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**DALAM MAHKAMAH RAYUAN MALAYSIA
BIDANGKUASA RAYUAN
RAYUAN SIVIL NO. W-03-02-03**

ANTARA

**RAHAZ SDN BHD
(No. Syarikat: 22838-V) ... PERAYU**

B

DAN

- 1. FASTON GROUP LIMITED**
- 2. AICA TRADING COMPANY LTD ... RESPONDEN-**
- 3. SHINTO KOEKI KAISHA LTD ... RESPONDEN**

DAN

**DALAM MAHKAMAH RAYUAN MALAYSIA
BIDANGKUASA RAYUAN
RAYUAN SIVIL NO. W-03-03-03**

C

ANTARA

**RAHAZ SDN BHD
(No. Syarikat: 22838-V) ... PERAYU**

DAN

- 1. FASTON GROUP LIMITED**
- 2. AICA TRADING COMPANY LTD ... RESPONDEN-**
- 3. SHINTO KOEKI KAISHA LTD ... RESPONDEN**

D

DAN

**DALAM MAHKAMAH RAYUAN MALAYSIA
BIDANGKUASA RAYUAN
RAYUAN SIVIL NO. W-03-04-03**

ANTARA

**RAHAZ SDN BHD
(No. Syarikat: 222838-V) ... PERAYU**

DAN

BURWOOD GROUP LTD ... RESPONDEN

DAN

A

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. W-03-05-03**

ANTARA

RAHAZ SDN BHD

(No. Syarikat: 222838-V)

... PERAYU

DAN

B

MERBOK HILIR BHD

(No. Syarikat: 321155-K)

... RESPONDEN

**[Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
Guaman Sivil No. D7-22-3239-1999**

Rahaz Sdn Bhd

(No. Syarikat:222838-V)

... Plaintiff

C

Dan

1. Faston Group Limited

2. AICA Trading Company Ltd

3. Shintoa Koeki Kaisha Ltd

4. Burwood Group Limited

5. Merbok Hilir Berhad

(No. Syarikat: 321155-K)

**... Defendan
Defendan**

D

Dan

Bank Islam (L) Ltd

... Pencelah]

**CORUM : MOKHTAR SIDIN, JCA
ZALEHA ZAHARI, JCA
HELILIAH MOHD. YUSOF, JCA**

JUDGMENT OF THE COURT

E

Appeal No. W-03-02-03, No. W-03-03-03, No. W-03-04-03
and No. W-03-05-03, were heard jointly. All four appeals were

A dismissed with costs on 7.11.2006 for the following reasons.

In this judgment parties will be referred to as follows:
Rahaz Sdn. Bhd. (the Appellant in all four appeals) will be referred to as "Rahaz". Faston Group Limited (the 1st Respondent in Appeal No. W-03-02-03 and Appeal No. W-03-03-03) will be referred to as "Faston". AICA Trading Company Ltd (the Respondent in Appeal No. W-03-02-03 and Appeal No. W-03-03-03) will be referred to as "AICA". Shintoa Koeki Kaisha Ltd., (the Respondent in Appeal No. W-03-02-03 and Appeal No. W-03-03-03) will be referred to as "Shintoa". Faston, AICA and Shintoa will collectively be referred to as "the Japanese Shareholders". Burwood Group Limited (the Respondent in Appeal No. 03-04-03) will be referred to as "Burwood". Merbok Hilir Berhad (the Respondent in Appeal No. W-03-05-03) will be referred to as "Merbok".

D Unless expressly stated, reference to any legal provision refers to the provisions of the Companies Act 1965.

BACKGROUND

E By a Shareholders Agreement dated 26.3.1996 between Rahaz, Faston, AICA, Shintoa and Burwood, ("the Shareholders Agreement") they all became shareholders of Merbok on terms specified therein. The Shareholders Agreement *inter alia*

A provides as follows:-

"6. TRANSFER OF SHARES

B 6.1 No Shareholder shall, without the prior written consent of the Shareholders holding more than fifty per cent (50%) of the then issued and outstanding ordinary shares:-

6.1.1

6.1.2 sell, transfer or otherwise dispose of any of such Ordinary Shares (or any legal or beneficial interest therein); or

C 6.1.3 enter into any agreement in respect of the votes attached to Ordinary Shares; or

6.1.4 agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing;

save and except in accordance with the provisions of this Clause and of Clause 7 hereof.

D 6.2 If in relation to any of the Shareholders ("the Defaulting Shareholder):-

6.2.1 the Defaulting Shareholder fails to remedy any material breach on his part of this Agreement within 21 days from the service of any written notice by the other Shareholders complaining of such breach;

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E 6.2.5 the Defaulting Shareholder is the subject of any change in its control or ownership;

then upon written notice to the Defaulting Shareholder by any other Shareholder this Agreement shall automatically terminate with respect to the Defaulting

A Shareholder, but without prejudice to its obligations under Clause 10.2.

6.3 Within thirty (30) days after termination of this Agreement pursuant to sub-clause 6.2 any other Shareholder shall be entitled to serve a notice on the Defaulting Shareholder requiring the Defaulting Shareholder to sell to it all (but not some only) of the Ordinary Shares held by the Defaulting Shareholder. It more than one other Shareholder serves a notice simultaneously or separately within a period of not more than sixty (60) days on the Defaulting Shareholder under this sub-clause then such notices shall take effect as if they require the Defaulting Shareholder to transfer his Ordinary Shares to all other Shareholders who served such notices in proportion to the number of Ordinary Shares held by them respectively.

B

6.4 The Directors shall request the Auditors to determine and certify the sum per share considered by them to be the fair value thereof as at the last date of such thirty (30) day period and the sum so determined and certified shall be the price at which the Ordinary Shares held by the Defaulting Shareholder shall be transferred. If the Shareholders do not agree that the Auditor should determine the price, the Directors shall request the President for the time being of the Malaysian Association of Certified Public Accountants to appoint a qualified accountant to determine and certify the sum per share.

C

The decision of any accountant shall, in the absence of manifest error be binding on and conclusive as against the parties hereto. Completion of the transfer of Ordinary Shares hereunder shall take place at the Company's principal place of business at twelve noon three (3) business days after the Auditors or the accountant (as the case may be) shall have certified the fair value of the Ordinary Shares.

D

Provided Always that if the approval of any authority is required for such transfer completion shall place five (5) business days after the last of such approvals shall have been obtained and at such reasonable time and

E

A place as the purchasing Shareholder may specify by not less than thirty-six (36) hours written notice to the Defaulting Shareholder whereupon:-

B 6.4.1 the Defaulting Shareholder shall deliver to the purchasing Shareholder a duly executed transfer or transfers in favour of the purchasing Shareholder or as it may direct together with the share certificate in respect of the said Shares and (if requested by the purchasing Shareholder) a power of attorney in such form and in favour of such person as the purchasing Shareholder may nominate so as to enable the purchasing shareholder to exercise all rights of ownership in respect of the said shares including, without limitation, the voting rights thereto;

C 6.4.2 against such delivery, the purchasing Shareholder shall pay the purchase price for the said Shares to the Defaulting Shareholder by bankers' draft for value on the date of completion;

6.4.3 the parties hereto shall procure (insofar as they are able) that the said transfer or transfers shall be registered;

D 6.4.4 the Defaulting Shareholder shall do all such other things and execute all such other documents as the purchasing Shareholder may require to give effect to the sale and purchase of the said Shares; and

6.4.5 if requested by the purchasing Shareholder, the Defaulting Shareholder shall procure the resignation of all the Directors appointed by it (and its predecessors in title to the said Shares) and such resignation shall take effect without any liability on the Company for compensation for loss of office or otherwise.

E 6.5 If any approval necessary for the sale and purchase is refused or is not obtained within four (4) months of the termination of this Agreement and if possible, is not waived by the purchasing Shareholder,

A the purchasing Shareholder shall be entitled to nominate in writing, a third party or parties to accept a transfer of the said shares pursuant to the terms aforesaid in his its place.

8.1 Except as otherwise provided herein, this Agreement shall continue in full force and effect without limit in point of time until the earlier of the following events:-

B 8.1.1 the Shareholders agree in writing to terminate this Agreement;

8.1.2 an effective resolution is passed or a binding order is made for the winding up of the Company; and

8.1.3 the obtaining of the last of the approvals necessary for the listing of the Ordinary Shares of the Company on the Kuala Lumpur Stock Exchange;

C Provided however, that this Agreement shall cease to have effect as regards any Shareholder who ceases to hold any Ordinary Shares save for any provisions hereof which are expressed to continue in force thereafter.

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11.5 Survival of Rights, Duties and Obligations

D Termination of this Agreement for any cause shall not release a party from any liability which at the time of termination has already accrued to another Shareholder or which thereafter may accrue in respect of any act or omission prior to such termination.”

E Sometime in August 1999 the Japanese Shareholders entered into a Sale and Purchase Agreement with Burwood by which agreement the Japanese Shareholders agreed to sell the 22,500,000 shares in Merbok, and Burwood agreed to acquire the said shares, (the "Share Sale Transaction").

A Burwood then, by a facsimile message dated 26.08.1999, informed Dato' Samsudin bin Abu Hassan, the Controlling Shareholder of Rahaz, of the said Share Sale Transaction.

B Rahaz was of the view that the Share Sale Transaction between the Japanese Shareholders and Burwood without obtaining their prior written consent was in breach of clause 6.1 of the Shareholders Agreement. Rahaz interpreted clause 6.1 to mean that the Share Sale Transaction was subject to the approval of more than 50% of the shareholders of Merbok and that, in ascertaining the shareholder or shareholders having more than 50% shareholding in clause 6.1, the shareholding of parties involved in the transaction should be excluded, and the required percentage of the 50% computed from the remainder. C Rahaz then, through their solicitors, issued a letter dated 3.9.1999 giving notice to Burwood to remedy the alleged breach. Similar notices by letters dated 08.10.1999 were issued by Rahaz's D solicitors to Faston, AICA and Shintoa. Burwood and the Japanese Shareholders did not remedy the alleged breach within the period specified in the said notices.

E Rahaz then claimed, that Burwood's and the Japanese Shareholders' failure to remedy the alleged breach of clause 6.1, pursuant to clause 6.2 automatically terminated the Shareholders Agreement. Further letters dated 05.10.1999 and 06.10.1999

A were issued by Rahaz's solicitors, requiring Burwood to sell their shares in Merbok to Rahaz pursuant to Clause 6.3. Similar letters, all dated 03.11.1999, were issued by Rahaz's solicitors to the Japanese Shareholders also requiring them to sell their shares in Merbok to Rahaz.

B Burwood's reply through their solicitors, Messrs Shook Lin & Bok (by letters dated 06.10.1999 and that dated 07.10.1999) denied that Burwood was in breach of the Shareholders Agreement as alleged.

C Rahaz then contended that the Japanese Shareholders' and Burwood's failure to sell their Merbok shares to them constitutes a further breach of the Shareholders' Agreement.

D On 17.12.1999 Rahaz commenced proceedings for specific performance of the Shareholders Agreement and other reliefs against the Japanese Shareholders and Burwood. As for Merbok, who was cited as 5th Defendant, no substantive cause of action was pleaded against them save in general terms, i.e., for an order that Merbok "*comply with such orders for specific performance as may be granted by the Court*".

E Rahaz's rests their claim on the following basis namely that they were the beneficial owner of 29,250,000 shares in the Merbok which was held by the following nominees: Arab Malaysian Nominees (Tempatan) Sdn Bhd 6,750,000 shares and

A Amsec Nominees (Tempatan) Sdn Bhd, 22,500,000 shares. Rahaz alleged as a shareholder holding 78.3%, and/or in any event more than 50% of the then issued ordinary shares in Merbok, their prior written consent was necessary in respect of the said Share Sale Transaction. Further or alternatively, Rahaz
B alleged, apart from itself, the Japanese Shareholders and Burwood, the consent of the other shareholders of Merbok whose shareholdings amounting to 8,100,000 ordinary shares was also required. In their reply to the defence filed by the Respondents, Rahaz's case was that Merbok was bound to recognize Rahaz's beneficial ownership of shares in Merbok. According to
C Rahaz the conversion of Merbok as a public company does not affect the Shareholders' Agreement and that Merbok was required to adopt a neutral stand in shareholders' disputes. Rahaz further alleged that Merbok's Managing Director was manipulating Merbok to serve the purposes of the Japanese Shareholders and Burwood. Be that as it may, this allegation of
D manipulation has not been particularized.

The Japanese Shareholders in their defence contended that Rahaz had no *locus standi* to commence this action against them, and did not have a reasonable cause of action as against them for the following reasons: there is no requirement to obtain
E Rahaz's consent as Rahaz is not a shareholder of Merbok. Alternatively, even Rahaz is accepted as a "shareholder" of Merbok, Rahaz's consent need not be obtained as the required

A consent from shareholders holding more than 50% of the then issued and outstanding shares in Merbok had already been obtained. The construction to be given to the words in Merbok in clause 6.1 read together with 6.1.2 of the Shareholders Agreement, was that the shareholding of parties involved in the transaction must be included in computing the required percentage and that such consent had been obtained. The Japanese Shareholders denied that they were in breach of clause 6.1 of the Shareholders Agreement and the question of remedying any breach, as well as automatic termination of the Shareholders Agreement as contended by Rahaz, did not arise. It was further pleaded the Share Sale Transaction had since been completed. Further, upon Merbok's conversion as a public company, clause 6.1 and 6.1.2 of the Shareholders Agreement no longer had any effect.

Burwood in its defence also pleaded that Rahaz had no cause of action against them. According to Burwood it was inaccurate to describe Rahaz as a "shareholder" of Merbok, and that Rahaz did not have *locus standi* to institute proceedings against them. It also took issue with Rahaz's interpretation of clause 6.1 of the Shareholders Agreement. Burwood's interpretation of clause 6.1 was that as pleaded by the Japanese shareholders, which that is computing the 50% consent requirement in clause 6.1, the shareholding of persons involved in the transaction must be included, and that in the circumstances of

A this case the requisite consent had been obtained. There was accordingly no breach of the Shareholders Agreement in relation to the Share Sale Transaction, to be remedied. The Shareholders Agreement accordingly did not terminate and Rahaz did not acquire the right to compulsorily acquire their shares. It was further pleaded that clauses 6.1 and 6.1.2 of the Shareholders Agreement no longer had effect in view of the Merbok's changed status as a public company.

Merbok's defence also raised the issue of Rahaz's locus standi to institute proceedings against them by reason of Rahaz not being a registered shareholder of Merbok. Merbok cannot refuse any share transfers presented to them. In view of Merbok's converted status as a public company with effect from 10.10.1996, all restrictions, limitations and prohibitions relating to the transfer of Merbok's shares ceased to apply.

D After filing their respective defence, Faston, AICA and Shintoa, had, vide Enclosures (57) and (58), Burwood vide Enclosure (52), whilst Merbok vide Enclosure (61), filed their respective applications to strike out the action against them pursuant to O. 18 r. 19 of the Rules of the High Court 1980 ("the Rules"). The Senior Assistant Registrar allowed all four striking out applications and struck out the Appellant's suit as against the respective Applicants. On appeal to the Judge-in Chambers vide Enclosures E (183), (184), (185) and (186) respectively, (which appeals were

A heard jointly on 26.11.2002) the High Court Judge affirmed the SAR's decision.

DECISION

B Our view on the preliminary issue raised by the Appellant's Counsel are these. The Appellant submitted that the Respondents, having entered an unconditional appearance and filed their respective defence, were precluded from filing an application to strike out under O.18 r. 19 (1) of the Rules. Reliance for this contention was placed on the Supreme Courts decision in *Alor Janggus Soon Seng Trading Sdn Bhd and others*
C *v Sey Hoe Sdn Bhd and others* [1995] 1 MLJ 241.

We are of the view that nothing turns on this point. O.18.r. 19 is explicit. The Court may strike out a pleading "*at any stage of the proceedings*". The decision of the Supreme Court in *Alor*
D *Janggus* was merely an *obiter dictum*, and therefore not binding on this court. This preliminary issue was devoid of merit and rightly rejected by the High Court Judge.

On the issues raised in arguments on the merits are as follows.

E Whether Rahaz is a "shareholder" of Merbok at the point of time of the alleged breach and at the commencement of proceedings?

A In making a considered decision on this issue the following provisions applies. A person is a member/shareholder of a company if his name is included in the company's register of members [section 16 (6)]. The register of members is *prima facie* evidence of the matters stated therein [section 158 (4)]. The memorandum and articles of association are binding on every member or shareholder of a company [section 33]. No notice of any trust shall be entered on a register of a company [section 163 (4)].

On the facts of this case, by Rahaz's own admission in their Statement of Claim, they are not a registered shareholder of Merbok, but only a beneficial owner of the 29,250,000 shares registered in the name of the specified nominees. Rahaz's argument was that "shareholder" must be construed to include a party who had pledged their shares. The Judge however held that such beneficial ownership cannot be taken into account. We agree. A beneficiary of shares, registered in the name of another as trustee, had no rights in such company. This conclusion is fortified by Article 6 of the Merbok's memorandum and articles which states:

"No person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or be required in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any other rights in respect of any share other than an

A absolute right to the entity thereof in the registered holder except only as by these Articles otherwise provided for or as by Act required or pursuant to any order of court."

If any of the party to the Shareholders Agreement no longer holds any ordinary shares in Merbok, that shareholder can no longer enforce the Agreement as the said Agreement would no longer have any effect vis-a-vis the said former shareholder. The Proviso to clause 8 states:

'provided however, that this Agreement shall cease to have effect as regards any Shareholder who ceases to hold any Ordinary Shares save for any provisions hereof which are expressed to continue in force thereafter'

In the case of Clause 6, the said provision does not provide that it shall remain in force in relation to former shareholders. Rahaz, as a former shareholder cannot enforce clause 6 of the Shareholders Agreement against any other party. The Judge was accordingly right in finding that the Shareholders Agreement ceased to have effect as against Rahaz.

The facts also shows that Rahaz has lost such beneficial rights in the shares upon which their claim is based soon after the commencement of this action. As at 8.9.2000, about ten (10) months after the date of the filing of the action, those shares had been registered in Kilang Bumi Aluminium Sdn Bhd ("Kilang Bumi"). Rahaz's attempt to question the transfer of the shares to

A Kilang Bumi was clearly not maintainable as all approvals had been obtained and the transfer of the shares to Kilang Bumi has been completed. Rahaz clearly no longer had any rights or claim on those shares upon which their claim rests.

B To conclude on this issue, we are of the view that the High Court Judge was, in considering clauses 3, 6 and clause 7.10 of the Shareholders Agreement, right in ruling that the word "shareholder" means a "registered shareholder" and in ruling that Rahaz is not entitled to exercise any rights under the Shareholders Agreement.

C Merbok's converted status as a public company

D Merbok was not a party to the Shareholders' Agreement and is not bound by the terms and conditions of the same. Rahaz clearly does have any cause of action against Merbok arising from the alleged breach, and for this reason, has not pleaded any substantive cause of action against Merbok, nor did they seek any substantive relief against Merbok.

E By reason of Merbok's converted status as a public company effective 10.10.1996, the following provisions were applicable. Section 15(1)(a) provides for the restriction on transfer of shares of a private company. Section 26(2) provides that when a company converts to a public company, all restrictions, limitations

A or prohibitions under section 15(1) ceases to form part of the memorandum and articles of association of the company. Thus, there clearly can be no restriction on the transfer of shares of Merbok upon its conversion as a public company by reason of sections 15 and 26, and accordingly clause 6 of the Shareholders' Agreement can no longer have any effect. Merbok, as a public company, is obliged to effect any transfer of shares lawfully obtained and presented to it.

We are of the view that the inclusion of Merbuk as a party to this action was clearly an abuse of the process of Court and the suit against Merbok rightly struck out.

Meaning of the phrase “the prior written consent of the Shareholders holding more than fifty per cent (50%) of the then issued outstanding ordinary shares” in clause 6.1 of the Shareholders Agreement

The Judge rejected Rahaz’s argument that the shareholdings of shareholders involved in the transaction must be excluded in computing the required percentage in clause 6.1.

We agree with this finding of the learned Judge. The interpretation suggested by Rahaz would result in the absurd situation where infinitesimal minority shareholders of Merbok could hold 99.8% of the preponderant overwhelming majority

A shareholders at ransom where, for example, 99.8% of
shareholders were involved in a share transaction, thus excluding
their votes from the percentage of votes (50%). The phrase “the
prior written consent of the Shareholders holding more than fifty per
cent (50%) of the then issued outstanding ordinary shares” in
B clause 6.1 must necessarily be construed to mean 50% of the total
shareholdings of Merbok, and not that as interpreted by Rahaz.

On Rahaz Counsel’s suggestion that due to divergent
interpretation, this constituted an arguable issue and oral evidence
being necessary to ascertain the intention of parties, reading the
C Shareholders Agreement as a whole, effect must be given to
clause 11.6. The intention of the parties to the Shareholders
Agreement is clear and no extraneous evidence is to be adduced
in the interpretation of the Shareholders Agreement. As oral
evidence has been expressly excluded, we are in agreement with
the learned Judge that this was not a basis warranting a trial.

D The correct principles for striking out had been applied by
both the SAR and the Judge. It is plain and obvious that the
Rahaz’s claim against all of the Respondents was futile and
doomed to failure. The SAR was right in allowing all of the striking
out applications, and the High Court Judge was also right in
E dismissing the corresponding appeals with costs.

A The appeals were accordingly dismissed with costs. The deposit to the respective Respondent to account of taxed costs.

B

ZALEHA ZAHARI
Judge
Court of Appeal
Malaysia

Dated: 10.4.2009

Note:

- C For the Appellant in all four appeals ... En. Firoz Hussein b. Ahmad
Jamaluddin
(Dato' Dominic Putucheary & Cheng
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- D For the Respondent in ... En. Lambert Rasa-Ratnam
Appeal No. W-03-03-03 (En Gan Khong Aik and En. Thuang
and Appeal No. Kah See with him) ,
W 03-02-03 Tetuan Lee Hishammuddin Allen &
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- E

- A For the Respondent in ... En. Tommy Thomas
Appeal No. W-03-04-03 (En. Alan Gomes with him)
Tetuan Tommy Thomas,
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- B For the Respondent in ... En. Balvinder Singh Kenith,
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