DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN
[GUAMAN SIVIL NO: MT1-22-390-1999]

ANTARA

CHOI CHI HONG **... PLAINTIF**

DAN

1. KIM DONG BAE
2. APM CORPORATION SDN BHD **... DEFENDAN-DEFENDAN**

CONTRACT: *Shareholders' agreement - Validity - Terms and effect of agreement - Whether agreement valid*

COMPANIES AND CORPORATIONS: *Shares - Ownership of shares - Whether plaintiff paid for his 45% shareholding in company - Whether forfeiture of plaintiff's shares in company valid - Whether plaintiff entitled to full and frank disclosure of all company accounts*

COMPANIES AND CORPORATIONS: *Directors - Removal - Whether removal of plaintiff as company director valid - Whether plaintiff received notice of Extraordinary General Meeting and attended meeting - Whether plaintiff given right to be heard at Extraordinary General Meeting*

Held (allowing plaintiff's claim in para 10 (a) - (k) with costs.)

Case(s) referred to:

Tay Choo Foo v. Harrisons Holdings (M) Bhd [2001] MLJU 105 ***(dist)***

Legislation referred to:

Companies Act 1965, ss. 100 (1), 128 (2), 362 (1)

JUDGMENT

[A] FACTS

[1] The Plaintiff and 1st Defendant are Korean Nationals residing in Malaysia. Both had agreed and established a locally incorporated company named APM Corporation Sdn. Bhd. which is the 2nd

Defendant in this suit. A shareholders agreement in simple form in the Korean language was executed between Plaintiff and 1st Defendant on the 3-7-1997. Amongst the essential term of the Agreement is that the shareholdings in APM Corporation Sdn. Bhd. shall at all times be maintained at a ratio of 55%: 45% for the 1st Defendant and the Plaintiff respectively. The 1st Defendant was the sole signatory to all the company cheques, ie, APM Corporation Sdn. Bhd. (the 2nd Defendant). The 2nd Defendant is in the business of marketing, designing and fabricating machinery. By common conduct and implied term, the Plaintiff alleges that the 1st Defendant would supply the Plaintiff with monthly statement as to the profits, losses and investments in the company. The Plaintiff alleges that the paid up capital of the company was increased by payment from the company's profits according to the ratio above. Plaintiff also alleges that he had paid a total of RM225,000/- towards the paid up capital of the company. Plaintiff also alleges that towards the middle of the year 1998, contrary to the common conduct and implied term, the 1st Defendant refused to provide the Plaintiff with the monthly accounts of the company stated above and had refused to pay to the Plaintiff his portion of the agreed profits. The Plaintiff then sent to the 1st

Defendant demands on 8-10-1998, 29-10-1998 and 25-11-1998. On 16-10-1998, the 1st Defendant gave an undertaking to provide the company's accounts but failed to do so. The Plaintiff then commenced this civil suit. In the meantime, the Plaintiff was removed as a director of the company and his shares were forfeited by the company.

[2] The 1st Defendant denies all of the above and asserts that the Plaintiff has no right to the accounts and that Plaintiff's removal as the director and the forfeiture of his shares in the company was lawful.

[3] The Plaintiff claims for the accounts and other documents of the Defendant company, assessment of damages for breach of term of contract between Plaintiff and Defendants and interests at the rate of 8% from date of filing to the date of final disposal of the case. This is at para (a) - (k) of the Statement of Claim.

[4] The Defendants denied the claims of the Plaintiff and counter claimed for the return of all confidential documents and materials of the Defendant company that the Plaintiff is in possession and for an

order that Plaintiff stop using the confidential information that belong to the Defendant company and damages as in para 33 (a) - (i) of the Defence.

[5] Both parties had agreed on the issues to be tried. They are:-

(i) To identify the terms and effect of the agreement dated 3rd July 1997.

(ii) Whether or not the Plaintiff has paid for his 45% shareholding in the company.

(iii) Whether the Plaintiff is entitled to be given full and frank disclosure of all the company accounts.

(iv) Whether the Plaintiff's removal as director of the company by this Defendant is valid.

(v) Whether the forfeiture of the Plaintiff's shares in the company is valid.

(vi) Whether the Plaintiff is entitled to the remedy claimed in paragraphs 10 (a) - (k).

[B] ISSUES

[6] To identify the terms and effect of the Agreement dated 3-7-1997:-

6.1 After having perused the Agreement dated 3-7-1997 (translated text at page 146 of Bundle C - Agreed Bundle of Document) the Court is of the view that it is a valid Agreement. The English translated version does not bear the signatures of both Plaintiff and 1st Defendant. For this, the Court rely on the Korean text as at page 147 of Bundle C. That text bears the signature of both parties ie, Plaintiff and the 1st Defendant. The Agreement is dated 3-7-1997 and the terms are clearly set out in the said Agreement.

[7] Whether or not Plaintiff has paid for his 45% shareholding in the company:-

7.1 The Court had perused documents at pages 136, 139, 140 and 144 of Bundle C. In total the shares that was allotted for the Plaintiff is 225,000. Those documents also stated that the amount for the shares had been paid for in cash. These documentary evidence had been agreed by both parties. As such, the Court finds that the allotted shares had been paid in full by the Plaintiff. The certificate numbers and the number of shares owned by the Plaintiff is at page156 of Bundle C (Exhibit D 18). Although this is a letter bearing the letterhead of the 2nd Defendant and is a letter of forfeiture of Plaintiff's shares, it tells of the number of shares and the certificate number. Therefore, as at 25-8-1999 which is the date of the letter D 18, the Defendant company had recognized and treated the Plaintiff as a shareholder.

7.2 Following from the finding that Plaintiff had paid for the shares and was given the certificates numbers, and following the finding that the Agreement dated 3-7-1997 is valid in its terms, the Court find that the Plaintiff had paid his 45% shares of the company. Therefore the Plaintiff has now become the owner of shares issued to him. Section 100 (1) of the Companies Act 1965 provides:-

> *"100. (1) A certificate under the common or official seal of a company specifying any shares held by any member of the company shall be prima facie evidence of the title of the member to the shares."*

Therefore, the Plaintiff is still a shareholder of the company. As such, the Court is of the opinion that there is no necessity to consider on the issues of call for allotted shares which was said to be unpaid by the Plaintiff.

[8] Whether the Plaintiff is entitled to be given a full and frank disclosure of the company accounts.

8.1. Since the Court has made a finding that the Plaintiff is still a shareholder of the Defendant company, he is entitled as a member of the company to a full and frank disclosure of the company's accounts and other documents. Section 362 (1) of the Companies Act 1965 provide the following:-

> *"362. (1) If any person in contravention of this Act refuses or fails to permit the inspection of any register minute book or document or to supply a copy of any register minute book or document the Court may by order compel an immediate inspection of the register minute book or document or order the copy to be supplied"*

Based on the abovesaid section, this Court can by order compel the Defendant company to allow Plaintiff an immediate inspection of the register, minute book, or documents and this Court now order that the Plaintiff be allowed to inspect immediately the abovesaid register, minute book or documents.

[9] Whether Plaintiff's removal as director of the company by the Defendants is valid:-

9.1. Both DW1 and DW2 confirmed that the registered address of the Plaintiff was at W4-03-04 Goodyear Court 9, Subang Perdana. According to PW1, he received a letter from the Defendants, dated 5-11-1998 giving him notice that they intend to remove him as a director. The meeting was to be held on 30-11-1998 at 11.00 a.m. He wanted to attend the meeting but was late by 10 minutes. By the time he arrived, the meeting had already passed a resolution to terminate him as a

director. He was therefore not given the opportunity to present his case. On the same date ie, 30-11-1998, he received a letter informing him of his termination as a director (page 100, Bundle C).

9.2. Much was argued by both sides as to the letters and notices sent to the 2 addresses ie, The Riana Green address and the Subang Perdana address. The Court is of the view that the Plaintiff did receive the notice of that fateful EGM and he did attend the meeting. The purpose of Article 108 of the Article of Association of the company is to inform the members (in this case the Plaintiff) that there would a meeting and he admitted that he attended the meeting but was late by 10 minutes by which time the resolution to remove him had been passed. Section 128 (2) of the Companies Act 1965 provides:-

"128. Removal of directors

(2) Notwithstanding anything to the contrary in the memorandum or articles of the company, special notice shall be required of any resolution to remove a director or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) ***shall be entitled to be heard on the resolution at the meeting****."* (Emphasis added).

9.3. The law makes it mandatory for the director who is to be removed be given the right to be heard. The word "shall" in section 128 (2) of the Companies Act 1965 is

mandatory in nature. The removal of a director is not something to be taken lightly. It is a serious matter. In this case, the Court is of the opinion that even though he was late by 10 minutes, he did attend the EGM and since the law has given him the right to be heard, he should be given that right. Since that right to be heard was not given, the Court is of the opinion that his removal as a director is null and void. He therefore is still a director of the Defendant company.

[10] Whether the forfeiture of the Plaintiff's shares in the company is valid:-

10.1. This issue had been dealt with in paragraph 7.2 above.

[11] Whether the Plaintiff is entitled to the remedy claimed in paragraph 10 (a) - (k).

11.1. After having heard the evidence of the Plaintiff and the Defendants and after perusing the documents in the Agreed Bundle and after having heard submissions of both parties, the Court is of the opinion that the Plaintiff is entitled to the remedies claimed. Thus the Plaintiff's claim in para 10 (a) - (k) is allowed with costs.

[C] COUNTER CLAIM BY THE DEFENDANTS

[12] I will now deal with the counter claim of the Defendants. The Defendants had not adduced evidence on the counter claim. Even though the 1st Defendant alleged that Plaintiff was involved or had set up a rival company called Tech World (see para of "Butir Butir" in the Defence) there was no evidence adduced at all on this matter. In fact, there was hardly any evidence to support the Defendants counterclaim.

[13] As such I dismiss the counter claim with costs.

[14] It is to be noted that the 1st Defendant had given evidence of the judgments of the Suwon District Court, Civil Division 10 and the judgment of the Seoul High Court. Defendants argued that the subject matter of this case in Malaysia is the same as that already decided in the Seoul High Court. Counsel for the Defendants cited the case of *Tay Choo Foo v. Harrisons Holdings (M) Bhd* [2001] MLJU 105. Counsel for the Defendants argued that if this Court allows the Plaintiff's claim this would encourage duplicity of proceedings. It would be prejudicial to the Defendants as the exact facts has been finalized and adjudicated in Korean Courts. It would also tantamount to unjust enrichment.

[15] This Court had read the case cited above and is of the view that in this case before the Court the Defendants cannot claim duplicity of proceedings and an abuse of process. In that case, Ramly Hj. Ali JC (as he then was) had come to the conclusion that there is duplicity of proceedings and an abuse of the court process after he had made comparisons of the pleadings in both cases. In this case, the 1st Defendant only submitted the judgments of the

Courts in Korea. No pleadings was tendered in this Court. This Court is not bound by the decision of the Seoul High Court and most importantly this Court do not have the benefit of reading and comparing the pleadings of the case in Korea and our present case.

(DATO' NORAINI BT ABDUL RAHMAN)

Judicial Commissioner

High Court (Civil 1)

Shah Alam

Date of Decision: 10 JULY 2009.

COUNSELS:

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