IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 02(f)-45-07-2016(W)

BETWEEN

RINOTA CONSTRUCTION SDN BHD … **Appellant/ Petitioner**

AND

1. **MASCON RINOTA SDN BHD** … **Respondents**
2. **MASCON SDN BHD**
3. **OLYMPIA INDUSTRIES BHD**
4. **DATO' YAP YONG SEONG**
5. **YAP WEE KEAAT**
6. **MASCON CONSTRUCTION SDN BHD**

Coram: Zulkefli bin Ahmad Makinudin, PCA
Suriyadi Halim Omar, FCJ
Ramly bin Hj. Ali, FCJ
Balia Yusof bin Hj. Wahi, FCJ
Jeffrey Tan Kok Wha, FCJ

JUDGMENT OF THE COURT

Introduction

1. This is an appeal by the Appellant against the decision of the Court of Appeal in allowing the appeal by the Respondents against the decision of the High Court. The Appellant was the Petitioner in

the section 181 Petition of the Companies Act 1965 at the High Court and the Respondents in the present appeal were the Respondents. We shall refer to the respective parties as they were before the High Court.

2. The The learned High Court judge allowed the Petitioner's section 181 Petition and made the following orders:

(a) An order that the 2nd, 4th, 5th, 6th and 7th Respondents jointly and severally purchase the shares owned by the Petitioner in the Company at such price and terms determined by the Court; after making all necessary adjustments to the accounts of the Company to compensate for the acts and oppression of the Respondents;

(b) An order that the 2nd and 4th Respondent pay, or cause its subsidiaries or associated companies to pay the 1st Respondent all debts owed to it by the 2nd and 4th Respondent or its subsidiaries or associated companies in connection to the lease agreement and loans extended to the undisclosed "*fellow subsidiaries*";

(c) An order that a certified public accountant be appointed to inspect the accounts of the 1st Respondent for the period beginning June 1995 to the date of this order, and to report to this Honourable Court of the results of the inspection.

3. On appeal, the Respondents' appeal was allowed with costs. The orders of the High Court judge were set aside.

Questions of Law

4. This Court had granted the Petitioner leave to appeal on 21.6.2016 on the following questions of law:

i. *Whether in the circumstances of this case, the Applicant's only remedy lay in a derivative action in the name of the 1st Respondent Company to the exclusion of any remedy for minority oppression under section 181 of the Companies Act?*

ii. *Whether in the circumstances of this case, the reflective loss principle had any application?*

Background Facts

5. (1) The Petitioner ["Rinota Construction Sdn Bhd"] and the 2nd Respondent ["Mascon Sdn Bhd"] had in early 1995 agreed to carry out construction business through a joint-venture company, the 1st Respondent (Mascon Rinota Sdn Bhd) ["the Company"].

(2) The Petitioner and the 2nd Respondent contributed RM200,000 and RM300,000 respectively to the issued and paid-up capital of the Company.

(3) There was however no written "*Shareholders Agreement*" or "J*oint Venture Agreemet"* entered into by the parties. Accordingly the relationship between the shareholders *inter se* and the operations of the Company were solely dictated by the Company Memorandum and Articles of Association.

(4) The 2nd Respondent is a subsidiary of the 3rd Respondent ["Olympia Industries Bhd"]. The 3rd Respondent holds 71% of the equity of the 2nd Respondent. The controlling shareholders of the 3rd Respondent are the 4th Respondent ["Dato' Yap Yong Seong, his son the 5th Respondent ["Yap Wee Keat"] and other family members.

(5) The 3rd Respondent has other wholly owned subsidiaries that is Jupiter Securities Sdn. Bhd. (Jupiter), Olympia Leisure Sdn. Bhd. (Olympia Leisure) and Olympia Land Berhad (Olympia Land). The 6th Respondent ["Mascon Construction Sdn Bhd"] is a wholly owned subsidiary of the 2nd Respondent.

(6) At all material times the 2nd Respondent remains as the controlling shareholder of the Company. The particulars of the Board of Directors of the Company are as follows:

(a) The 5th Respondent (nominated by the 2nd Respondent);

(b) Ng Chee Hua (nominated by the 2nd Respondent);

(c) Ng Poh Hwa (nominated by the 2nd Respondent);

(d) Richard Tankersley (nominated by the Petitioner); and

(e) Lau Luen Wah (nominated by the Petitioner).

(7) Sometime in 1995, Ng Kwee Ying (f) replaced Lau Luen Wah as the Petitioner's second nominee on the Board of the Company. Subsequently Ng Chee Hua and Ng Poh Hwa both resigned from the board on 1st July 1996, and were replaced by Yeoh Sek Phin as a Director nominated by the 2nd Respondent.

(8) The 5th Respondent resigned from the board on 6.9.1999. Richard Tankersley, Ng Kwee Ying and Yeoh Sek Phin remained as the Directors of the Company.

(9) On 1.11.1995, Yeoh Sek Phin was appointed as Executive Director of the 2nd Respondent and also took over as Director in charge of the Company. Richard Tankersley is the Managing Director and controlling shareholder of the Petitioner.

(10) It was agreed between the 5th Respondent and Richard Tankersley that the Company would be given the opportunity to carry out a minimum of five projects on a negotiated managing contractor cost plus basis to be provided by the Olympia group, namely:

(i) Casa Lago Condominium project;

(ii) the Harbour Club project;

(iii) the Hyatt Hotel (Malacca) project;

(iv) two more proposed blocks of condominiums immediately adjacent to the Casa Lago project; and

(v) a minimum of one tower block at Olympia's project site in Sentul, Kuala Lumpur.

(11) It was also agreed that the Petitioner and Richard Tankersley would participate actively in the project. It was further agreed by the Parties that the 3rd Respondent would provide the budget for each project and that the contracts would be negotiated within the project budgets on a managing contractor cost plus basis.

(12) In consideration of the aforesaid agreements, the Petitioner agreed to take a minority stake in the Company. The Parties agreed that from the commencement of the business of the Company, Richard Tankersley would initially act as the Director supervising the Project Manager. The 2nd Respondent would be in charge of the administration and finance of the Company.

(13) On the basis of the above understandings, the Company was duly incorporated.

(14) In 1995, the Casa Lago and the Harbour Club projects was awarded to the Company by Olympia Land Berhad (OLB). The said development was completed in December 1996. The Final

Accounts related to the two said projects for OLB were signed of in January 1999.

(15) The main complaint raised by the Petitioner could be summarised as follows:

i) The non-award of further "*negotiated construction contracts*" allegedly expected by the Company, and

ii) Those financial or accounting discrepancies which arguably meant that the Audited Annual Accounts of the Company as drawn up did not reflect the true value of or the proper financial state of the Company.

(16) In 2006, the Petitioner filed a section 181 Petition. The Petitioner's cause of action alleges oppression by the majority shareholders of the minority shareholders' interest. The Petitioner sought the following reliefs:

i) An order that the 2nd to 7th Respondents do jointly and severally purchase the shares owned by the Petitioner in the Company at such price and terms determined by the Court; after making all necessary adjustments to the accounts of the Company to compensate for the acts and oppression of the Respondents;

(ii) An order that the 2nd and 4th Respondents pay, or cause its subsidiaries or associated companies to pay the 1st Respondent all debts owed to it by the 2nd and 4th

Respondents or its subsidiaries or associated companies in connection to the lease agreement and loans extended to the undisclosed "*fellow subsidiaries*"; and

(iii) An order that a certified public accountant be appointed to inspect the accounts of the 1st Respondent for the period beginning June 1995 to the date of this order, and to report to the Court of the results of the inspection.

Proceedings in the High Court

6. The learned High Court Judge allowed the Petitioner's section 181 Petition. In Her Ladyship's judgment she alluded that the acts of the respective Respondents have unfairly discriminated and are prejudicial to the Petitioner as a member and shareholder of the Company. The affairs of the Company were conducted in an oppressive manner adversely affecting the financial interest of the Petitioner.

7. The learned High Court Judge accepted the Petitioner's version of the oppressive conduct as the reasonable, credible and probable version, on the ground that it is cogently supported by both oral and documentary evidence. Her Ladyship found that the evidence adduced for the Respondents were self-destructive and clearly contradicts their own contemporaneous documents and oral evidence.

8. The learned High Court Judge found the following to be oppressive conduct, namely:

a. Olympia Group/2nd Respondent taking over the 1st Respondent's ("the Company") construction equipment and using it in their own projects without paying commercial rental to the Company;

b. unauthorized disposal of the principle assets of the Company without consent or knowledge of the Petitioner or its directors on the Company's Board;

c. the accounting treatment of the construction equipment whereby the 2nd Respondent claimed beneficial ownership of the whole of the same by virtue of having paid the third to fifth years of the lease instalments (roughly 3/5th of same, the remaining 2/5th having been paid by the Company); while at the same time debiting back to the Company (without the knowledge of the Petitioner) all these instalment payments without giving credit in the form of commercial rental for the use by the 2nd Respondent of the equipment and thereby putting the Company into what appears to be a heavily insolvent position;

d. discrimination in charging of interest on moneys owing by the Company to the 2nd Respondent (including the instalment payments) while no interest was claimed on behalf of the Company for moneys owing to it by other subsidiaries;

e. completely ignoring all the Petitioner's legitimate complaints;

f. the accounting treatment of the Company whereby debit notes were continuously raised by the 2nd Respondent against the Company without the knowledge of the Petitioner or their representatives in the Board of the Company and without any independent acknowledgment for or on behalf of the Company ;

g. using their control over the Company as contractor and Olympia Land Bhd as employer in respect of the contracts for the Casa Lago and Harbour Club projects to deprive the Company of cash flow to which they were entitled;

h. disregard by the controllers of the Company of the agreement and/or understanding arising from the discussions which led to the formation of the Company and disregard of the legitimate expectations of the Petitioner arising from the same; and

i. having formed the Company as a subsidiary of the 2nd Respondent operating in the same class of business, failing in its obligation to deal fairly with the Company and in adopting a policy of leaving the Company to die.

Proceedings in the Court of Appeal

9. Aggrieved by the High Court decision the Respondents appealed to the Court of Appeal. The Court of Appeal allowed the Respondents' appeal.

10. The issues which arose before the Court of Appeal were:

(i) whether the given facts amounted to *'oppressive acts*' or '*conduct in disregard*' to the Petitioner's interest such as would be sufficient to warrant the granting of any relief under s. 181 of the Companies Act 1965; and

(ii) Whether the existence of those facts *ipso facto* meant that the remedies under s. 181 Companies Act 1965 should be granted to the Petitioner as was done by the High Court.

11. The Court of Appeal found that there was no legal or sustainable basis for the exercise of the court's discretion under s. 181 of the Companies Act, to allow the Petition and make the orders for a reassessment of the company's financial records/state and thereafter for a buyout of the Petitioner's shares in the company by the 2nd, 4th, 5th, 6th, and 7th Respondents. The Court of Appeal *inter alia* held that:

i. The question of delay in filing the Petition was of paramount importance in any consideration of the exercise of the court's discretion under s. 181 of the Companies Act. Herein, this Petition was only filed in 2006, *i.e.* ten years after those

matters complained of had first occurred. Acting without expediency to protect or further one's rights when an alleged breach or violation of such right arose amounted to acquiescence, meaning acceptance or consent to that situation. The court should deny relief to an interested party who had sat on his rights and accepted tacitly such practices or decisions adopted by a company in its business affairs over time, but who now wished to advance matters related to or arising therefrom as a grievance for relief under s. 181 of the Companies Act. [**See page 11 of the Court of Appeal Grounds of Judgment**].

ii. The Petitioner *qua* shareholder of the company was seeking for a buyout of the Petitioner's shares by, not just the 2nd Respondent, but others who were not members of the company. It was trite that relief to be allowed under s. 181 of the Companies Act was discretionary to be determined by the court upon equitable principles, inclusive of the conduct of the parties taken in its totality. The Petitioner here was also restricting the relief that was being sought to a forced buyout of their shares in the company which, admittedly for all intents and purposes, was a dormant entity as at the date the Petition was filed. [**See pages 11 & 12 of the Court of Appeal Grounds of Judgment**].

iii. There is a well-established principle in corporate law that bars a shareholder from directly bringing or relying on

'*losses*' of the company to seek relief for himself unless by way of derivative action. This was known as the *'reflective loss principle*'. The principle applied where the shareholder's alleged loss was merely a reflection of the company's loss, such as where the shareholder's loss was a diminution in the value of his shares as a result of those alleged wrong to the company. In such situations, recovery by the shareholder of the loss he suffered was precluded, as this would mean making the wrongdoer liable for the same wrong twice over. **[See pages 17 & 18 of the Court of Appeal Grounds of Judgment**]

iv. The recourses available to the Petitioner having such complaints (of loss caused to the company) was by way of derivative action brought under s. 181A of the Companies Act to recover first monies due to the company and/or effect appropriate corrections to the company's financial statements. Another avenue that was open to the Petitioner was to go for outright winding up of the company on just and equitable grounds. In the latter event, the liquidator is empowered to examine the company's account, investigate wrong doings, rectify errors in accounting and even bring needful proceedings against those that had caused the '*losses*' to the company (ss. 300, 303, 304, 305 and 306 of the Companies Act) including recovery action against delinquent officers or shareholders of the company. [**See page 20 of the Court of Appeal Grounds of Judgment**].

Decision of this Court

12. At the outset we would like to state that it is quite clear from the Court of Appeal's Grounds of Judgment that the Court of Appeal made no attempt to scrutinize the findings of fact made by the High Court Judge. The Court of Appeal failed to carry out the required analysis and the test laid down by established principles and case authorities as being necessary before a Court of Appeal as an appellate court can reverse the findings of fact of a High Court Judge who had the benefit of hearing the oral testimony of the witnesses. [**See the case of Gan Yook Chin v. Lee Ing Chai (2005) 2 MLJ 1**]. On the contrary the Court of Appeal's Judges in the present case were contented to rely on the delay point and the derivative action point which in their view made it unnecessary to go any further.

13. We are of the view since the Court of Appeal was moved to intervene basically only on the two grounds and in the absence of any attempt by the Court of Appeal to critically analyse and then overrule the High Court Judge's findings of fact, we take the position that there is no burden on the Petitioner to reopen and justify these findings. It is our considered view that the Court of Appeal had wrongly applied their powers of appellate intervention in reversing the finding of facts of the High Court. In the circumstances we will deal with only the two issues of the delay point and the derivative action point as raised and dealt with by the Court of Appeal.

The Delay Point

14. We are of the view the Court of Appeal have wrongly held that there was acquiescence as well as delay by the Petitioner in bringing the Petition where there was no evidence of acquiescence and where the evidence showed that the Petitioner had persistently pursued its claims and received no answers from the Respondents.

15. It is also to be noted that this issue of delay was never raised in the affidavits or submissions of parties until after the completion of the trial. The issue was also never put in cross-examination to the Petitioner's witness by the Respondents. In fact the Petitioner's main witness, Mr. Richard Tankersley had written a total of 10 letters to the Respondents setting out in detail the substance of his complaints and these covered the entire period from 18.12.1997 to 30.3.2005. These letters showed clearly and positively that there was never any acquiescence. A reply from the Respondents to the Petitioner on the complaints made was merely for the Petitioner to be patient and wait while they look into the complaints.

16. It is our considered view that the minority oppression petition is an equitable remedy and equitable defences as distinguished from legal defences have to be considered. Mere delay without acquiescence is not a defence in equity. [**See the case of Fitzerald v. Masters (1956) 5 CLR 420 at 433**].

17. It is always a question of fact in each case whether inferences can be drawn of release or waiver of the claim. On the evidence in the present case, it is clear that there was never any conduct of the Petitioner which could amount to waiver. There is positive evidence that there was no waiver or acquiescence.

The Derivative Action Point

18. We shall now deal with the derivative action point. The derivative action and the minority oppression petition are not mutually exclusive and there may be circumstances which give rise to both a derivative action and an oppression proceeding, but they remain distinct remedies with separate rationales and statutory functions. [**See the case of Kok Jui Hiong v. Kit Tak Sang (2014) 2 CLJ 401**].

19. The essential difference between the derivative action and the minority oppression petition is that:

(a) a minority oppression petition deals with action by the minority shareholder of a company against the majority controllers where the company cannot be the petitioner and is only a nominal defendant;
(b) by contrast a derivative action is brought by a minority shareholder for and on behalf of the company to deal with wrongs done to the company and for the benefit of the company e.g. to recover for the company assets which may have been unlawfully siphoned off from the company.

20. The Petitioner's claims in this petition relate to the oppressive conduct of the Respondents who have benefitted as the majority shareholder to the detriment of the Petitioner as the minority shareholder. We agree with the submission of learned counsel for the Petitioner that the claims have all the hallmarks of a minority oppression petition and none of the hallmarks of a derivative action for the following reasons:

(a) The wrongful conduct in this case does not affect all the shareholders equally. They benefit the majority shareholder and its affiliates at the expense of the minority shareholder;

(b) In a derivative action, the relief is sought on behalf of a company for the benefit of that company e.g. to return to that company funds misappropriated by third parties. This is not the case here where the Petitioner is seeking compensation for assets misappropriated by the majority shareholders.

(c) There is a personal element i.e. the Petitioner's personal interest as minority shareholder is uniquely and directly affected by the alleged wrongful conduct.

(d) A derivative action would serve no purpose for the Petitioner since it could only seek to restore benefits to the joint venture company.

21. On the "*reflective loss*" principle as raised by the Court of Appeal in their Judgment we are of the view that this principle can

have no application to this case where there is no claim by the Company. The reflective loss principle only applies when a company suffers loss caused by the breach of duty owed both to the Company and the shareholder. On this point in the case of **Johnson v. Gore Wood & Co. [2002] 2 AC 1** at page 62 it had this to say:

> "*In such a case the shareholders loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the Company and its creditors and other shareholders. Neither course can be permitted.*"

22. We are also of the view that the "*reflective loss*" principle has absolutely no application in a minority oppression petition where the diminution in value of the minority share can be attributed as in this case to the oppressive conduct of the majority shareholders and its affiliates. The loss is not a loss in respect of which the 1st Respondent's company has a claim of its own and there is no question of double recovery.

Conclusion

23. For the reasons abovestated we allow this appeal by the Petitioner with costs here and below. We answer both the Questions posed in this Appeal in the negative. The decision and orders of the

Court of Appeal are hereby set aside. We affirm the decision of the High Court and orders made by the High Court are restored. Deposit is to be refunded to the Petitioner.

(ZULKEFLI BIN AHMAD MAKINUDIN)
President
Court of Appeal

Dated: 9th November 2017

Counsel for the Appellant

Dato' WSW Davidson, Karen Ng Yueh Ying and Kenny Chan Yew Hoong

Solicitors for the Appellant

Messrs. Azman Davidson & Co.

Counsel for the Respondents

Porres Royan and Prem Ramachandran

Solicitors for the Respondents

Messrs. Kumar Partnership