salt water fishes in cages to meet the local and international demand of seafood production. The location identified to carry out the fishery cultivation was at Sungai Menghulu, Kuah, Langkawi, Kedah Darul Aman (hereinafter referred to as the "Programme Site").

[7] The Programme was spearheaded by the defendant and was part of the strategic socio-economic development to promote trade, investment and economic development within the Northern Corridor Economic Region of Malaysia.

[8] In the Tripartite Agreement, the plaintiff was identified as the management company in the Programme whose role was to "conduct and manage" individuals and/or Bumiputera entities who participate in the Programme (hereinafter referred to as the "Contract Farmers"). The tenure of the agreement was to expire on 31.12.2017.

[9] The Tripartite Agreement provided, *inter alia*, that the funding for the Programme shall come from the plaintiff and the defendant. The plaintiff was to contribute RM5 million, whereas, the defendant was to contribute RM10 million. The funds were supposed to facilitate the plaintiff's initial start-up costs for the Programme and also assist the

plaintiff to purchase the equipment which was necessary to roll out the Programme.

[10] The defendant's contribution, ie, RM10 million, was to be used in the manner as stipulated in the Annexure "A" of the Tripartite Agreement. The plaintiff's contribution was to be used for any other expenditure or cost throughout the tenure of the agreement other than those items stipulated in Annexure "A". Annexure "A" provided that the defendant's fund was to be used, inter alia, for the construction of cages, buildings for transit and quarantine, building for cold room, Jetty, signage, access road, fencing, gate, and to purchase generator, feed processing machine, net clearing machine, boats and fish fries.

[11] It is not in dispute that the defendant had disbursed its portion of the funds according to the Tripartite Agreement.

[12] On 25.4.2011, the plaintiff and defendant entered into a further agreement (hereinafter referred to as the "Facilitisation Agreement"). JPK was not a party to this agreement.

[13] In this Facilitisation Agreement, the plaintiff and defendant agreed to set up a plant for hatchery and nursery of grouper fish fries. The plant was to be built within the vicinity of the Programme Site (on shore). The objective of having the plant was to reduce dependency of importing grouper fish fries from neighbouring countries.

[14] The agreed costs to set up the plant was RM9.2 million. The defendant was to contribute RM5 million, whereas, the plaintiff was to

contribute RM4.2 million. The tenure of this Facilitisation Agreement was to expire on 24.4.2019.

[15] It is also not in dispute that the defendant had disbursed its portion of the funds according to the Facilitisation Agreement.

[16] On 29.3.2012, the plaintiff and the defendant entered into a third agreement (hereinafter referred to as the "Expansion Phase Agreement"). In this agreement, the plaintiff and the defendant agreed, *inter alia*, to construct and install 800 new commercial salt water fish rearing cages in addition to the existing 800 cages which were constructed earlier. JPK was also not a party to this agreement.

[17] The costs to construct and install the 800 new commercial salt water fish rearing cages was agreed at the price of RM17.7 million. In this agreement, it was stated, *inter alia*, that it was the plaintiff who had approached the Government of Malaysia for financial assistance, and that the Government of Malaysia had agreed, through the defendant, to provide financial assistance to the plaintiff amounting to RM8.1 million only. The funds were disbursed accordingly to the plaintiff. The tenure of this Expansion Phase Agreement was to expire on 28.3.2019.

[18] The Facilitisation Agreement and the Expansion Phase Agreement entered into between the plaintiff and the defendant were consequential to the Tripartite Agreement (the three agreements shall hereinafter be collectively referred to as "the Agreements").

[19] The total amount the defendant had disbursed for the Programme or paid to the plaintiff for the Programme was RM23.1 million; whereas,

the total amount the plaintiff was supposed to have contributed was RM18.8 million.

[20] The defendant's role in the Programme and in the Agreements was minimal. In the Tripartite Agreement, the defendant's role was to provide financial assistance and JPK was to, *inter alia*, provide the location, monitor and render expert and consultation advice throughout the subsistence of the agreement, especially on the environmental monitoring programme. It was the plaintiff who was given the main roles, namely, to manage the Contract Farmers and also to cultivate the salt water fishes for the Programme (see Recital I and paras 6.1.1, 6.1.2 and 6.1.3 of the Tripartite Agreement).

[21] In the Facilitisation Agreement, the defendant's role was to provide financial assistance to the plaintiff for the setting-up of the hatchery and nursery plant up to the amount as stipulated therein; whereas, the plaintiff was responsible for, *inter alia*, all aspects of the facilitisation process and/or equipment purchase and/or payment to third party including but not limited to the sourcing of, its choice of, the negotiation of, and the payment of the fees, price of the contractor and/or suppliers and/or payment to third party (see paras 5.1 and 5.2 of the Facilitisation Agreement).

[22] In the Expansion Phase Agreement, the defendant's role was to financially assist plaintiff in furtherance of the facilitisation, ie, the constructing and installing of 800 fishery cages, up to the amount as stipulated therein; whereas, the plaintiff's role was to be responsible in all aspects relating to the facilitisation which may include construction works, purchase and installation of equipment, including but not limited

to the sourcing of, tender process, the appointment of, the negotiation of and the payment of the fees/disbursements of the contractors and/or suppliers and/or any relevant third party related to the said exercise in the agreement (see paras 6.1 and 6.3 of the Expansion Phase Agreement).

[23] The relevant clauses in the plaintiff's case are Clauses 4.1 and 10.1. Clause 4.1 of the Tripartite Agreement stated as follows:

> *4.1. A Joint Committee shall be set up to deliberate and recommend on the matters that are expressly and specifically stated within the provisions of this Agreement.*
>
> *4.2. The Joint Committee shall consist of the following members:*
>
> *4.2.1. Three (3) representatives chosen and appointed by NCIA of which one (1) of the representative shall be the Chairman;*
>
> *4.2.2. One (1) representative chosen and appointed by PJK; and*
>
> *4.2.3. One (1) representative chosen and appointed by POSB.*

[24] Clause 10 of the Tripartite Agreement stated as follows:

10. FORCE MAJEURE

10.1. If POSB knows or has reason to know of the occurrence or potential occurrence of any Force Majeure, POSB shall notify NCIA and JPK of such occurrence or potential occurrence immediately following the awareness of such occurrence. POSB shall, as far as possible, provide to NCIA and JPK full details such occurrence or potential occurrence and the steps proposed to be taken by POSB to minimise any resulting delay due to the said Force Majeure. In the event of Force Majeure, Parties shall, in good faith, discuss, either in person, telephone or by e-mail, directions and instructions for minimising the effects of any such Force Majeure.

10.2. In the event of Force Majeure having prevented the Parties from performing their obligations under this Agreement for a period of beyond thirty (30) days, any Party shall be entitled to terminate this Agreement by giving fourteen (14) days written notice thereof to the other Party.

[25] The meaning of "force majeure" was defined in the Agreement as follows:

> *"means an act, omission or circumstance relied on by a Party to this Agreement as a force majeure event and over which that Party could not reasonably have exercised control, including, but not limited to, acts of God, acts of omissions of government, epidemics, quarantines, earthquakes or other natural disasters, or government regulations imposed after the commencement of this Agreement. An event or act shall not excused or delayed by Force Majeure if it could reasonably be circumvented through use of alternative source, work around the plans or other means within the control of such party."*

[26] A similar force majeure clause is also found in the other two agreements.

[27] In all the Agreements, there are repayment clauses - the plaintiff was to "repay" the defendant for the defendant's contributions to the Programme once the plaintiff has begun to generate income from the selling of the products produced from the fish cultivation in the Programme. The repayments were to be in stages as stipulated in the respective Agreements.

The Plaintiff's Claim

[28] I now turn to the plaintiff's claim. The plaintiff averred that on June 2012, the Programme Site was hit by a purported storm. The purported storm, according the plaintiff, damaged 400 fishery cages and resulted in loss of fishes.

[29] The plaintiff also averred that the damage was highlighted to the defendant, and there was no decision made by the defendant and/or the Joint Committee to resolve the issue. As a matter of goodwill, the plaintiff undertook to repair the damaged cages. It cost the plaintiff a sum of RM2 million to repair the damaged cages. The restoration was completed in December 2012, the plaintiff asserted.

[30] On June 2013, according to the plaintiff, the Programme Site was hit by another storm. The storm had again damaged 400 fishery cages and resulted in loss of fishes. The plaintiff again highlighted the issue to the defendant, and the defendant did not take steps to mitigate the losses or to remedy the situation.

[31] The plaintiff averred that it was not in the position to provide further funds to re-build the damaged cages caused by the second storm, considering the fact that the plaintiff had already spent RM2 million to repair the 400 damaged cages earlier in 2012.

[32] The plaintiff also averred that it had on several occasions requested the defendant to resolve the issue so that the Programme could be carried out as planned. However, the defendant purportedly

refused to resolve the matter and failed to co-operate with the plaintiff, as such, the implementation of the Programme was affected and the plaintiff had suffered losses, the plaintiff further averred.

[33] The plaintiff alleged the storms amounted to force majeure. The plaintiff averred that the defendant failed to comply with the provisions of the force majeure clauses in the Agreements to discuss directions and instructions for minimising the effects of such force majeure.

[34] The plaintiff had no option but to file this suit to compel the defendant to perform its contractual and statutory obligations as the authority overseeing the implementation of the Programme.

The Defendant's Case

[35] In its defence, the defendant averred that the plaintiff's claim was misconceived. The defendant averred that the purported storms which the plaintiff had claimed to have occurred in June 2012 and June 2013 could not tantamount to force majeure.

[36] The defendant also averred that this was not an appropriate case for a decree of specific performance to be granted to compel the defendant to continue to perform its part of the Agreements.

[37] Lastly, the defendant denied that it was liable for the repair costs incurred by the plaintiff as well as the losses and damages that the plaintiff had purportedly suffered.

Issues to be Tried

[38] During case management, the parties agreed to narrow down the issues to be tried (for the plaintiff's claim) as below:

[39] Firstly, whether the plaintiff or the defendant had breached any terms of the Tripartite Agreement.

[40] Secondly, whether the plaintiff is entitled to the remedy of specific performance.

[41] Lastly, whether the plaintiff is entitled to restitution remedies for the financial losses and damages incurred due to the purported storms that had occurred at the Programme Site.

The Findings of this Court

First Issue: Whether the plaintiff or the defendant had breached any terms in the Tripartite Agreement.

[42] For this first issue, it is prudent to first look at the basis of the plaintiff's claim. The plaintiff's claim stemmed from the averments concerning the occurrence of the alleged storms in June 2012 and June 2013.

[43] The plaintiff filed this claim due to the defendant's failure to respond to and address the plaintiff's pleas. Hence, the plaintiff averred that the defendant's failure or refusal to address the issue amount to a

breach of Clause 10.1 of the Tripartite Agreement, ie, the force majeure clause.

[44] The defendant averred that it did not breach the Tripartite Agreement, and said the plaintiff had failed to prove storms in fact occurred in June 2012 and June 2013 which could trigger the invocation of the force majeure clause in the Agreement.

[45] In regard to the proving of the occurrence of the alleged storms, the plaintiff relied on evidence of PW2. PW2 in his witness statement stated as follows:

> *"S: Dalam tindakan undang-undang yang difailkan oleh syarikat POSB terhadap NCIA di Mahkamah ini, sila terangkan apa sebenarnya punca pertikaian di antara pihak POSB dan NCIA?*
>
> *J: Isu atau pertikaian di antara pihak POSB dan NCIA bermula selepas satiu kejadian rebut kuat melanda kawasan tapak PASM pada 6 Jun 2012. Ini adalah rebut kali pertama berlaku di mana rebut ini telah menyebabkan kerosakan teruk kepada 400 sangkar ikan di Blok A dan mendatangkan kerugian apabila benih ikan dan ikan dalam sangkar terlepas ke laut.*
>
> …."
>
> (see Q&A No. 35 of PW2's witness statement)

"S: Selepas Disember 2012, adakah projek PASM kembali berjalan lancer?

J: Selepas Disember 2012, pihak kami sedang cuba untuk memulihkan kembali aktiviti perternakan ikan. Pada ketika itu, pemulihan mengambil masa disebabkan harga ikan kerapu di pasaran juga agak rendah iaitu sekitar RM35 sekilogram.

Malah, sekitar Jun 2013, projek PASM menghadapi satu lagi rebut kuat di mana 400 sangkar di blok bersebelahan (Blok B) di dalam Fasa 1 musnah.

Untuk rebut kali kedua, pihak syarikat saya memohon bantuan kewangan daripada pihak NCIA untuk kos membina semula sangkar."

(see Q&A No. 40 of PW2's witness statement)

[46] In cross-examination, the defendant's counsel challenged PW2 that no such extra-ordinary storm occurred in June 2012:

142Q: Boleh saya cadangkan bahawa tiada rebut yang luar biasa yang telah berlaku di kawasan tersebut pada bulan June 2012.

A: Tidak setuju.

143Q: Adakah Encik Azhar berusaha untuk mendapatkan sebarang laporan kaji cuaca untuk tujuan kes ini?

A: Tidak.

[47] The plaintiff did not produce any official meteorology report issued by the relevant authority in support of PW2's allegations that storms had occurred in June 2012 and/or June 2013.

[48] The plaintiff merely relied on the bare allegations made by the plaintiff's witness, PW2. In fact, the best party to support such allegation would be the personnel from the JPK, because JPK was responsible for the environmental monitoring under the Tripartite Agreement.

[49] One Mazayu Binti Mohamad (PW1), the personnel from JPK, gave evidence for the plaintiff. In her testimony in regard to the occurrence of the storms, she stated as follows:

S. Pada sekitar Jun 2012 dan Jun 2013, bolehkah Puan Mazayu terangkan kepada Mahkamah sama ada berlaku apa-apa rebut kuat di kawasan projek PASM di Sungai Menghulu?

J. Ya, Jabatan ada dimaklmkan secara lisan berkenaan rebut di kawasan projek.

(see Q&A No. 9 of PW1's witness statement)

[50] In cross-examination, PW1 was asked whether she did any follow up to verify the occurrence of the alleged storms, she answered as follows:

> *5Q: berdasarkan daripada makluman tersebut, adakah JPK ada membuat sisiatan susulan?*
>
> *A: Saya tidak pasti.*

[51] Based on the evidence adduced by the plaintiff in regard to the occurrence of the purported storms in June 2012 and June 2013, this Court was unable to make a finding of fact on the balance of probabilities that there were actual storms which occurred in June 2012 and June 2013 which could have triggered the invocation of the force majeure clause in Clause 10.1 of the Tripartite Agreement.

[52] The storms that the plaintiff alleged to have had occurred in June 2012 and June 2013 were not supported by any independent evidence, but were bare allegations made by PW2. The documentary evidence referred by the plaintiff purportedly to support the plaintiff's averment was actually the minutes and reports that contain the plaintiff's own allegations that the storms had occurred.

[53] This Court is of the considered view that for a party in an agreement to invoke a force majeure clause, the burden lies on the party wishing to rely on it, to prove the force majeure event, and as a result of such force majeure event, the party could not perform his part of the obligations in the agreement (see *Intan Payong Sdn Bhd v. Goh Saw Chan Sdn Bhd* [2005] 1 MLJ 311 as cited by the defendant's counsel).

[54] In this instant case, I could not find in the plaintiff's case any evidence of an event which could trigger the force majeure clause or any evidence to support that the plaintiff could not, as a result of force majeure, perform its part of the obligations under the Agreements.

[55] Even if this Court were to accept the storms had in fact occurred in June 2012 and June 2013, the evidence in the plaintiff's case does not support a finding of fact that the defendant was in breach of the force majeure clause in the Agreements and that this resulted in the plaintiff not being able to perform its obligations in the Agreements.

[56] This Court refers to exhibit P15, a letter from the plaintiff to the defendant dated 28.11.2013. The relevant parts of the letter are reproduced as follows:

> *Untuk makluman NCIA, POSB telah membina semula 400 buah sangkar bagi menggantikan sangkar-sangkar yang telah rosak akibat rebut pada Jun 2013 [sic]. Kerja-kerja pembinaan tersebut telah siap pada Disember 2012. Kos pembinaan semula sangkar-sangkar tersebut bernilai lebih daripada RM2 Juta dan ianya ditanggung sepenuhnya oleh POSB*
>
> ***Pembinaan semula sangkar-sangkar tersebut adalah bagi membolehkan pihak POSB membayar balik pinjaman kepada NCIA dan seterusnya supaya kami dapat membayar levi daripada hasil ternakan yang dikeluarkan.***

Pada bulan Jun 2013, satu blok ternakan yang menempatkan sebanyak 400 buah sangkar telah mengalami kerosakan serius akibat dilanda rebut agak kuat. Untuk makluman NCIA, pihak ***kami masih belum dapat membina semula sangkar-sangkar tersebut disebabkan oleh masalah kewangan. Masalah kewangan tersebut berpunca daripada perbelanjaan yang telah dikeluarkan bagi menampung kos pembinaan semula 400 buah sangkar yang dilanda rebut pada Jun 2012 dan ianya turut disebabkan oleh penurunan harga pasaran bagi ikan dalam sangkar.***

Sehubungan dengan itu, ***POSB ingin memohon jasa baik NCIA bagi penyusunan semula jadual pembayaran balik pinjaman yang telah diberikan kepada POSB.*** *Penyusunan pembayaram semula yang dicadangkan oleh POSB adalah seperti berikut:*

i. *Fasa 1 sebanyak RM1,360,000.00 bermula pada Disember 2013 ditunda pada Disember 2014;*
ii. *Fasa 2 sebanyak RM214,285.00 bermula pada 2013 ditunda kepada Disember 2014.*
iii. *Fasa 3 sebanyak RM1,620,000.00 bermula pada Disember 2013 ditunda kepada Disember 2014.*

> *Selain itu,* ***POSB juga ingin memohon jasa baik NCIA untuk mendapatkan pinjaman kewangan sebanyak RM2,000,000.00.*** *Tambahan jumlah pinjaman yang dipohon ini adalah bagi membolehkan POSB menyegerakan kerja-kerja pembinaan semula 400 buah sangkar yang telah tertangguhkan akibat* ***kekurangan peruntukkan kewangan syarikat.***

[57] The plaintiff's letter clearly shows that the plaintiff admitted that the costs of repair for the damaged cages in Jun 2012 was supposed to be borne by the plaintiff. Hence, the restoration of the damaged cages was part of the plaintiff's obligations to make good the damaged cages.

[58] The plaintiff alleged he had incurred RM2 million to repair the damaged cages after the first storm. The plaintiff also alleged he could not repair the damaged cages after the second storm because it ran out of funds. The plaintiff said it ran out of funds because of the costs incurred for earlier repair and because of the slide in market prices for fishes in cages. As such, the plaintiff sought from the defendant a loan of RM2 million to proceed with its obligations.

[59] The plaintiff could not now turn-around to say that the defendant had breached the force majeure clause in not responding to the plaintiff's plea. In fact, the defendant was not obligated to respond to the plaintiff's plea for a loan, because the plaintiff's inability to proceed with its obligations under the Agreements was not due to any force majeure. The real reason the plaintiff was unable to procced with its obligations under the Agreements was the plaintiff company had run out of money.

[60] In evidence, the defendant sought from the plaintiff to show its books of account to verify and determine the financial standing of the plaintiff's company, but the plaintiff did not provide such documents. Instead, the plaintiff brought this action against the defendant.

[61] This Court is of the considered view that the defendant's request to the plaintiff to produce its books of account was prudent and within its contractual rights to do so. Pursuant to Clause 6.3 of the Tripartite Agreement the plaintiff was supposed to render all reasonable and necessary assistance to enable the defendant and/or JPK, its personnel and authorised representatives to examine any records maintained by the plaintiff.

[62] If the plaintiff had revealed its books of account to the defendant, the defendant could have responded and addressed the plaintiff's plea for a loan, although the defendant had no obligation under the Agreements to provide such loan to the plaintiff.

[63] To further buttress the point that the plaintiff's case does not support a finding of fact that the defendant was in breach of the force majeure clause in the Agreements which resulted in the plaintiff not being able to perform its obligations in the Agreements, the Court refers to the plaintiff's own evidence in the plaintiff's letter (exhibit P15), where it alleged only 400 cages were destroyed by the alleged storm in June 2013. This means there were still 1200 cages not affected by the alleged storm.

[64] The plaintiff could have continued with the operation of the Programme relying on the 1200 cages. The plaintiff should not have stopped the entire operation just because of the 400 damaged cages.

[65] Further, the alleged storm did not affect the operation of the hatchery and nursery plant. The plaintiff did not provide any reasonable explanation as to why the entire operation of the Programme, including the operation of the hatchery and nursery plant, had to stop just because of the 400 damaged cages. As mentioned earlier, there were still 1200 cages left, and with the 1200 cages the plaintiff could have produced a sizable amount of fishes and fries for the continuation of the operation of the hatchery and nursery plant.

[66] The 400 damaged cages would in one way or another affect the output of the production, but that could not be the reason for the plaintiff not to proceed with the operation of the Programme and fulfil its obligations in the Tripartite Agreement.

[67] In the plaintiff's letter, the plaintiff had averred and admitted that it ran out of money to proceed with the operation and pleaded for a loan from the defendant. The plaintiff failed to obtain a loan from the defendant. The plaintiff could not continue to perform its obligations in the Tripartite Agreement was because it ran out of money, and it was not because of any force majeure.

[68] Based on the above evidence and analysis, this Court is of the considered view that the inaction on the defendant's part towards the plaintiff's plea for a loan could not amount to a breach of the Tripartite Agreement.

[69] In fact, I am more inclined to accept that the plaintiff was in breach of its obligations when it ceased operations despite the fact there were 1200 cages left which could have been used for continuing the operation of the Programme. It was not the storms, if any, that had prevented the plaintiff from performing its obligations.

[70] I found that the plaintiff could not proceed with the operation of the Programme due to its own financial problems which in turn led to the entire Programme to standstill.

[71] The plaintiff failed to prove that storms had actually occurred which could trigger the invocation of the force majeure clause and had caused the plaintiff to be unable to perform its obligations in the Tripartite Agreement. As a result, the plaintiff could not rely on the force majeure clause.

Second Issue: Whether the plaintiff is entitled to the remedy of specific performance.

[72] In order to compel a party to perform its obligation(s) in an agreement, first the court has to examine what the obligation(s) of the party is (are) in the agreement. In this instant case, the main obligation of the defendant in all the Agreements was to provide financial assistance to the plaintiff. It was an agreed fact that the defendant had fulfilled its main obligation, ie, contributed the amounts as stipulated in the respective Agreements.

[73] The plaintiff sought a decree to compel the defendant to continue to cooperate with the plaintiff and to render its assistance to the plaintiff in the Programme until the year 2019.

[74] In substance, what the plaintiff wanted the court to grant was to compel the defendant to convene a meeting between the parties to resolve the plaintiff's grievances. The bottom line was the plaintiff wanted further funding from the defendant or the Government of Malaysia to "revive" the Programme.

[75] The defendant's counsel submitted in his written submission, which I fully agreed, that if the Court were to grant a specific performance to compel the defendant to convene a meeting, and in the event the Joint Committee could not resolve or to meet the plaintiff's demand, i.e. for further funding, such equitable order would be a futile exercise.

[76] This Court is also of the considered view that the role played by the defendant in the Programme was twofold. Firstly, the defendant was the body who provided financial assistance to the plaintiff in order to implement the Programme, and any funds from the defendant actually came from the public funds approved by the Government of Malaysia. Secondly, the defendant was the body to oversee the implementation of the Programme. It had a minimal role to play in the day to day running of the affairs and activities of the Programme.

[77] The Court was mindful that the Tripartite Agreement was not a business joint venture. The Tripartite Agreement was for the implementation of the Programme in furtherance to a collaboration effort

between the defendant and JPK to promote the business of cultivating salt water fishes in cages in the State of Kedah.

[78] The establishment of the defendant, a statutory body, was and still is to implement strategic socio-economic development in the Northern Corridor Economic Region of Malaysia. The Programme was one of the pilot projects introduced in the Northern region of Malaysia. The Programme was supposed to promote and to provide trade, investment and economic development within the State of Kedah. Hence, the defendant's role in the Programme was part of its social and economic responsibilities to ensure the Programme would benefit the people of the State of Kedah and in the Northern region of Malaysia.

[79] If the intention behind the plaintiff's claim was to seek further funding from the defendant, I am of the considered view that such specific performance decree could not be granted. I adopt the words of Abdul Malik Ishak J (as he then was) in the High Court case of *Interstate M&E Sdn Bhd & Ords v. Fore-Sight trading Sdn Bhd & Ors* [2007] 6 MLJ 677, at p. 687, wherein his Lordship held:

> *"...Of course, the discretion to grant specific performance cannot be exercised capriciously. It must be exercised in accordance with the established principles (Re Hallett's Estate [1880] 13 Ch D 696 at 710, per Jessel MR). According to Kindersley VC in New Brunswick and Canada Railway and Land Co Ltd v Muggeridge [1859] 4 Drew 686 at 698-699, the court will not grant specific performance if it is idle and nugatory to do so and his Lordship also expressed the*

view that the court will not make any order in vain. For instance, in Seawell v. Webster [1859] 29 LJ Ch 71 at p 73, Kindersley VC aptly said:

> *Put the extreme case of a vendor burning a title deed: the court could not make a decree that he should deliver it up, and be imposed if he does not."*

[80] I am of the considered view that the decree of specific performance could not be granted in this instant case as it could not serve a purpose because the defendant was not in the position to agree or not to agree to any further financial assistance, it is only the Government of Malaysia who can make a decision whether further financial assistance should be given to the plaintiff.

[81] The defendant's counsel had indicated in his written submission that the defendant had earlier in principle agreed with the plaintiff that the defendant could reschedule the repayments if the plaintiff could produce the accounts and documents requested by the defendant in which the plaintiff had refused to produce. This indicates that the plaintiff was not ready to open its books for inspection and have a full and frank disclosure of its income and expenditure in the operation of the Programme. If the plaintiff had done so earlier when requested by the defendant to produce its books, the plaintiff need not have come to the court for such an order. The parties could have met and discussed how to resolve the matter amicably.

[82] It is not prudent and sensible to now compel the defendant to meet with the plaintiff and also to compel the defendant to procced with the

Programme when the defendant is not in the position and does not have the capacity to do so, ie, to provide further funding.

Third issue: Whether the plaintiff is entitled to remedy of restitution for the financial losses and damages incurred due to the purported storms that had occurred at the Programme Site.

[83] The remedy of restitution is relevant only when there is a breach of contract by a party, and the innocent party may choose to terminate the contract and recover a reasonable sum on *quantum meruit* or *quantum valebat* (see *Planche v. Colburn* [1831] 8 Bing 14 and *De Bernardy v. Harding* [1853] 8 Exch 822).

[84] In this instant case, the plaintiff did not terminate or rescind the Tripartite Agreement or any of the subsequent agreements entered into. Further, the plaintiff did not succeed in proving on a balance of probabilities that the defendant had breached the Tripartite Agreement. Hence, the whole of plaintiff's claim for damages should fail.

[85] The plaintiff pleaded, *inter alia*, as follows:

> *(i) Defendan meneruskan perlaksaan kerjasama pengurusan Projek tersebut dengan Plaintif seperti yang dijanjikan dengan segala kepakaran dan sehingga tempoh matang pelaksaan projek tersebut pada Tahun 2019; dan sebagai alternatifnya jika gagal Defendan membayarkan ganti rugi kepada Plaintif atas kerugian dan kehilangan pendapatan sehingga tempoh*

matang Projek Tahun 2019 seperti yang akan ditaksirkan.

[86] Further down in its prayers, the plaintiff also pleaded as follows:

(iv) Defendan membayar Kehilangan dan/atau kerugian hasil sebanyak Ringgit Malaysia Tiga Puluh Lima Juta Tujuh Ratus Dua Belas Ribu (RM35,712,000.00) Sahaja;

(v) Gantirugi sengsara sebanyak Ringgit Malaysia Enam Juta (RM6,000,000.00) Sahaja.

[87] Prayer (i) stated damages to be assessed, whereas, prayer (iv) sought damages for losses and/or loss of profit amounting to RM35,712,000.00. This Court could not make out what the plaintiff was seeking for damages. Be that as it may, the plaintiff could not succeed in its claims because the plaintiff did not succeed in proving the defendant was in breach of the Tripartite Agreement or any of the other two agreements.

[88] The plaintiff in it prayers also claimed compensation or reimbursement for the costs it had incurred to repair the damaged cages as follows:

(ii) Defendan membayar balik kepada Plaintif kos pembinaan 400 buah sangkar sebanyak Ringgit Malaysia Dua juta (RM2,000,000.00) Sahaja

berserta faedah 4% keatasnya dikira dari tarikh Saman dan Pernyataan Tuntutan difailkan;

(iii) Defendan membiayai dengan serta merta kos sebanyak Ringgit Malaysia Dua Juta (RM2,000,000.00) Sahaja bagi pembinaan semula 400 buah sangkar yang musnah pada rebut Jun 2013:

[89] This Court again refers to exhibit P15, the letter from the plaintiff to the defendant dated 28.11.2013. The relevant paragraph of the letter is reproduced as follows:

> *Selain itu, POSB juga ingin memohon jasa baik NCIA untuk **mendapatkan pinjaman** kewangan sebanyak RM2,000,000.00. Tambahan jumlah pinjaman yang dipohon ini adalah bagi **membolehkan POSB menyegerakan kerja-kerja pembinaan semula 400 buah sangkar** yang telah tertangguhkan **akibat kekurangan peruntukkan kewangan syarikat.***

[90] The plaintiff did not in its letter state the defendant was obliged to compensate or reimburse a sum of RM2 million to the plaintiff. The letter clearly shows that the plaintiff was seeking to borrow a sum of RM2 million from the defendant. The plaintiff in its claims had prayed for compensation or reimbursement of the RM2 million which is inconsistent with the plaintiff's position in the letter.

[91] The defendant's counsel in his written submission cited the Court of Appeal case in *First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd* [2013] 4 MLJ 693. This Court fully appreciates the principle and reasoning of the Court of Appeal. Applying the same principle and reasoning of the Court of Appeal in this present case, this Court is of the considered view that the plaintiff is estopped from making any claim which appears to be an afterthought against the defendant.

[92] The plaintiff did not at the material time claim compensation or reimbursement of RM2 million from the defendant because the plaintiff accepted it was its obligation to repair the damaged cages. The plaintiff could not turn around and sue the defendant for compensation or reimbursement of the costs it had incurred in repairing the damaged cages after the defendant had refused to grant a loan of RM2 million to the plaintiff. Such an afterthought claim clearly is an abuse of court process and could not stand in the eyes of the law.

Conclusion

[93] Based on the above reasoning, this Court dismissed the plaintiff's claims and awarded costs of RM50,000.00 to be paid to the defendant by the plaintiff.

(CHOO KAH SING)
Judicial Commissioner
High Court, Alor Setar

Counsel:

For the plaintiff's - Hizri Hassan, Muhammad Akram & Ahmad Shamil; M/s Akram Hizri & Azad

For the defendant's - Isa Aziz Ibrahim; M/s Ranjit Ooi & Robert Low

Case(s) referred to:

Intan Payong Sdn Bhd v. Goh Saw Chan Sdn Bhd [2005] 1 MLJ 311

Interstate M&E Sdn Bhd & Ords v. Fore-Sight trading Sdn Bhd & Ors [2007] 6 MLJ 677

Planche v. Colburn [1831] 8 Bing 14

De Bernardy v. Harding [1853] 8 Exch 822

First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd [2013] 4 MLJ 693