PERBADANAN KEMAJUAN PERTANIAN SELANGOR A

v.

MEGAFORES NURSERY SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
MAH WENG KWAI JC
[COMPANIES (WINDING UP) NO: D-28-NCC-65-2010]
22 NOVEMBER 2010

COMPANY LAW: *Winding-up - Just and equitable grounds - Company's incorporation illegal - Company's substratum failed - Directors breached common law and statutory fiduciary duties - Company's management deadlocked - Public funds and public policy involved in company's operations - Whether prudent to wind up - Companies Act 1965, ss. 218(1)(f), (i), 132(1), 132E and 133A - Selangor Agricultural Development Corporation Enactment No. 12 of 1972, s. 14B(1) - Incorporation (State Legislatures Competency) Act 1962, s. 14(1) - Contracts Act 1950, ss. 24(a), (b)* C D

A petition was filed to wind-up the first respondent ('the company') pursuant to s. 218(1)(f) and (i) of the Companies Act 1965 ('the CA') on the ground it was just and equitable to do so. The grounds for the petition were, *inter alia*, that the company's incorporation was illegal, its substratum had failed, its directors had committed breaches of common law and/or statutory fiduciary duties resulting in conflict of interest, its management was deadlocked and there was a breakdown of mutual trust and confidence between the company and the petitioner. E F

The petitioner was established under the Selangor Agricultural Development Corporation Enactment No. 12 of 1972 ('the 1972 Enactment'). It was also subject to the provisions of the Incorporation (State Legislatures Competency) Act 1962 ('the 1962 Act'). The petitioner held 49 per cent of the shares in the company. The second respondent held the balance 51 per cent. The third to the sixth respondents were directors of the company. The third to the fifth respondents were also majority shareholders of the second respondent. The Selangor state government granted a 60-year lease over 5000 hectares of land gazetted for a forest reserve to the petitioner to undertake reforestation of the area ('the project'). The petitioner entered into a Joint Venture Agreement ('the JVA') with the second respondent to jointly carry G H I

A out the project through the company. At the same time, the petitioner granted a 50-year sub-lease over 1,000 hectares to the company to carry out the project.

Held (allowing the petition):

B **(1)** It was just and equitable to wind-up the company on the grounds its incorporation was illegal for being in breach of s. 14B(1) of the 1972 Enactment and s. 14(1) of the 1962 Act. Its substratum had also collapsed. (paras 4 & 7).

C **(2)** The evidence clearly showed the company did not have the finances or the intention to complete and fulfill the reforestation plan. As public funds and public policy were involved in the operations of the company, it was prudent that it be wound up. (para 7)

D **(3)** As the company had deviated from the agreed objective of reforestation of the sub-leased area, the very essence of the JVA no longer existed. The substratum of the company had been removed or destroyed. The JVA was also tainted with E illegality since the incorporation of the company was illegal. (para 6)

(4) The third and fourth respondents acted *ultra vires* their powers and in breach of the CA. They made several loans to third F party companies in which they had interests without obtaining the approval of the company's board of directors and shareholders. They continued to draw excessive remunerations despite the company's accumulated losses. Management was deadlocked and the petitioner lost confidence and trust in the G company's board of directors. The petitioner's continued existence in the company was not tenable. (para 6)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

H *Chai Sau Yin v. Liew Kwee Sam [1962] 1 LNS 21 PC* ***(refd)***

Ebrahimi v. Westbourne Galleries Ltd [1973] AC 360 ***(refd)***

Liew Jui Hua & Ors v Johor Property (M) Sdn Bhd [1998] 2 CLJ Supp 34 HC ***(refd)***

Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***

I *Thong Foo Ching & Others v. Shigenori Ono [1998] 4 CLJ 674 CA* ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 132(1), 132E, 133A, 218(1)(f), (i)
Contracts Act 1950, ss. 24(a), (b)
Incorporation (State Legislatures Competency) Act 1962, s. 14(1)

For the petitioner - Lim Kian Leong (Rachel Tan with him); M/s Lim Kian Leong & Co
For the respondent - Hizri Hassan; M/s Che Mokhtar & Ling

Reported by Ashok Kumar

JUDGMENT

Mah Weng Kwai JC:

[1] On 27 January 2010 the petitioner filed a petition to wind-up the 1st respondent pursuant to s. 218(1)(f) and (i) of the Companies Act 1965 (the CA) on the ground that it is just and equitable to do so.

[2] The respondents opposed the petition and upon reading the petition and the affidavits filed, hearing of the oral submissions of counsel and upon a consideration of the written submissions of counsel for the petitioner and the respondents, the court on 14 September 2010 granted an order in terms of the petition (encl. 1) and the 1st respondent was accordingly wound-up.

[3] Being dissatisfied with the decision of the court, the respondents on 23 September 2010 filed a notice of appeal against the said decision.

[4] Brief Facts Of The Case

4.1 The petitioner is a statutory body/body corporate established under the Selangor Agricultural Development Corporation Enactment No. 12 of 1972 [Enactment No. 7 of 1982 (Amendment)] (the 1972 Enactment). The petitioner was incorporated to *inter alia* "encourage the industry or agricultural development inside and outside of the State of Selangor" (see s. 12(1) of the 1972 Enactment).

4.2 On 30 September 2000 the 1st respondent was incorporated as a private company limited by shares under the CA. The petitioner held 49% of the shares while the 2nd respondent held 51%.

A 4.3 The 3rd to the 6th respondents are directors of the 1st respondent. The 3rd to the 5th respondents are shareholders of the 2nd respondent who collectively hold 83.9% of the issued capital of the 2nd respondent.

B 4.4 The objects of the 1st respondent are *inter alia*, to carry on the business of nursery forest planning, designing and landscaping, and to carry on the business of growing, cultivating, buying, selling etc. and otherwise dealing in flowers, bulbs, fruits, trees, plants and flora of all kinds.

C 4.5 On 22 February 2001 pursuant to a Lease and Concession Agreement (the LAC Agreement), the State Government of Selangor (the State) as lessor granted a lease of 5,000 hectares of land gazetted to be a permanent forest reserve and known as Hutan Simpan Rantau Panjang for a period of D 60 years to the petitioner as lessee to undertake and commence reforestation of the permanent forest reserve (the Forest Reserve).

4.6 To reforest the Forest Reserve, the State gave approval to the E petitioner to replace the existing Acacia Mangium trees with Sentang, Jati and rubber trees together with other species of trees approved by the State, the National Forestry Council and other relevant authorities (the Reforestation Plan).

F 4.7 The 2nd respondent applied to the petitioner to participate in the Reforestation Plan on the basis that it had the necessary capacity, expertise and funds to carry out the Reforestation Plan. The petitioner then entered into a Joint Venture Agreement (the JVA) on 22 February 2001 with the 2nd G respondent to jointly undertake the Reforestation Plan.

4.8 On the same date ie, 22 February 2001, the petitioner granted a Sub-lease Agreement to the 1st respondent for an area of 1,000 hectares (the said Area) for a period of 50 years for the H sole purpose of carrying out the Reforestation Plan with the planting of approved species (the Sub-lease). This Sub-lease Agreement was entered into pursuant to cl. 15 of the LAC Agreement.

I [5] Grounds For Winding-up The 1st Respondent

5.1 The petitioner's grounds for winding-up the 1st respondent are *inter alia*:

(a) The incorporation of the 1st respondent on 30 September 2000 was illegal. A

(b) Failure and/or loss of substratum of the 1st respondent.

(c) Breaches of common law and/or statutory fiduciary duties by the 3rd to 6th respondents as directors of the 1st respondent resulting in conflicts of interest. B

(d) Management deadlock.

(e) Justifiable loss of confidence. C

(f) Irretrievable breakdown of mutual trust and confidence between the petitioner and the respondents.

[6] The main issues considered by the court are *inter alia*, as follows: D

6.1 *Issue 1 – Whether The Incorporation Of The 1st Respondent Was Illegal*

6.1.1 The petitioner being a statutory body/body corporate is subject to the direction of the Prime Minister or Minister nominated by him or the Minister of Finance pursuant to s. 12A of the 1972 Enactment. E

6.1.2 Section 14B(1) of the 1972 Enactment provides that: F

> The corporation shall not, without the prior written consent of the Minister of Finance unless he gives a general or specific direction on the matter:
>
> (a) establish or promote the establishment or expansion of companies or other bodies to carry on activities either under the control or partial control of the Corporation itself or independently; G
>
> (b) give financial assistance to any company, other statutory authority, any body or person by the taking up of shares or debentures or by way of any loan, advance, grant or otherwise. H

6.1.3 The petitioner is also subject to the provisions of the Incorporation (State Legislatures Competency) Act 1962 (the 1962 Act). In particular, s. 14(1) of the 1962 Act which is *pari materia* with s. 14B(1) of the 1972 Enactment provides that the prior written consent I

of the Minister of Finance is required before the corporation can establish a company to carry out activities under the control or partial control of the corporation itself or independently.

6.1.4 The petitioner's petition and supporting affidavits clearly state that the petitioner had failed to obtain the prior written consent of the Minister of Finance to incorporate the 1st respondent and to hold 49% of its shareholding. The incorporation of the 1st respondent was in fundamental breach of the statutory requirements under s. 14 of the 1962 Act and s. 14B of the 1972 Enactment.

6.1.5 The respondents do not dispute and/or deny that the prior written consent of the Minister of Finance was not obtained for the purpose of incorporating the 1st respondent. The respondents contend that the incorporation of the 1st respondent cannot be treated as illegal at its inception since the 1st respondent has been lawfully registered under the CA. I cannot however, agree with the submission of counsel for the respondents that just because the 1st respondent has been registered under the CA therefore it cannot be treated as illegal at its inception. This is simply because when the 1st respondent was being incorporated the prior written consent of the Minister of Finance or the lack of it, was not an issue that was raised.

6.1.6 Counsel for the respondents also contended that the prior written consent of the Minister of Finance was not necessary as the JVA entered into between the petitioner and the 2nd respondent was not for "agricultural development" but for "forestry development" and/or "reforestation plan" under the National Forestry Act 1984. Counsel relied on the proviso to s. 3 and the Second Schedule of the 1962 Act claiming that the special provisions in the Second Schedule of the 1962 Act are only applicable to a corporation incorporated for the purpose of (a) agricultural development or (b) housing development or (c) development of urban or rural areas. Counsel also contended that the petitioner does not come within the definition of "corporation"

under para. 1 of the Second Schedule of the 1962 Act. With respect, I think counsel for the respondents has missed the point. Section 14(1) of the 1962 Act and s. 14B(1) of the 1972 Enactment both clearly stipulate that the petitioner cannot establish any company or give financial assistance to any company without the prior written consent of the Minister of Finance regardless of the objects of the company. Thus, whether the 1st respondent was to carry out agricultural development or forestry development and/or the Reforestation Plan does not matter. Section 3 and its proviso, s. 3A and the second schedule of the 1962 Act when read together, mean that the provisions of the second schedule apply to corporations including the petitioner which were incorporated both before and after the Act came into force. In short, it is incorrect for the counsel for the respondents to argue that the prior written consent of the Minister of Finance is not necessary because the 1st respondent is not engaged in the business of agricultural development. The objects of the 1st respondent and the status of the 1st respondent are irrelevant to the issue of illegality of the incorporation of the 1st respondent.

6.1.7 It is the finding of the court that the incorporation of the 1st respondent with the petitioner as one of its two shareholders without the petitioner first having obtained the prior written consent of the Minister of Finance is therefore illegal. On this ground alone, it would be just and equitable for the court to order the winding-up of the 1st respondent.

6.2 *Issue 2 – Whether The Petitioner Can Rely On Its Own Illegality*

6.2.1 The issue of the illegality of the incorporation of the 1st respondent was only discovered when an audit of the 1st respondent's affairs was conducted in 2007/2008. Thus, it appears that the petitioner and all the respondents were acting in ignorance of the illegality at all material times. The petitioner having discovered the illegality relies on it as the main ground to wind-up the 1st respondent. The court now having been apprised of the illegality cannot look sideways and ignore the

existence of the illegality. The illegality is fundamental and renders the petitioner's investments in the 1st respondent *void ab initio* for illegality.

6.2.2 It does not matter that the petitioner was a party to the illegality. Once the illegality was discovered, the court has a duty to act on it.

In the Court of Appeal case of *Thong Foo Ching & Others v. Shigenori Ono* [1998] 4 CLJ 674, Siti Norma Yaakob JCA (as she then was) held that "the illegality of an agreement sued upon, in any case, is a matter which the court is obliged to take notice of *ex proprio motu*, once it is apprised of facts tending to support the suggestion. No court would knowingly be party to the enforcement of an unlawful agreement. And that as the arrangement between the parties is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is *void ab initio* and the parties were outside the pale of the law. The respondent, being thereto, cannot claim any remedy under this arrangement. Even if the respondent had no knowledge of the illegality, the arrangement being intrinsically and inevitably illegal, the law gives him no allowance for innocence so far as consequences are concerned."

6.2.3 Where a contract is *ex facie* illegal, it is settled law that the court will take judicial notice of such illegality. Such judicial notice may be taken at any stage of the proceedings.

On the issue of *ex facie* illegality, the Supreme Court in the case of *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 had this to say:

> [1] The courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality, and refuse to enforce the contract and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is *ex facie* illegal.

[2] However, in situations when the contract is not *ex facie* illegal, illegality need not be pleaded but the court can still take judicial notice of the illegality and refuse to enforce it. The situation is when facts which have not been pleaded emerge in evidence in the course of trial showing clearly the illegality eg, the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances.

6.2.4 The Privy Council in the case of *Chai Sau Yin v. Liew Kwee Sam* [1962] 1 LNS 21 in allowing the appeal held that the appellant is entitled to rely upon his own illegality in respect of the purchase of rubber from the respondent in view of the prohibition imposed by s. 5(i) of the Rubber Supervision Enactment which forbids the purchase of rubber without a licence.

6.2.5 Counsel for the respondents contended that the petitioner is estopped by its conduct on relying on the issue of illegality and relied on the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 to support his contention. I am of the view that as the illegality was the result of statutory requirements, the doctrine of estoppel cannot be invoked against the petitioner in this case. Further, neither the justice of the case nor the conduct of the 2nd to the 5th respondents would justify the application of estoppel against the petitioner. If estoppel was invoked by the court, this would mean that the illegality on the part of the petitioner in the incorporation of the 1st respondent would be allowed to continue in breach of the statutory requirements. This the court was not prepared to do.

6.3 *Issue 3 – Whether The JVA Is Valid*

6.3.1 It will be noted that the 1st respondent was incorporated on 30 September 2000, which is about five months before the petitioner entered into the JVA with the 2nd respondent on 22 February 2001 for the purpose of carrying out the Reforestation Plan. Importantly, it was the declared intention of the petitioner and the 2nd respondent to enter into the JVA to carry out the Reforestation Plan through the 1st respondent.

A 6.3.2 Since it is the finding of the court that the incorporation of the 1st respondent is illegal, I am of the view that the JVA, although entered into between the petitioner and the 2nd respondent (and not with the 1st respondent), is tainted with illegality as well. If
B the JVA is allowed to be enforced this would contravene the statutory requirements of the 1962 Act and the 1972 Enactment by circumventing those same statutory provisions.

C 6.3.3 Sections 24(a) and (b) of the Contracts Act 1950 provide that the consideration or object of any agreement is lawful unless (a) it is forbidden by a law and (b) it is of such a nature that, if permitted, it would defeat any law. Since it is the decision of the
D court that the JVA is tainted with illegality, the object or consideration of the JVA will be rendered unlawful by virtue of ss. 24(a) and (b) of the Contracts Act 1950.

E 6.4 *Issue 4 – Whether There Is Failure And/Or Loss Of Substratum Of The 1st Respondent*

6.4.1 As stated earlier, the sole purpose of the JVA was to carry out and complete the Reforestation Plan through the 1st respondent. Pursuant to cl. 3.3 of the JVA, the
F 1st respondent was to carry out the Reforestation Plan in phases over a five year period at a rate of 200 hectares per year commencing from the year 2000. However, as of 14 January 2008, the 1st respondent had only planted an area of about 607 hectares with
G Sentang trees and a few thousand Batai trees without planting the balance 393 hectares with trees of approved species.

6.4.2 Clause 3.2 of the sub-lease agreement provides that
H the 1st respondent shall only use the said Area for purposes of the Reforestation Plan. In breach of the sub-lease agreement, the 1st respondent not only delayed the reforestation unreasonably but had also carried out plans to convert the said Area into a
I "commercial forest" or "integrated forest farming with animal husbandry". The 1st respondent also made plans to promote eco-tourism in the forest.

6.4.3 The 1st respondent (and the 2nd respondent) had acknowledged that the said Area was too small to carry out the Reforestation Plan successfully. In fact, it had been stated by the 1st respondent that the said Area could only be a "show plantation". Further, as there was no title to the land, the 1st respondent was not able to obtain any finance or loans on the lease of the state land. In the absence of such financing, the 1st respondent relied heavily on the advances made by the petitioner to carry out its activities. The 1st respondent simply did not have the cash flow to maintain its operations.

6.4.4 Due to the small area of land and the lack of finance, the 1st respondent was never really in a position to fulfil its obligations right from the start. The petitioner had wrongly relied on the representations of the 2nd respondent that it had the capacity, knowledge and funds to carry out the Reforestation Plan.

6.4.5 As at 31 December 2008, the 1st respondent had accumulated losses of about RM1.7 million and a deficit of RM138,652 for the year ending 2008. It is therefore clear that the 1st respondent does not have the financial resources to complete the Reforestation Plan. The accounts show that the 1st respondent is not viable.

6.4.6 The petitioner as a joint-venture partner had contributed advances of about RM2.9 million as at 31 December 2008 to the 1st respondent based on mutual trust. On 5 May 2009, the petitioner issued a letter of demand for the sum of RM2.976 million owing as at 31 March 2009. Surprisingly, the 3rd respondent denied that the sum was owing by the 1st respondent although the 3rd respondent had on 24 August 2007 acknowledged receipt of a loan of RM2.5 million from the petitioner pursuant to the JVA.

6.4.7 Without proper replanting of the approved species of trees, there has been uncontrolled growth of the unwanted Acacia Mangium trees. In fact the 1st respondent stopped replanting trees of approved species in 2005/2006.

6.4.8 In breach of cl. 15 of the Sub-lease Agreement, the 1962 Act, the 1972 Enactment, the CA and the National Forestry Act 1984, the 1st respondent had unlawfully and/or wrongfully assigned and/or disposed of its rights and obligations in respect of the said Area to third party companies which had connections and/or interest with the 2nd, 3rd and 4th respondents without the written consent of the petitioner and the State. The third party companies connected with the 2nd, 3rd and 4th respondents are Mega Foresternak Sdn Bhd, Megaforest Ideal Feed Sdn Bhd, Mega Forestindah Paya Sdn Bhd and Mega Forest Plantation Sdn Bhd.

6.4.9 Following the 1st respondent's unauthorised assignments and/or disposal of its rights and obligations in the said Area, the 1st respondent acquired 15% shareholding "in kind" in the connected third party companies namely Mega Foresternak Sdn Bhd, Megaforest Ideal Feed Sdn Bhd and Mega-Forestindah Paya Sdn Bhd in breach of cl. 15 of the Sub-lease Agreement, the CA, the National Forestry Act 1984 and the National Forestry Policy 1978. The said connected third party companies at all material times were not authorised to remain on the land and to carry out their activities without the requisite permit and/or licence from the Director of the Selangor State Forestry Department. Mega Foresternak Sdn Bhd illegally constructed an animal barn and carried out cattle and fish farming and general animal husbandry on the land while Megaforest Ideal Feed Sdn. Bhd. illegally built a factory measuring 14,400 square feet in area to manufacture and/or process animal feed.

6.4.10 On 11 April 2003, the 1st respondent wrongly and unlawfully entered into an agreement with Matsushita Electric Works Ltd of Japan to cultivate Kenaf trees which is not one of the approved species, for the production of fibreboard.

6.4.11 On 28 June 2005, the 1st respondent had also carried out negotiations with the relevant authority to establish a National Service Training Camp within the said Area pursuant to the 1st respondent's declared objective of eco-tourism for commercial considerations.

6.4.12 Thus, it can be seen from all the above instances that as the 1st respondent has deviated from the agreed objective of reforestation of the area, the very essence of the JVA no longer existed. They had thereby removed or destroyed the substratum of the 1st respondent. This would be another just and equitable ground for the court to wind-up the 1st respondent.

6.4.14 In the case of *Liew Jui Hua & Ors v. Johor Property (M) Sdn Bhd* [1998] 2 CLJ Supp 34 Abdul Malik Ishak J (now JCA) explained the failure of the substratum of a company as follows:

> Failure of substratum would be in a situation where the whole substratum of the company has gone down the drain (*Re German Date Co* [1882] 20 Ch D 169; *Re Haven Gold Co* [1882] 20 Ch D 151, *Re Red Rock Gold Mining Co* [1888] 61 LT 785; *Re Bleriot Aircraft Co* [1916] 32 TLR 253; *Re Eastern Telegraph Co.* [1947] 2 All ER 104; *Re Merchant Navy Supply Assn Ltd* [1947] 1 All ER 894; *Galbraith v. Merito Shipping Co* [1947] SC 446; and *Re Kitson & Co Ltd* [1946] 1 All ER 435. The substratum has been held to be gone when the main object for which the company was formed has become impracticable: *Re Suburban Hotel Co* [1867] 2 Ch App 737. Finally, where the company was a "bubble" a winding-up order would also be allowed by the court: *Re London and County Coal Co* [1867] LR 3 Eq 355.

6.5 *Issue 5 – Whether The 3rd To 6th Respondents Had Breached Their Common Law And Fiduciary Duties As Directors Of The 1st Respondent*

6.5.1 In breach of ss. 132(1), 132E & 133A of the CA, the 1st respondent had unlawfully made several loans to the connected third party companies totalling RM672,930.71 thereby giving rise to a series of conflict of interest situations. It is clear that the 3rd and 4th respondents have acted *ultra vires* their powers and in breach of the CA in authorising the aforesaid loans without first obtaining the approval from the Board of Directors and shareholders in a general meeting of the 1st respondent.

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6.5.2 The failure by the 3rd and 4th respondents to disclose their interest in the connected third party companies to the Board of Directors of the 1st respondent had resulted in a loss of trust in them by the petitioner. Due to the conflict of interest and the breakdown of
B mutual trust, the continuance of the petitioner in the existence of the 1st respondent would not be tenable.

6.5.3 Despite the accumulated losses of the 1st, 3rd and 6th respondents continued to draw excessive directors'
C remuneration. For instance, for year ending 2007 the revenue of the 1st respondent was RM35,515 but the directors' remuneration came up to RM287,843 and for year ending 2008 the revenue of the 1st respondent was only RM19,220 while the directors' remuneration
D amounted to RM138,000.

6.5.4 On a consideration of the 'just and equitable' provision, Lord Wilberforce delivering the judgment of the House of Lords in the case of *Ebrahimi v. Westbourne Galleries*
E *Ltd* [1973] AC 360 held that a limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind it *inter se* were not necessarily merged in its structure that, while the "just and equitable" provision did not
F entitle a party to disregard the obligation which he assumed by entering a company, it enabled the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on
G legal rights or to exercise them in a particular way.

6.6 *Issue 6 – Whether There Was Management Deadlock In The 1st Respondent*

6.6.1 As at February 2009, the 1st respondent failed to give
H the petitioner monthly statements of accounts. When the petitioner asked for the statements, the 3rd respondent replied that there was no need to give them to the petitioner. At the same time, the 3rd respondent had informed the petitioner that the staff responsible for
I preparing the statements had resigned and asked the petitioner for a new staff so that these statements could be prepared.

6.6.2 On 8 October 2009, the 1st respondent instead of repaying the advances contributed by the petitioner, without the consent of the petitioner and in breach of the CA, converted the sum of RM1,706,9670 owing into paid up capital of 1,706,670 shares issued to the petitioner. Counsel for the respondents had contended that with the increase in the shareholding of the petitioner, there was no dilution of the petitioner's interest. But this contention really misses the point as the petitioner never evinced an intention to increase their shareholding but had in fact demanded for the repayment of its advances to the 1st respondent.

6.6.3 The above instances clearly show that there was a deadlock in the management of the 1st respondent resulting in a loss of confidence by the petitioner in the 1st respondent's Board of Directors.

6.7 *Issue 7 – Whether The Petitioner Was Acting With Ulterior Motives And Had Come To Court With Unclean Hands*

6.7.1 Counsel for the respondents contended that the petitioner did not make full and frank disclosure of all issues to the court, that the petitioner lacked *bona fides* and that the winding-up petition was an abuse of court process. The respondents' complaint of non-disclosure is based on two instances namely:

(a) that the petitioner had failed to pay RM600,000 to the 1st respondent being part of its share of compensation received in respect of the acquisition of 43.68 hectares of said Area and

(b) that there was encroachment into the said Area by Syarikat In-N-Out Plantation.

6.7.2 To begin with, this petition being an *inter partes* and not *ex parte* application did not require the petitioner to disclose each and every matter connected with the management of the 1st respondent. In any event, the 1st respondent had commenced action to recover the said sum of RM600,000 from the petitioner in the Shah Alam High Court. Those legal proceedings can still be maintained by the liquidator of the 1st respondent subsequently.

A

6.7.3 As for the alleged encroachment by Syarikat In-N-Out Plantation, I agree with counsel for the petitioner that it is for the 1st respondent itself to protect its own interests and not to leave the problem with the petitioner. I cannot agree with counsel for the
B respondents that the petitioner had acted with oblique or ulterior motives by not mentioning the alleged encroachment by Syarikat In-N-Out Plantation in the petition. I am also of the view that the petition to wind-up the 1st respondent is not with the intention to
C frustrate the 1st respondent's claim for the sum of RM600,000 against the petitioner in the Shah Alam High Court. In any event, the sum owing to the petitioner by the 1st respondent far exceeds the sum of RM600,000 claimed.

D

6.7.4 I am also satisfied that the petitioner in presenting the petition is not trying to recover the sum of about RM2.9 million due and owing by the 1st respondent but to wind-up the 1st respondent on the main
E grounds of illegality and the loss of substratum. This is clear because in the petition, the petitioner does not make a claim for the sum of RM2.9 million or any part thereof.

F

6.7.5 I am further satisfied that the deadlock in management and the breakdown of mutual cooperation and trust were not due to the acts or omissions of the petitioner but were due to the acts and defaults of the respondents. I do not see the need for this matter to
G go to trial by way of a civil suit merely to determine the issue of illegality and the conduct of the petitioner and the respondents respectively.

6.8 *Issue 8 – Whether The Petitioner Ought To Have Given Notice To The 1st Respondent To Remedy The Alleged Breaches*

H

6.8.1 Pursuant to cl. 11.1 of the Sub-lease Agreement, the petitioner is obliged to give the 1st respondent 12 months' notice to remedy any alleged breaches. The petitioner did not give any notice to the 1st
I respondent. To my mind, the omission by the petitioner to give the notice is a non-issue in this petition. This petition concerns the petitioner as a shareholder of the

1st respondent and as a party to the JVA. The petitioner is not seeking to terminate the Sub-lease Agreement in this petition and in any event, upon the winding-up of the 1st respondent, matters arising out of the Sub-lease Agreement will have to be separately addressed and resolved by the liquidator of the 1st respondent with the petitioner.

6.8.2 Similarly, the omission by the petitioner to refer to the steering committee and/or arbitrator pursuant to cl. 12.2 of the Sub-lease Agreement is a non-issue and does not render the filing of the petition premature or an abuse of process by the petitioner.

[7] Conclusion

7.1 I am of the considered view that it was just and equitable to wind-up the 1st respondent pursuant to s. 218(1)(f) and (i) of the CA on the grounds that the incorporation of the 1st respondent was illegal and in breach of the statutory requirements and that the substratum of the 1st respondent has collapsed. The evidence clearly shows that the 1st respondent did not have the finances or the intention to complete and fulfil the Reforestation Plan. As public funds and public policy are involved in the operations of the 1st respondent, it is only prudent that in the given circumstances of the case, the 1st respondent be wound-up.