DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO: 02(f)-31-04/2019(B)

SUMMARY OF DECISION

[1] The appeal before us relates to the issue involving a body incorporated under **Menteri Besar Selangor (Incorporation) Enactment 1994** (MBI Enactment).

[2] The plaintiff is a body incorporated under the MBI Enactment and is known as Menteri Besar Selangor (Pemerbadanan). The defendants were former employees of the plaintiff employed under their respective contracts of employment.

[3] The plaintiff claims its Board of Directors (BOD) constituted the Menteri Besar Selangor, the State Secretary and the State Financial Officer. The then Menteri Besar of Selangor, Tan Sri Dato' Seri Abdul Ibrahim (TSKI), also the former Menteri Besar Selangor (Pemerbadanan) had approved VSS payments by the plaintiff without the approval of its BOD in the sum of RM2,713,590.00 to be paid to the defendants under a Voluntary Separation Scheme (VSS Payments).

[4] The VSS Payments were paid and received by all the defendants.

[5] The plaintiff which is the current Menteri Besar (Pemerbadanan) initiated these proceedings in the High Court against all the defendants to recover the VSS Payments received by them, pleading that they were unlawful payments. The alleged unlawfulness was predicated on the fact that;

i. TSKI had approved the payment without the approval of the plaintiff's BOD;

ii. The allegation of conspiracy against the first defendant and the second defendant in order to injure the plaintiff in making that unauthorized and unapproved payment to the other defendants; and

iii. In conspiring to injure the plaintiff, the first defendant and second defendant were said to have breached their fiduciary duties to the plaintiff which resulted in an unjust enrichment to each of the defendants.

[6] In response, the defendants contended that TSKI was then a statutory corporation sole constituted in a single person pursuant to the

MBI Enactment. As a corporation sole, it was within the powers of TSKI as conferred by section 4 of the MBI Enactment, to approve the VSS Payments without the need to obtain prior approval of the BOD.

[7] After a full trial, the High Court found favour with the defendants' case and dismissed the plaintiff's claim. Essentially the learned trial Judge agreed that:

(1) the plaintiff is a corporation sole created by the MBI Enactment and it is not governed by a BOD because there is no provision in the MBI Enactment requiring so;

(2) On the conspiracy allegation, the High Court held that since the object of payment was lawful and it was not brought about by unlawful means, the allegation of conspiracy failed; and

(3) The attempt by the plaintiff to argue that there was interference with the terms of the employment contract by TSKI in approving the VSS Payments because there was no VSS terms, was dismissed for want of pleadings.

[8] The Court of Appeal agreed with the High Court that the plaintiff is a corporation sole and that there is no express requirement in law wanting any approval by BOD. That notwithstanding it found:

i. that a BOD did exist in the plaintiff;

ii. the existence was not denied by TSKI;

iii. that past records showed that decisions of the plaintiff were always made upon approval of the BOD, except for the VSS Payments; and

Finally it held and found that good governance, accountability and corporate governance dictated that TSKI must obtain the approval of BOD, the existence of which he had already acknowledged.

[9] Against that decision, four following questions of law were brought before us, which we will deal with, in turns.

Question 1

Whether Menteri Besar Selangor (Pemerbadanan) (MBI), the plaintiff that was established by the Menteri Besar Selangor (Incorporation) Enactment 1994 is in law a corporation sole or corporate aggregate?

[10] A point to note on this question is that the plaintiff in its submission did not dispute that it is a corporation sole created under the MBI Enactment. It is therefore not disputed that the plaintiff is a body corporate

qua corporation sole. So too were the findings of both the courts below. In that light, Question One posed is indeed superfluous.

[11] In any event, in reliance on the authorities cited by the defendants, it is plainly clear that the Menteri Besar Selangor (Pemerbadanan) established by the MBI Enactment is in law a corporation sole and not a corporation aggregate.

[12] We have however perused through the authorities cited on the meaning and definition of a corporation sole. These include the MB Encatment itself, the **Halsbury's Laws** (5th edn, 2010) Vol. 24 on Corporation which explained corporation sole as "a body politic having perpetual succession, constituted in a single person, who has capacity to undertake various functions in right of some office or function, has a capacity to undertake various functions . W Blackstone, **Commentaries on the Law of England in Four Books** (Vol. 1 Philadelphia J B Lippincott Company 1893), at page 469 described corporation sole as a body "consisting of only one person and his successors, in some particular situation are incorporated by law in order to give them some legal capacities and advantages particularly that of perpetuity, which in their natural persons could not have had." Echoing a similar stance, J W Salmond and P J Fitzgerald in **Salmond on Jurisprudence** (12th edn,

Sweet & Maxwell 1966) shared the same view of a corporation sole, as an incorporated series of successive persons which only has one member at a time.

[13] Cases below cited by the counsel for the defendants in his written submissions will further illustrate the distinction between the two types of corporation.

i. The English case of **Daimler Company Limited v Continental Tyre and Rubber Company (Great Britain) Limited** [1916] 2 AC 307;

ii. The case of **The Overseers of the Poor, of the City of Boston v David Sears** 39 Mass. 122 cited Blackstone's;

iii. The United States case of **In re Roman Catholic Church of the Archdiocese of Santa Fe**, 2020 Bankr. LEXIS 3511, expressed itself on the notable difference in these terms; and

iv. **Hubbard Association of Scientologists International v The Attorney General for The State of Victoria** [1976] Vic Rp 10, the Supreme Court of Victoria, Australia made the

distinction between the two types of corporation by referring to “Grant on Corporations” (published in 1850).

v. The Supreme Court of New South Wales said the same in **Archbishop of Perth v 'AA' to 'JC' Inclusive; 'DJ' and Ors v Trustees of Christian Brothers and Ors** BC9501687. The High Court of Australia in **Crouch v Commissioner for Railways (Qld)** (1985) 62 ALR 1 made its observation on the subject that “**a corporation sole has two capacities, that of the natural person and that of the corporation.**” Adding its observation further, it was stated that a particular incumbent of the office, for so long as he or she holds it, is clothed by the law with the personality, powers and functions of the corporate entity.

vi. The same position was taken by the Supreme Court of India in **S Govinda Menon v The Union of India & Anor LNIND** [1967] SC 33 and **The Board of Trustees, Ayurvedic Andunani Tibia College, Delhi vs The State of Delhi And Anor LNIND** [1961] SC 337.

vii. Nearer home, in **State of Johor and Another v Tunku Alam Shah ibni Tunku Abdul Rahman and Others** [2005] SGHC 156, the High Court of Singapore found the bequest of Tyersall in that case as "State property" did not offend rules against perpetuities because it is a bequest to a corporation sole. That finding was made by referring to the Black's Law Dictionary which defines corporation sole as a successive person holding an office as continued legal person.

[14] The case of **Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Ors** [1998] 5 MLJ 129 cited by the plaintiff in support is not on point. In that case it was held that Menteri Besar sitting alone was not an Exco decision under the State Constitution and cannot bind the Exco. We agree that is the correct proposition of law relating to Menteri Besar's power under the State Constitution of Johore. It is not relevant for our consideration because we are not deciding on the power of Menteri Besar under the State Constitution here.

[15] The Malaysian courts have been consistent in applying the distinction between a corporation sole and a body corporate. The Court of Appeal in **Badan Peguam Malaysia v Louis Edward Van Buerle** [2006] 1 MLJ 21 held and found the Malaysian Bar to be a corporate aggregate.

In our view, the strikingly obvious distinction as stated earlier is that one cannot be a corporation sole on one hand but at the same time operate as if it were a corporation aggregate.

[16] With respect, the Court of Appeal had erred, when it accepted the plaintiff as a corporation sole but yet imposed the requirement of accountability in the same manner as a corporation aggregate.

[17] The next issue raised in both Question 2 and Question 3 will be taken together in this discussion. They are as posed below:

> **Question 2**
>
> If MBI is a corporation sole, whether the Menteri Besar at the material time is empowered to enter into contracts in the name and on behalf of MBI in his sole discretion?
>
> **Question 3**
>
> Whether MBI's 'Board of Directors' that is not established under the Menteri Besar Selangor (Incorporation) Enactment 1994 can fetter the powers of the Menteri Besar at the material time.

[18] Despite the position taken by the plaintiff that, it is indeed a corporation sole, it nevertheless contended that the approval of BOD is required since the BOD did in fact existed in the plaintiff. The plaintiff further relied on the principle of corporate governance and accountability to necessitate the approval of the BOD in any decision making by the plaintiff.

[19] The line of argument adopted by the plaintiff defies the definition and characteristic of a corporation sole. The common thread running through all the above definitions is clear, that a corporation sole is a body politic constituted one member. It can sue and be sued and exists in perpetuity, which currently takes the form of a statute creation, just like the plaintiff. The underlying objective is to create a perpetual existence of the incorporation, which a Menteri Besar, does not possess.

[20] To suggest that a corporation sole is legally bound to account to a BOD does no accord with the characteristic and definition. There was no legal authority by plaintiff to support that contention. The legal question in fact turns upon whether the incorporating law of the plaintiff imposes any duty on the plaintiff to be governed by any other body. A perusal of the MBI Enactment shows that there was nothing in that short Enactment requiring so.

[21] No doubt from the facts in this appeal, the BOD's approval may have formed part of the organizational practice of the plaintiff. The Court of Appeal in our view had also erred in finding that the plaintiff had always obtained BOD approvals on all matters except the VSS Payments. The evidence of TSKI that as a Menteri Besar (Pemerbadanan) he often approved donations and grants to bodies such as the Football Association and under Geran Selangorku on his own, was not considered by the Court of Appeal.

[22] Since there is no requirement in MB Enactment or any other law mandating the plaintiff to be governed by a BOD, the failure to obtain sanction of the BOD cannot be said to be a decision in breach of law or statute so as to render that decision unlawful. The plaintiff had therefore failed to establish that the approval of VSS Payments was unlawful.

[23] The principle of legal interpretation is trite. It is not the function and duty of a Court to read into the law, visibly missing provisions into the legislation. For this we have referred this Court's decision in K**uala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v Transport Workers' Union** [1971] 1 MLJ 102 and all other cases cited before us

which held that, the powers and duties of an authority or body established under a statute, are contained in the statute itself without more.

[24] The Court is duty bound to give effect to the intent and object of the legislature in the exercise of interpreting a statute. If the intention of the Selangor State Legislature was to make it mandatory for the plaintiff to be governed by a BOD, it would not be difficult for such provision to be enacted clearly in the MBI Enactment, as is done in other incorporating statutes. In this we have also perused through the other State Legislatures in Malaysia having been conferred with the legislative power by the Incorporation (State Legislatures Competency) Act 1962, had enacted the incorporation of Menteri Besar or Chief Ministers respectively and “transform” him into a body corporate.

[25] Almost all the State enactments employed similar mode and had created this type of corporation with a similar undertone. Except for the state of Pahang, the person incorporated is the State Secretary and not the Menteri Besar.

[26] The Federal Parliament too had incorporated a corporation of similar nature by enacting the Minister of Finance (Incorporation) Act 1957

and creating the person holding the post of Minister of Finance as Minister of Finance Incorporated as a body corporate.

[27] By comparison, unlike the MBI Enactment, the Chief Minister Malacca (Incorporation) Enactment 1993 and the Kelantan Menteri Besar Incorporation Enactment 1950 provide for creation of committees which the MB Enactment in this case does not.

[28] The legal position of a corporation sole differs from a corporation aggregate such as a company under the Companies Act 2016. Section 211, of the Companies Act makes it mandatory that “The business and affairs of a company shall be managed by, or under the direction of the Board.” Whereas the MBI Enactment is the plaintiff's charter, which defines its powers and duties and any limitation of the powers conferred can only be discerned from the incorporating statutes.

[29] In arriving at this conclusion, we are not for a moment rejecting the principle of accountability as applied by the Court of Appeal. It is no doubt a profound principle to uphold in the exercise of powers of an authority. However, we are here to determine the issue of unlawfulness, tasked with a duty to interpret the MBI Enactment, relying on settled principle we have alluded to earlier. The State Legislature in its wisdom did not see the need

to make the plaintiff accountable in law. That said, the State Legislature or the State Government of Selangor may have some other ways of making the plaintiff accountable in its action to the State Government.

[30] In answering Question 2 therefore, we are of the view that at the material time, TSKI was legally empowered to approve the VSS Payments under the MBI Enactment on his own, without the need for approval of the BOD. Hence that question must be answered in the affirmative.

[31] It follows that Question 3 should be answered in the negative. There is no fetter imposed by law on the plaintiff pursuant to the MBI Enactment. Thus, notwithstanding the creation of the BOD purportedly supervising the plaintiff, it cannot change the plaintiff's legal status.

[32] We now come to the next question, which is Question 4.

Question 4

Whether employees of MBI acting under the instructions of Menteri Besar at the material time can be held liable for breach of trust and/or breach of fiduciary duty to MBI's board of directors?

[33] The facts revealed that the first and second defendants were acting under the direction of TSKI as Menteri Besar. They were not the ones who orchestrated the payment. The third to eighth defendants were merely recipients of the VSS Payments on the termination and cessation of their employment with the plaintiff. Not a scintilla of evidence was produced to suggest that these other defendants played any role in the process to have the VSS Payments approved.

[34] The role played by the first and second defendants cannot by any stretch of imagination be in support of the conspiracy alleged against them. We are in complete agreement with the High Court in its finding that it would be difficult to construe the writing of the memos to TSKI as acts of conspiracy. There was nothing else shown to link the other defendants to the alleged conspiracy. The plaintiff had failed to establish how these defendants had breached the trust or fiduciary duties to the plaintiff.

[35] To sum up, we agree with the defendants that the plaintiff is a corporate sole incorporated as Menteri Besar (Pemerbadanan). The Menteri Besar then TSKI's powers pursuant to the MBI Enactment is not fettered and not subjected to the BOD. The plaintiff had failed to establish the alleged conspiracy against the defendants. In the result, the plaintiff had failed to mount a case that the VSS Payments are unlawful.

[36] For all the reasons stated, the appeal by the defendants is unanimously allowed with costs. The Order of the Court of Appeal is set aside and the Order of the High Court is hereby reinstated.

ROHANA YUSUF
President of the Court of Appeal

Dated: 19th April 2021