



**DALAM MAHKAMAR TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
[GUAMAN NO: 22NCVC-514-2011]**

ANTARA

MEGA FOREST PLANTATION MANAGEMENT ... PLAINTIFF

DAN

PERBADANAN KEMAJUAN PERTANIAN SELANGOR ... DEFENDANT

DECISION ON ENCLOSURE (6)

1. Enclosure (6) is an application by the Defendant to strike out the Plaintiff's Writ and Statement of Claim pursuant to Order 18 Rule 19(1) (a), (b) and or (d) of the Rules of the High Court 1980 (RHC 1980) or under the inherent jurisdiction of the High Court and for all proceedings to be stayed pending the hearing of this application and or such other relief which the Court thinks fit.
2. The Defendant's application was supported by an Affidavit in Support affirmed by its Deputy Group General Manager (Business Development), Encik Aqmal Azam bin Ahmad in enclosure (6A) which exhibited a number of documents in support of the application and an Affidavit In Reply by the same deponent in enclosure (6C).



3. The Plaintiff opposed the application *vide* its Affidavit in Opposition affirmed by its Managing Director, Dato' Abdullah Bin Omar in enclosure (6B) also enclosing a number of exhibits in support of its opposition.

Background facts

4. The Plaintiff is a company incorporated in Malaysia under the provisions of the Companies Act 1965 while the Defendant is a body incorporated under the Selangor Agricultural Development Corporation Enactment No. 12 of 1972.

5. On 1/11/1998, the Plaintiff forwarded a proposal to the then Menteri Besar of Selangor (YAB Datuk Abu Hassan Omar) to develop the forest reserve area in Hutan Simpan Rantau Panjang and Hutan Simpan Bukit Tarek into an integrated forest farm whereby the *Acacia Mangium* trees in that area will be replaced with *Sentang*, *Jati* and other marketable timber trees as approved by the Selangor Forestry Department,

6. The Defendant was duly authorized by the Selangor State Government to jointly undertake and carry out the reforestation plan with the Plaintiff and the Defendant *vide* its Board Meeting dated 12/8/1999 approved the undertaking of the joint venture with the Plaintiff.

7. The Selangor State Government has on 22/2/2001 leased an area in the forest reserve at Hutan Simpan Rantau Panjang and Hutan Simpan Bukit Tarek measuring 10,000 hectares (“the Leased Area”) to the Defendant pursuant to the Lease and Concession Agreement dated 22/2/2011 (see Exhibit AA-4 Defendant's Affidavit in Support).



8. Pursuant to a Joint Venture Agreement dated 22/2/2001 (“JVA”), the Defendant and the Plaintiff formed a joint venture company ie, Megafores Nursery Sdn. Bhd (JV company) to jointly carry out the said reforestation project and agro-forestry activities (see Exhibit AA-4 Defendant's Affidavit in Support).

9. The Plaintiff holds 51% shareholding in the said JV company while the Defendant holds 49% shareholding.

10. Pursuant to a Sub Lease Agreement dated 22/2/2001 (“the Sub Lease Agreement”), the Defendant subleased an area measuring 1,000 hectares within the Leased area at the Hutan Simpan Rantau Panjang (“the Subleased Area”) to the JV company to carry out the reforestation project for a period of 50 years (see Exhibit AA-4 Defendant's Affidavit in Support).

11. Subsequently, in 2002, the Selangor State Government privatized the construction of Universiti Industri Selangor, Berjuntai Bistari Campus (UNISEL) to Maxisegar Sdn Bhd. As a result of the said privatization exercise the JV company was directed to surrender 107.93 acres (43.68 hectares) of land in the Subleased Area to Maxisegar.Sdn Bhd for construction of road linking UNISEL to Bukit Beruntung. Due to this land acquisition, the said JV company claimed it suffered losses of 31,000 planted *Sentang* trees.

12. Pursuant to Minutes of Meeting of the Selangor State Government *vide* EXCO-MTES No: 5/2004 dated 26/1/2004, the JV company was promised by the Selangor State Government and the Defendant that it will be paid a compensation of RM4 million. But, as at 2008 the TV company only received an amount of RM400,000.00 (see Exhibit P-9 Plaintiffs Affidavit in Opposition);



13. The Defendant then proposed to the Plaintiff to sell their 49% shareholding in the said JV company to the Plaintiff. The Plaintiff, on 18/11/2008 offered to purchase the Defendant's shares at RM1.5 million but it was not agreed by the Defendant.

14. There was a change in the Selangor State Government in 2008 after the general election and the officers in the Defendant's Board had also been changed.

15. On 27.1 2010 the Defendant presented a winding up petition to wind up the JV company at the Kuala Lumpur High Court *vide* Petition No: 28NCC-65-2010 on the grounds, *inter alia*:

(a) that the incorporation of the TV company was illegal since the Defendant (Petitioner) at the material time did not obtain written consent from the Minister of Finance as required under section 14B(1) Selangor Agricultural Development Enactment 1972; and

(b) that the activities and operations of the JV company are illegal.

16. In paragraphs 19 - 21 of the Winding Up Petition dated 27.1.2010, the Defendant (Petitioner) stated that it has not obtained prior written consent from the Minister of Finance and has not met the statutory requirements under section 14B(1) of the Selangor Agricultural Development Enactment 1972 (see page 9 Exhibit P-4 Plaintiffs Affidavit in Opposition).

17. On 14/9/2010, the Kuala Lumpur High Court granted the winding up order against the JV company ie, Megafores Nursery Sdn Bhd (see "Winding Up



Order” in Exhibit AA-2 and judgment of the Winding up Court dated 22.11.2010 (“the Judgment”) in Exhibit AA-3 in Affidavit In Support).

18. The Plaintiff and the JV company appealed to the Court of Appeal against the said Winding Up Order and obtained *interim* stay from the High Court. However, the appeal was dismissed with no order as to costs on 17.1.2011.

Plaintiff's claim in the present suit

19. On 29.4.2011, the Plaintiff filed this suit against the Defendant to claim damages from the Defendant for the losses suffered by the Plaintiff due to the Defendant's negligence and breach of statutory duty.

20. The Plaintiff avers in its Statement of Claim, *inter alia*, that as a result of the Defendant's negligence to obtain the prior written consent from Minister of Finance and its breach of its statutory duty, the Plaintiff as a majority shareholder has suffered loss in its investment in the JV company.

21. The Plaintiff avers in its Statement of Claim that prior to the said winding up action, it has already taken a loan from Bank Pertanian Malaysia in 2004 for the sum of RM500,000.00 (see Exhibit P-7 Plaintiffs Affidavit in Opposition) and has obtained financing from the Ministry of Finance and Agro Bank Malaysia in 2009 for the sum of RM5.2 million (see Exhibit P-8 Plaintiffs Affidavit in Opposition) for the purpose of the reforestation and agro forestry activities conducted by the JV company.



22. However, due to the Defendant's negligence and breach of statutory duty, the Plaintiff suffered loss and is unable to generate profit from its investment in the JV company. The Plaintiff still need to repay the financing obtained from the relevant institutions.

23. Besides relying on the tort of negligence and breach of statutory duty, the Plaintiff in its Statement of Claim also relies on the breach of the Joint Venture Agreement and misrepresentation on the part of the Defendant.

Basis of the application

24. The Defendant's application in Enclosure 6 to strike out the Plaintiff's suit under Order 18 rule 19(1)(a) or (b) and or (d) of the RHC 1980 as well as under the inherent jurisdiction of the Court is premised on the ground that the Plaintiff has no reasonable cause of action and its Writ and Statement of Claim is scandalous, frivolous, vexatious and an abuse of process of the Court and ought to be struck out on these grounds.

Submission on behalf of the Defendant

25. Learned counsel for both parties had on the Instruction of the Court given their written submission which was supplemented by their oral submission during the hearing of enclosure (6) on 2 August 2011.

26. On behalf of the Defendant, Ms Low Chi Cheong of Messrs Lim Kian Leong & Co submits that the Plaintiff's Writ and Statement of Claim ought to be struck off based on the following grounds:

(1) *Illegal JVA*

- (a) In its Writ and Statement of Claim the Plaintiff pleads misrepresentation, negligence and/or breach of statutory duties and breach of the JVA against the Defendant;
- (b) However, the NA has already been held in the Judgment to be tainted with illegality and is therefore unlawful by virtue of section 24(a) and (b) of the Contracts Act 1950. Hence, the JVA is therefore also *void ab initio*;
- (c) It follows that since the JVA is not valid and is illegal, the Plaintiff's Statement of Claim should be struck out and the Action dismissed (see *Ng Kian Chong & 2 Ors v. Saw Seng Kee* [1994] 4 CLJ 857);
- (d) It is submitted that no court would enforce an unlawful agreement and irrespective of whether a party has knowledge of the illegality, the law does not discriminate as the arrangement is intrinsically and inevitably illegal;
- (e) No court would knowingly be party to the enforcement of an unlawful agreement (see *Thong Foo Ching & Others v. Shigenori Ono* [1998] 4 CLJ 674).

(2) *Purported reliance on Sub-Lease Agreement by Plaintiff*

- (a) In its Affidavit in Opposition to the application, the Plaintiff concedes that it is solely relying on the JVA as stated, in paragraph 15 of their Affidavit in Opposition affirmed by Dato' Abdullah bin Omar on 27.6.2011;
- (b) Based on the above argument and in light of the Plaintiff's admission in paragraph 15 of its Affidavit in Opposition, it is very clear that the Action should be struck;
- (c) Nevertheless, the Plaintiff purports in its Statement of Claim to also rely on Sub-lease Agreement between the Defendant and the JV Company (Megafores Nursery Sdn Bhd);
- (d) It is submitted that the Plaintiff is not a party to the Sub-lease Agreement and it has no right or cause of action arising therefrom;
- (e) It is trite law that a stranger to a contract may not enforce such a contract as it was not a party to it (See *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 CLJ 67, *Phua Siong Hoe v. RHB Bank Bhd & Anor; Persatuan Pemilik Tanah, Taman Pandan (Intervenor)* [2001] 6 CLJ 326);
- (f) In any event, the Sub-lease Agreement is also tainted with illegality as the Judgment has held that Megafores Nursery Sdn Bhd was illegality incorporated and that the JVA is tainted with illegality and unlawful. If Megafores Nursery Sdn Bhd was illegally incorporated, it goes without

saying that all such transactions entered into by MegafOres Nursery Sdn Bhd must also fall;

- (g) Hence, the Plaintiff is not only relying on the JVA which has been determined by the Winding Up Court to be illegal but also is relying on a different agreement despite its express assertion to the contrary;
- (h) Hence, the Plaintiff cannot circumvent the Judgment to bring an action against the Defendant when there is no reasonable cause of action to begin with and this amounts to an abuse of the process of the court.

(3) *Res Judicata and Issue Estoppel*

- (a) This Action is clearly in breach of the doctrine of *res judicata* and issue *estoppel*;
- (b) In the landmark case of *Asia Commercial Finance (M) Berhad v Kawai Teliti Sdn Bhd* [1995] 3 CLJ 783, the then Supreme Court held, *inter alia*, as follows:

When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate acelpftie* The public policy of the law is that it is in the public interest that there should be finality in litigation - interest rei publicae ut sit finis /itium. It is only just that no one ought to be vexed twice for the same cause of action *nemo debel bis vexari pro eadem causa*. Both maxims

are rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy,

Since a *res judicata* creates an *estoppel per rem judicatum*, the doctrine of *res judicata* is really the doctrine of *estoppel per rem judicatum*, the latter being described sometimes in a rather archaic way as *estoppel* by record. Since the two doctrines are the same, it is no longer of any practical importance to say that *res judicata* is a rule of procedure and that an *estoppel per reme judicatum* is that of 1 evidence.

- (c) It is also clear that by virtue of the decision in *Asia Commercial Finance (M) Berhad* that issues pertaining to this Action which have been and or should have been canvassed during the Winding Up Proceedings should have been raised during the said proceedings. The Plaintiff is now *estopped* from attempting to relitigate the issues that have been determined either expressly or by necessary implication. The Plaintiff is now attempting to relitigate those very same issues when it had been and/or should have been dealt with then and not now before a different forum is clearly an abuse of process (see *Ng Kian Chong*). It would tantamount to be a breach of the *res judicata* and/or issue *estoppel* doctrine;
- (d) Further, the Judgment of the Winding Up Court has been upheld by the Court of Appeal in Civil Appeal No. W-01-(NCC)-573-2010 and is binding on this Court (see *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1996] 2 MLJ 57);

- (e) The doctrine of issue *estoppel* extends to preclude a party to a proceeding from relitigating in a second proceeding identical issues of fact, law or mixed fact or law which have been determined in the earlier proceedings irrespective of whether the second proceeding involves different parties (See *Nanang International Sdn Bhd v. The China Press Bhd* [1999] 2 MLJ 681);
- (f) It is respectfully submitted that this Court cannot and ought not to alter, vary or set aside the Judgment that had been regularly obtained as more particularly so when the Court of Appeal has affirmed the Judgment (See *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143);
- (g) By asking this Court to try this Action is tantamount to circumventing the findings of the Winding Up Court and asking this Honourable Court which is another court in another suit to question the earlier findings and rulings of the Winding Up Court (see *Everise Hectares Sdn Bhd v. Citibank Bhd* [2011] 2 CLJ 25);
- (h) Further and/or in the alternative by the very facts above this action is scandalous, frivolous, vexatious and is an abuse of process and should be struck out not only under Order 18 Rule 19 (1) of the Rules of the RHC 1980 but also under the Court's inherent jurisdiction (see *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, SC).

Submission on behalf of the Plaintiff

27. On behalf of the Plaintiff, Encik Hizri bin Hasshan from Messrs Che Mokhtar & Ling, advanced, *inter alia*, the following grounds as to why this Court ought not to strike out the Plaintiff's action.

(1) *Plaintiff has a reasonable cause of action*

The Plaintiffs Statement of Claim dated 29/4/2011 has disclosed reasonable cause of action against the Defendant particulars of which are as follows:

- (a) Misrepresentation: paragraphs 41 to 60. Statement of Claim;
- (b) Negligence and breach of statutory duty: paragraphs 61 to 68 Statement of Claim;
- (c) Breach of Joint Venture Agreement: paragraphs 69 to 76 Statement of Claim;
- (d) Further, Plaintiff has also pleaded all the relevant, necessary and material facts to support the Plaintiffs claim against the Defendant as well as to formulate a complete cause of action. As such, it is submitted that the Plaintiffs Statement of Claim is not defective;
- (e) Decided Cases in this country have established that in an application to strike out based on O. 18 r. 19 (1)(a), the Courts do not have to look at the affidavits as no such evidence shall be admissible. They must consider only the pleadings for the purpose of determining whether, in

the instant appeal, the Plaintiff's statement of claim discloses a reasonable cause of action;

- (f) In the present case, the Plaintiff has pleaded the JVA and all the material facts to formulate a complete cause of action against the Defendant and they disclose a reasonable cause of action;
- (g) The power of court to dismiss an action or to strike out the Statement of Claim summarily is a drastic one. Such power should be exercised only in plain and obvious cases. In our present case, the Defendant has failed to show that the Plaintiff's claim is obviously unsustainable. Plaintiff's Statement of Claim has disclosed reasonable cause of action;
- (h) The mere fact that the Plaintiff's case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285, *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7).

(2) *No definitive decision that JVA illegal*

- (a) The Defendant's allegation that the JVA is illegal is baseless since there is no declaration obtained by the Defendant before a Court of competent jurisdiction to declare the JVA between the Plaintiff and Defendant as illegal or unlawful pursuant to section 24 Contracts Act;

- (b) The Winding Up Order dated 14/9/2010 granted by the Kuala Lumpur High Court does not specifically declare that the JVA as illegal;
- (c) Further and/or alternatively, even if the NA was considered as illegal (which is denied), the Plaintiffs suit cannot be struck out as Plaintiffs claim is also based on several other causes of action such as tort of negligence, breach of statutory duty and misrepresentation;
- (d) There are serious issues to be tried in this case pertaining to the following:
 - (i) failure or omission on the part of the Defendant to obtain written consent from Minister of Finance as required under Item 14(1), Second Schedule of the Incorporation (State Legislatures competency) Act 1962 and section 14B(1) of the Selangor Agricultural Development Corporation Enactment No. 12 of 1972;
 - (ii) failure of the Defendant to disclose the breach of their statutory duty to the Plaintiff and Why no attempts were made to rectify or remedy the said breach;
 - (iii) failure of the Defendant to exercise reasonable skill and care as a statutory body formed by the State Government as well as a joint venture partner of the Plaintiff to ensure that all their internal legal requirements are complied with before entering into joint venture with the Plaintiff;



- (iv) failure to exercise reasonable duty of care to prevent or mitigate loss to the Plaintiff as joint venture partner;
 - (v) The misrepresentation made by the Defendant to the Plaintiff for almost nine (9) years by giving the impression that their investment and participation in the joint venture is lawful.
 - (e) All the above issues require *viva voce* evidence from the Defendant's legal officers, audit department as well as the Defendant's Board of Management;
 - (f) In its Statement of Defence the Defendant failed to answer those issues raised by the Plaintiff and only made a bare denial to the Plaintiff's claim;
 - (g) Further, Plaintiff avers that as a party to a Joint Venture Agreement, the Defendant owes a fiduciary duty towards the Plaintiff (see Gopal Sri Ram's judgment in *Hartela Contractors ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788);
- (3) ***The Issue of estoppel and res judicata are not applicable to the present case which is based on tort of negligence, breach of statutory duty, misrepresentation and beach of contract under JVA***
- (a) The Defendant had alleged that the Plaintiffs claim is scandalous, vexatious and an abuse of the process of the Court because the

Plaintiff attempts to relitigate the same issues which had been decided in the winding up proceedings at the Kuala Lumpur High Court;

- (b) It is submitted that the causes of action and issues in the present suit are different from the Cause of action or issues raised and decided in the winding up proceedings;
- (c) In the earlier winding up proceedings, the Kuala Lumpur High Court was asked to decide and adjudicate on the issue whether it is just and equitable to wind up the -N company ie, Megafores Nursery Sdn Bhd pursuant to sections 218(1)(f) and 218(1)(i) of the Companies Act 1965;
- (d) However, in the present case, this Court is required to decide and adjudicate on the different causes of action and issues, *inter alia*, as follows:
 - (i) whether the Defendant is negligent when they entered into the JVA with the Plaintiff without obtaining prior written consent from the Minister of Finance as required under section 148 of the Selangor Agricultural Development Corporation Enactment No. 12 of 1972;
 - (ii) whether the Defendant has breached the terms of the JVA;
 - (iii) whether the Defendant as a statutory body formed by the State Government has breached its statutory obligation;

- (iv) whether the Defendant is liable to pay damages for the losses suffered by the Plaintiff as a result of the Defendant's negligence, breach of statutory duty, breach of contract and/or misrepresentation.
- (e) As can be seen from the Judgment, the above issues have never been raised or decided with precision in the winding up proceeding at the Kuala Lumpur High Court. In fact, these issues are not fit and proper issues to be raised in a winding up proceeding;
- (f) Since the learned Judicial Commissioner in the Winding up Proceeding has not made any adjudication on the issues pertaining to the liability of the Defendant for negligence, breach of statutory duty, breach of contract and/or misrepresentation, these issues therefore could be raised in the present suit and adjudicated by this Court. Hence, the plea of *res judicata* must fail (see *Koperasi Bella Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 CLJ 335;
- (g) The Plaintiff submits that the finding on illegality of the JVA was in *obiter dicta*, as it was not a point in issue which was to be decided by the Winding up Court in a winding up proceeding. Further, there is no declaration sought by the Defendant in the winding up proceeding to declare the JVA;

- (h) From the Winding Up Order granted by the Kuala Lumpur High Court, the issue of alleged illegality of the NA has not been adjudicated with precision;
- (i) The remarks/comments made by the learned Judicial Commissioner in the winding up proceedings pertaining to the illegality of the JVA are mere *obiter dicta*. As such, the doctrine of *res judicata* cannot be applied (see *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31);
- (j) The Kuala Lumpur High Court as a Companies Winding Up Court is only required to decide on the issue whether it is just and equitable to wind up the JV company. As the learned Judicial Commissioner found out that the incorporation of the IV company is illegal, the JV company has been wound up;
- (k) By granting the winding up order against the JV company, it cannot be said that the JVA between the Plaintiff and Defendant is automatically rendered as illegal. This, is because the object and consideration of the JVA is still lawful ie, to jointly undertake a reforestation project;
- (l) Alternatively, by virtue of Clause 24.2 of the JVA (Clause on Severability), it has been contractually agreed between the parties that any provision which is rendered invalid shall not operate to invalidate the whole Agreement [see provision on page 173 Exhibit AA-4 Defendant's Affidavit in Support];

- (m) With regard to the Defendant's argument that the Plaintiff ought to have raised all the issues in the present suit in the earlier winding up proceeding, Plaintiff submits that the Kuala Lumpur High Court being a Companies winding up Court has no competent jurisdiction to try and adjudicate on civil disputes or tortious claims in winding up proceeding. Proceedings initiated by way of winding up petition cannot be changed into a writ action;
- (n) This is illustrated by the case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Others Appeals* [2001] 3 CLJ 248 in which Abdul Hamid Mohamad JCA (as his lordship then was) has at page 268 explained the difference between the procedure meant for a writ action and a winding up petition in the following manner:

In Sun Microsystems Malaysia Sdn Bhd v. KS Eminent Systems SdnBhd [2000] 4 CLJ 72, I stressed the difference between the procedure in respect of a writ action under the RHC 1980 and a winding-up petition under the Companies (Winding-up) Rules 1972:

It is important to note that the procedure in a winding-up Proceeding as provided by the Companies (Winding-Up) Rules 1972 is different from the procedure in a writ action as provided by the Rules of a High Court 1980 (RHC 1980). In a winding up proceeding, the procedure is simple and brief. That is what it is meant to be ...

It is important that the procedure applicable in a writ action should not be incorporated into a winding-up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action so that the plaintiff will know whether to take a judgment



in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding-up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc. in a winding up proceeding

- (o) The Plaintiff's causes of action in the present suit involve tort of negligence, breach of statutory duty, contractual dispute as well as misrepresentation. Hence, these causes of action and the related issues could only be raised in a writ action and not in the earlier winding up proceeding (see *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Drs* [2006] 2 CLJ 1);
- (p) It is thus submitted that Plaintiff's claim is proper in law and does not amount to an abuse of process of the Court;
- (q) Further and/or alternatively, the Plaintiff also submits that the earlier winding up proceeding has not resulted in a final judgment or decree. The Defendant, by filing the winding up petition to wind up the TV company, does not "sue" in the ordinary acceptance of the term. The winding up proceeding does not result in a judgment or decree, but only in making or refusing the Winding Up Order. It is similar to the foreclosure proceedings which result in the making or refusing Order for

Sale (see *Kandiah Peter v. Public Bank Berhad* [1994] 1 MLJ 119 at page 123);

- (r) Based on the aforesaid reasons, the Defendant's reliance on the plea of *res judicata* must fail as the causes of action and issues in the present suit particularly on the tort of negligence have never been decided or adjudicated by the Kuala Lumpur High Court in the earlier winding up proceeding.

(4) *The Defendant should not be allowed to take advantage/benefit from its own breach/wrongdoing*

- (a) The Defendant as the joint venture partner of the Plaintiff owes a fiduciary duty of care to the Plaintiff to ensure the success of the joint venture and reforestation project;
- (b) However, in the present case, the Defendant has breached its duties by failing to obtain the prior written consent from the Minister of Finance. The Plaintiff has not been informed of the requirement to obtain the said consent as this is the internal procedural requirement of the Defendant as a statutory body. Such requirement was imposed by the Defendant's own Enactment;
- (c) Therefore, this Court should not allow the Defendant to rely on its on breach wrongdoing in order to avoid and put an end to the JVA (see *Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd, Soo Yuh Mian*

(*intervener*) [2011] 3 CLJ 16, applied in the case of *Golden Vale Golf Range* cited earlier);

28. In conclusion, Plaintiff urges this Court to dismiss the Defendant's application in enclosure (6) with costs on the ground that the Plaintiff has a reasonable cause of action, that all the relevant and material facts have been pleaded to formulate a complete cause of action against the Defendant; that issue *estoppel* and *res judicata* do not apply to the present case since the causes of action and issues in the present suit have never been adjudicated in the winding up proceeding and the Plaintiffs claim for negligence, breach of contract, breach of statutory duty and misrepresentation require *viva voce* evidence and hence they can only be heard and tried in a writ action and not in a winding proceedings; and a Companies Winding Up Court does not have competent jurisdiction to hear and adjudicate a civil dispute and tortious claim.

Defendant's reply to Plaintiff's submission

29. *Estoppel* applies in 2 situations, ie, *res judicata* on a cause of action or issue. Issue *estoppel* applies to a situation where the issue could have been raised in a previous proceeding. but was not-raised. and hence it could not be re-litigated in a subsequent action.

30. In this case, the Defendant is not relying on cause of action *estoppel* but on issue *estoppel*.

31. It must be borne in mind that the winding up petition was not premised on section 218 (e) of the Companies Act 1965 but under section 218 (1) under the just and equitable principle.



32. Under such a winding up petition, the Court is required to determine all the issues between the parties including the shareholders' rights and shareholders' allegations *inter se* in determining whether it is just and equitable to wind up the company. It was a necessary and integral part of the exercise of the court's power to determine all those issues which were raised before exercising its power whether to wind up the company based on just and equitable ground. The learned Judicial Commissioner in the winding up proceeding has deliberated in detail on the issue of illegality and even representation on the joint venture project which he found came from the 2nd Respondent therein (the Plaintiff herein) and not the Defendant. Hence, issues which have been raised had been duly determined and are *res judicata* and those which should have been raised such as misrepresentation and negligence on the part of the Defendant but were not raised by the Respondent must be deemed to have been waived and barred by issue *estoppel*.

33. Indeed, during the winding up proceeding before the Winding Up Court, the Plaintiff in its Affidavit in opposition has never raised the issue of misrepresentation, The Plaintiffs Affidavit merely said the issue of illegality raised by the Defendant was an afterthought and went on to say that the consent of the Minister of Finance was not required (see paras 10.4 and 10.5 of Plaintiff's Affidavit In Opposition) and even if it was required it has been waived by conduct on the part of the Defendant, Hence issue *estoppel* applies to bar the Plaintiff from raising the issue of misrepresentation.

Plaintiffs reply to Defendant's submission

34. Plaintiff reiterates that a winding up Court is not a court of competent jurisdiction to adjudicate on the tortuous claim of negligence, breach of statutory

duty and misrepresentation because it is based on affidavit evidence and on non-disputed facts.

35. Since there are a lot of contentious facts in this action, it is a proper and fit case to be tried before this Court.

36. The Plaintiff in its Affidavit in Opposition to the present application had averred that it had obtained a loan of RM500,000 from Bank Pertanian and also Ministry of Finance and Agro Bank to finance the operation of the JV company because of its inability to obtain finance.

37. Out of the blue and without any warning the Defendant in 2010 presented a winding up petition against the JV company which was ordered to be wound up on 14.9.2010.

38. The main remedies by the Plaintiff is for damages for loss suffered to their investment and efforts in ensuring the success of the JV project.

39. During the Winding Up Proceedings, various grounds were raised by the Defendant to support the application, eg, illegality of the goat rearing project which Plaintiff submits were activities conducted with the active participation of the Defendant and as seen in the audit report exhibited as P8 in which the activity was stated as project ternakan kambing.

40. At that moment of time, representation was made to Plaintiff by Defendant that these agro-based forestry activities could be carried out as part of the JV project.



41. There were various letters from the Defendant which encouraged the Plaintiff to participate in these JV activities.

42. If there had no prior consent of the MOF what were the actions taken by the Defendant as a JV partner to the losses that the Plaintiff suffered?

- (a) Exhibit AA5 was a letter of Defendant to the Plaintiff dated 19.8,2008 as a majority shareholder informing the Plaintiff that it wished to sell the 49% shareholding in the JV to the Plaintiff;
- (b) Plaintiff via its solicitor has offered to buy the Defendant's shares at RM 1.5 million;
- (c) Had the Defendant sold its shares to the Plaintiff, breach of statutory requirement could still be rectified and they can mitigate the loss suffered by the Plaintiff;
- (d) However Defendant chose not to do so but straight away and drastically filed the winding up petition against the JV company;
- (e) At the Court of Appeal level, I had represented the Plaintiff while learned solicitor Ms Low was not present. Although 30 grounds of appeal had been filed by the JV company and the other Appellants, the CA was interested in only one ground whether incorporation of the JV company was illegal.

- (f) On that issue the CA agrees with the Kuala Lumpur Winding Up Court that although it was the Defendant that fails to obtain relevant consent from MOF, the Court nevertheless cannot enforce the illegal JVA and consequently the winding up order was upheld but no costs was awarded to the Defendant. However, no grounds of judgment were handed down by the CA;
- (g) We need to distinguish the Judgment in the winding up petition on illegality because it was not an issue to be determined and the finding was made in *obiter dicta*;
- (h) If we look at winding up petition the instilment is under section 218 of the Companies Act and not section 24 of the Contracts Act and no declaration was sought from the Court that the JVA was illegal;
- (i) In 2008, the Defendant tried to sell their shares to the Plaintiff which indicated that that they were not interested in running the TV project. Yet they refused to sell their shares even though an offer had been made by the-Plaintiff to purchase at RM1.5 million;
- (j) In 2010, the Defendant then sought to rely on its own breach of failing to obtain the consent of the MOF to avoid the JVA and to avoid its obligations under the JVA which is very inequitable and unconscionable indeed;



- (k) Plaintiff submits that this is not a plain and obvious case for the Statement of Claim to be struck out summarily just on the ground that similar facts have been raised in the Winding Up petition;
- (l) The Plaintiff wishes to stress that the causes of action on negligence, misrepresentation, breach of statutory duty only accrued after the Winding Up Court had made a finding that the JV company is illegal, Only did the Plaintiffs cause of action arise.

Reply by Defendant to Plaintiff's Reply

43. On the issue of misrepresentation, Defendant notes that the Plaintiff relies on certain clauses in the JVA and Sub-lease agreement and identified them as representations. These clauses cannot be relied upon because the JVA itself had been declared as illegal. By virtue, of that the Sub-lease Agreement is also illegal.

44. So if the Sub-lease Agreement was to form the basis of the Plaintiffs cause of action for misrepresentation, it must fall because those clauses had been struck out as a whole therefore by necessary order of things those representations must fall;

45. On the question of consent, during the winding up proceeding, the Plaintiff took the position that any such requirement had been waived. Therefore it cannot now take a different position and claims negligence on the part of the Defendant in not obtaining the consent.

46. On the submission that the issue of illegality is not the ratio of the Judgment of the winding up court, Defendant begs to disagree as the Judgment was based on several grounds, one of which was illegality of the JVA.

47. On the CA's decision, since it did not write any ground of judgment, therefore to conclude that it upheld the Judgment based on one ground alone is not true.

48. On the findings of the winding up court on the facts and issues in the winding up proceedings those conclusions stand on those facts and issues giving rise to *estoppel*. Hence, on those findings it cannot be challenged in another suit.

49. Hence, no matter how the Plaintiff describes its various causes of action, ie, negligence, misrepresentation or breach of statutory duty, they are all based on facts which have already been decided upon by the Winding Up Court and the result will be the same.

50. For all the reasons stated above, the Defendant prays that its application to strike out the Plaintiff's pleadings be allowed with costs to be paid forthwith.

Finding and Decision

51. In setting out to determine the Defendant's application to strike out the Plaintiff's Statement of Claim under O. 18 r. 19 of the R.HC 1980, I bear in mind the principles laid down in the following two leading cases governing such an application.

52. In the case of *Bandar Builder Sdn Bhd & Ors v. United Malayan banking Corporation Bhd* [1993] 4 CLJ 7, Mohamed Dzaidin bin Hj Abdullah SCJ,

53. Similarly, in the case *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457, Mokhtar Sidin, JCA, writing for the Court of Appeal, in reliance, *inter alia*, on the case of *Bandar Builder Sdn, Bhd* held, as follows:

In considering an application under O. 18 r. 19(1)(a), the court has to take into account the statement of claim on the face of it and no consideration whatsoever shall be paid to the evidence in the form of these affidavits. So long as the statement of claim discloses a reasonable cause of action, however weak the claim is the claim cannot be struck off summarily. At that stage of the proceedings it is not for us or for the learned judge of the High Court to consider the merits of Carah's claim. On an application under O. 18 r. 19(1)(a) the court has only to consider whether the statement of claim discloses a reasonable cause of action. The well established principle is that the court will not summarily strike out pleadings, except only in plain and obvious cases where the claim or counterclaim is plainly and obviously not sustainable. In *Owen Sim Liang Khui v. Plasau Jaya Sdn. Bhd. & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113, a recent decision of the Federal Court, Gopal Sri Ram, JCA at p. 136 said:

The power to summarily strike out a pleading must be sparingly exercised, and in respect of the philosophy that underlies the exercise of that power, we can do no better than to quote from the judgment of Mohamed Dzaidin SCJ in *Bandar Builder Sdn. Bhd. v. United Malayan Banking Corp, Bhd.* [1993] 4 CLJ 7; [1993] 3 MLJ 36 at p. 44:

This court as well as the court below is not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence, It has been said that so long as the pleading disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v. Lawson* [1915] 31 TLR 418 and *Wenlock v. Moloney & Ors.* [1965] 1 WLR 1238).

See also *Honan Plantations Sdn. Bhd v. Kerajaan Negeri Johor* [1998] 3 CLJ 253; [1998] 2 MLJ 498 CA; *New Straits Times (Malaysia) Sdn. Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor* [1985] 1 LNS 1; [1985] 1 MLJ 226 FC; *Drummond-Jackson v. British Medical Association and others* [1970] 1 All ER 1094 CA and the old English case of *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch. 274 CA. When it is shown that there is a reasonable cause, however weak it is, the court should refuse the application.

We would like to make it clear that at this stage of the proceedings on an application under O. 18 r. 19(1) of the Rules of the High Court 1980, we are not concerned with the prospect of success or failure of Carah's claim. This is a matter for the trial judge to decide on the evidence adduced before him. We are only concerned whether there is a reasonable cause of action raised by the appellants, We are of the opinion that the allegations in paras 10(1) and 10(1)(a) of Carah's statement of claim, on the assumption that they are true or proven, and without looking at the affidavit evidence, clearly disclose a reasonable cause of action. Accordingly, we are of the view that the lenders' application to strike out Carah's statement of claim under O. 18 r. 19(1)(a) of the Rules of the High Court cannot succeed.

54. Applying the principles laid down in the two aforementioned leading authorities to the present application before me, having taken into account the totality of the facts and circumstances of this case, and the very detailed submissions of learned counsel for both parties, I am of the considered view and agree with the Plaintiff that this is not a plain and obvious case for me to strike out the Plaintiffs Statement of Claim under O. 18 r 19 (1)(a), Neither can it be said that the Plaintiff's claim against the Defendant is so frivolous, vexatious or that its pleadings are otherwise an abuse of the process of the Court that I should exercise my summary power to strike out the Plaintiffs pleadings under O. 18 r 19(1)(b) and (d). I say so for the following reasons.

55. In the present case, it is obvious from the Statement of Claim that the Plaintiffs causes of action against the Defendant are based on negligence, misrepresentation, breach of statutory duty and breach of the JVA on the part of the Defendant.

56. A perusal of the material facts constituting each cause of action pleaded in the Statement of Claim showed that Plaintiff has pleaded all the material facts necessary to form a complete cause of action based on negligence, misrepresentation, breach of statutory duty and breach JVA.

57. I agree with learned counsel for the Plaintiff that in respect of each cause of action, the material facts pleaded raised serious issues for consideration by this Court *viz-a viz* the liability of the Defendant towards the Plaintiff, in particular:

- (a) whether the Defendant is negligent when they entered into the JVA with the Plaintiff without obtaining prior written consent from the Minister of Finance as required under section 148 of the Selangor Agricultural Development Corporation Enactment No. 12 of 1972;
- (b) whether the Defendant as a statutory body formed by the State Government has breached its statutory obligation;
- (c) whether the Defendant is liable to pay damages for the losses suffered by the Plaintiff as a result of the Defendant's negligence, breach of statutory duty and/or misrepresentation.

58. Whether the Plaintiff will eventually succeed in its claim is a separate matter altogether. As decided in the two authorities cited above, the mere fact that the Plaintiff's case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out summarily. The power of this Court to dismiss an action or to strike out the Statement of Claim summarily is a drastic one. Such power should be exercised only in plain and obvious cases. In the present case, I am of the considered opinion that the Defendant has failed to show that the Plaintiffs claim is obviously unsustainable.

59. With regard to the doctrine of *res judicata* based on issue *estoppel* relied on by the Defendant, while I agree that the finding of the learned Judicial Commissioner in the winding up proceeding that the JVA was illegal and the JV company was unlawfully incorporated was not an *obiter dicta* but the *ratio decidendi* of the decision, nevertheless I agree with learned Plaintiff's counsel that as decided in the aforementioned cases of *Maril-Rionebel (M) Sdn Bhd* and *Sun Microsystems Malaysia Sdn Bhd*, a winding up proceeding is not a civil proceeding. While the learned JC in the winding up proceeding might have decided on issue of illegality of the JVC, he has not decided on the issue of negligence, misrepresentation and breach of statutory duty on the part of the Defendant, which I agree with the Plaintiff, are in any case not appropriate issues to be raised in a winding up proceeding.

60. It would appear that the main basis for the finding of the Kuala Lumpur Winding Up Court that the JVA was illegal, and hence the JV Company was illegally incorporated, was that the prior written consent from the MOF as required under Item 14(1), Second Schedule of the Incorporation (State Legislatures Competency) Act 1962 ("the 1962 Act") and section 14B(1) of



the Selangor Agricultural Development Corporation Enactment No. 12 of 1972 (“the 1972 Enactment”) had not been obtained.

61. Be that as it may, I agree with learned Plaintiffs counsel that the *object* and *consideration* of the Joint Venture Agreement is still lawful ie, to jointly undertake a reforestation project. Hence, the question is, when the Defendant finally found out after 9 years of the JVA and incorporation of the JV Company that such consent of the MOF was not obtained, why did the Defendant not think of taking certain mitigating steps such as obtaining the consent of the MOF or selling its shareholding in the JV Company to the Plaintiff?

62. In this case, it would appear that the winding up by the Defendant some 9 years after the signing of the JVA and after so much waters had flowed under the bridge and soon after the change in political scene in the Selangor State Government was an afterthought and was motivated by *mala fide* on the part of the Defendant.

63. It is noted that the Plaintiff's claim for damages in this suit is also founded on the Defendant's breach of fiduciary duty as a JV partner to act in the utmost good faith in mitigating the losses of the Plaintiff, The Plaintiff had wanted to purchase the 49% shares of the Defendant which might have taken care of the issue of illegality but the Defendant although offering to sell its shares to the Plaintiff in 2008 failed to do so without giving any explanation.

64. The Plaintiff has also averred that it has expended a lot of money in the JV project by obtaining the necessary banking facility to finance the JV Company. It is my considered opinion that the Plaintiff should be given its day in Court to



ventilate its grievances against the Defendant. To strike out the Plaintiffs pleadings at this stage without hearing the Plaintiff will deprive the Plaintiff of a proper avenue to ventilate its case against the Defendant.

65. In conclusion, based on the foregoing reasons, I hereby dismiss the Defendant's application in enclosure (6) with costs in the cause.

(LIM YEE LAN)
HAKIM MAHKAMAH TINGGI MALAYA
NCVC, SHAH ALAM

DATED: 25 AUGUST 2011