IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[SUIT NO. WA-22NCC-155-04/2021]

BETWEEN

DATO' SHUN LEONG KWONG
(NRIC No. : 381205-10-5167) **... PLAINTIFF**

AND

1. **TOH MAY FOOK**
   (NRIC No. : 580223-10-5779)
2. **LIEW SOOK PIN**
   (NRIC No. : 770414-08-6694)
3. **DATO LEE CHIN HWA**
   (NRIC No. : 330914-71-5419)
4. **LEE MIN HUAT**
   (NRIC No. : 570908-05-5357)
5. **NICHOLAS PUN CHEE CHEANG**
   (NRIC No. : 890418-59-5281)
6. **SIOW PEI TEE**
   (NRIC No. : 821008-05-5312)
7. **SOON BAN HIN ORIENTAL (M) SDN BHD**
   [Company No. : 200201017993 (585656-V)]
8. **MENANG CORPORATION (M) BERHAD**
   [Company No. : 196401000240 (5383-K)] **... DEFENDANTS**

GROUNDS OF JUDGMENT

Introduction

[1] There are 5 applications before the Court to strike out the Plaintiff's Writ and Statement of Claim:

1.1. Enclosure ("Enc") 11 made by the 8th Defendant ("D8");

1.2. Enc. 15 made by the 1st and 2nd Defendants ("D1 & D2");

1.3. Enc. 17 made by the 3rd to 5th Defendants ("D3 to D5");

1.4. Enc. 26 made by the 6th Defendant ("D6"); and

1.5. Enc. 33 made by the 7th Defendant ("D7").

[2] All the applications were made pursuant to Order 18 rule 19(a), (b), and/or (d) of Rules of Courts 2012 ("ROC 2012") and/or Order 92 rule 4 ROC 2012 and/or the inherent jurisdiction of this Court except for Enc. 26 which was made pursuant to Order 18 rule 19(a) ROC 2012.

[3] On 14th October 2021, I had allowed all 5 applications with costs. As the matters were related, it is convenient to deal with all 5 enclosures in one judgment.

Background

[4] At all material times, the Plaintiff is a shareholder and was a director of the D8 (interchangeably referred to as "the Company"). D8 is a public company listed on Bursa Malaysia. D1 to D7 are shareholders of D8. D3 is the father of D4 and grandfather of D5. D4 is D5's uncle.

[5] The following undisputed events occurred leading to the filing of this suit:

Date	Event
09-11-2020	D1 issued a notice to appoint D2 as director in the 30.12.20 AGM; D2 in turn issued a notice to appoint D1 as director in the AGM
23-11-2020	D6 issued a notice to remove the Plaintiff's son, Dr Christopher Shun Kong Leng ("Christopher") as a Director of D8
01-12-2020	D5 issued a notice to remove Christopher as a Director of D8
30-12-2020	The Chairman in the AGM withdrew the proposed resolutions for appointment of D1 and D2 as directors as well as the resolution for removal of Christopher. Ordinary resolutions No. 5 was passed by 100% of voting shares allowing the directors to allot and issue shares.
18-10-2021	D1 and D2 filed OS WA-24NCC-9-01/2021 ("Suit 9") over the withdrawn resolutions seeking to declare that the decision of the Chairman is void.
19-01-2021	D3 and D5 issued a notice seeking to remove 4 existing directors of the Company associated with the P including Dr Christopher and Raja Shahruddin Rashid, the P's son in law and who was then D8' s Executive Chairman and to appoint 2 other persons as directors of D8.

20-01-2021	P lodged a com plaint with the SC on the breaches of the Capital Markets and Services Act 2007 ("CMSA") and the Malaysian Code of Take-Overs and Mergers 2016 ("TOM Code")
Before 29-01-2021	P alleged there was a compromise reached between P and D3.
29-01-2021	P, D1, D2 and D4 together with 4 other persons including P's daughter Marianna were appointed as directors of D8.
15-02-2021	The Board suspended P and Marianna as directors.
22-02-2021	D3 & D5 gave notice to convene EGM to remove P and Marianna.
25-02-2021	The Board decided to call EGM to be held on 30.3.2021 pursuant to the notice issued by D3 & D5.
01-03-2021	P filed KLHC Suit No. WA-22NCC-84-03/2021 ("Suit 84") against D3 for alleged breach of compromise, seeking for injunctive relief to prevent the 3rd Defendant from exercising his voting rights in the EGM to remove the P and Marianna as directors of D8.
02-03-2021	P and Marianna filed KLHC OS No.: WA-24NCC-95-03/2021 ("Suit 95") challenging their suspension as directors of the Company, and to prevent the EGM from proceeding.
29-03-2021	The High Court in Suit 84 dismissed the application for injunction to restrain the 3rd Defendant from exercising his rights in the EGM.

29-03-2021	The High Court in Suit 95 declared the suspension of P and Marianna was null and void. The court however did not grant any of the other relief sought including to invalidate the Board decision to call the EGM or for placement of shares.
30-03-2021	EGM proceeded, P and Marianna were removed as Directors.
03-04-2021	This suit was failed.

[6] The Plaintiff's pleaded causes of action are:

6.1. unlawful conspiracy:

6.1.1. At paragraphs 20 and 21 of the statement of claim ("SOC"), the Plaintiff pleaded:

"20. The Plaintiff will contend that the events set out above particularly the voting which occurred at the said AGM in support of the Withdrawn Resolution, were the result of an unlawful conspiracy involving D1 to D7 by themselves **and other parties whom the Plaintiff is unable to conclusively identify** at this stage but would otherwise include the parties referred to in paragraph 10 above, followed by the subsequent participation of the Company and all with the intention of injuring the Plaintiff including the Plaintiff's interest and control of the Company to the exclusion of the Plaintiff. The Plaintiff will, subject to discovery, also contend that the said EGM was pursuant to the same conspiracy and that, *inter alia*, the voting pattern involving D1

to D7, in particular, would have been repeated at the EGM resulting in the removal of the Plaintiff and Marianna as directors of the Company.

21. **Such a conspiracy was formed in or around August 2020 by D1 to D4 and other parties whose identity the Plaintiff cannot determine at this date**. Pursuant thereto and, among other things, D2 started making regular visits to the Company share registrar to inspect the records of depositors from October 2020 to December 2020. D5 joined the conspiracy by the very latest on 1.12.2020 when D5 issued a notice of intention to move resolution to remove Dr. Christopher as a director of the Company whereas D6 joined the conspiracy by the very latest on 23.11.2020 when D6 issued a notice of intention to move resolutions to remove Dr. Christopher which notice was in any event and intentionally crafted to be ineffective. D7 joined the conspiracy sometime before the AGM whereas the Company became a party to the conspiracy as soon as the board of directors was reconstituted and the Plaintiff excluded as director in in the manner set out above.

Particulars of unlawful acts

(a) the Defendants have breached the Capital Markets and Services Act 2007 ("CMSA") and the Malaysian Code on Take-Overs and Mergers 2016 ("TOM Code"). Under the CMSA control is defined as the acquisition of or holding of, or entitlement to exercise or control the exercise of, voting shares of more than 33% of shares in a company. The Plaintiff

will contend that at the AGM, D1 to D7 had in control more than 44% of the voting shares of the Company thereby obtained control of the Company. Among other things, the Plaintiff will refer to the affidavit affirmed by D1 and D2 in Suit 9 where among other things:

(i) D1 stated that he was allegedly informed by D5, Brian Wong Wye Pong, Ng Chee Cheng, Cheah Lam Hin, Lai Fu-Khate (as proxy for D7) that all of them voted in favour of the Withdrawn Resolutions. The relationship *inter se* the parties was not disclosed and the said AGM was conducted remotely so that in situ personal contact and communication was not available or possible;

(ii) the total votes or shares controlled by D1 to D7 and other unidentified parties forming "Persons Acting in Concert" as defined under the CMSA is 212,028,360 or 44.10% of the voting shares of the Company;

(iii) whilst D1 declared an interest of only 60,099,300 shares in the Company or 12.50% interest in the voting shares, he casted a total vote for 105,860,400 shares or 22.02% of the total voting shares;

(iv) whilst D2 declared an interest of 24,257,600 shares in the Company or 5.045% interest in the voting shares, she casted a total vote for 39,580,660 shares or 8.23% of the total voting shares; and

(v) whilst D5 declared an interest of 23,909,500 shares in the Company or 4.97% interest in the voting

shares, he casted a total vote for 61,550,200 shares or 12.80% of the total voting shares.

(b) After obtaining control of the Company breached the CMSA by falling to make a mandatory general offer for the remaining shares not held by D1 to D7 pursuant to Section 218(2) of CMSA and the TOM Code;

(c) after obtaining control of the Company breached the CMSA by proceeding to acquire additional voting shares in the Company otherwise than in accordance with Section 218(3) of CMSA and the TOM Code;

(d) after obtaining control of the Company appointed or caused to be appointed D1, D2, D4 and two others as directors of the Company in breach of the CMSA and the TOM Code;

(e) unlawfully obtained control of the Company and changing the composition and management of the Company;

(f) the Defendants have also breached Section 317 of CMSA read with Section 4 thereof as well as Section 137 and 138 of the Companies Act 2016 read with Section 8. The Plaintiff repeats the particulars set out in sub-paragraph (a) to (e) above;

(g) the breaches above also constitute breaches of the Bursa LR which require immediate disclosure under Rule 9.19(41);

(h) the illegally constituted Exco constituted breaches of the Company's Constitution namely Article 116

which *inter alia* requires the business and affairs of the Company to be managed by the directors or under the direction of the board;

(i) the High Court in Suit 95 has declared that the Plaintiff's suspension and that of Marianna as directors of the Company was unlawful and invalid. The unlawful suspension of the Plaintiff was at the instance of D1, D2 and D4 as directors of the Company;

(j) D3 with the support in particular of D1, D2, D4 and D5 breached the terms of the compromise as set out above. In this regard, the same set of solicitors represented D1 and D2 in Suit 9, D3 in Suit 84 and the Company as well as the individual members of the board of the Company in Suit 95.

The Plaintiff had *via* letter dated 20.1.2021 lodged a complaint on the breaches of the CMSA and the TOM Code with the Securities Commission. "(own emphasis)

6.2. Breach of statutory duties:

6.2.1. the Defendants have breached the CMSA and the TOM Code because during the AGM, the 1st – 7th Defendants had in control more than 44% of the voting shares of the 8th Defendant. In particular, the 1st – 7th Defendants failed to make a Mandatory General Offer or the remaining shares not held by them pursuant to Section 218(2) of the CMSA and the TOM Code (see paragraph 21(b) of the SOC).

[7] The Plaintiff in the SOC sought the following orders:

7.1. compelling D1 to D7 to make a MGO to the shareholders of D8

"(1) That D1 to D7 do make an application to the Securities Commission to seek direction to undertake a mandatory general offer ("MGO") at the higher of the price paid by D1 to D7 in the six months prior to the triggering of the MGO; or the pre-determined acquisition price for certain members of the PAC to be paid by the PAC leader upon successfully procuring Board Control of the Company;

…….

(3) Until further orders D1 to D7 or any one or more of them and the PAC be restrained from taking any further steps including exercising their voting rights or however; or if steps have been taken to restrain from proceeding with such steps the effect of which is to dilute the shareholding position of the Plaintiff in the Company

…….

(5) That D1 to D7 comply with all provisions of the Capital Markets and Services Act 2007, the Malaysian Code on Take-Overs and Mergers 2016, Companies Act 2016 and Bursa Malaysia Main Market Listing Requirements"

7.2. damages against D1 to D7 arising from conspiracy resulting in loss of directorship in D8

"(2) that D1 to D7 jointly and severally pay to the Plaintiff special damages as pleaded and damages to be assessed including exemplary or aggravated damages in respect of the matters set out above;"

The particulars of damages pleaded in paragraph 26 of the SOC in the main, relates to the Plaintiff's removal from the office of director

7.3. against D8:

"(4) Until further orders, the Company as D8 whether by itself or its agents or servants and/or directors or howsoever be restrained from in any way effecting any application to Bursa Malaysia and/or the Securities Commission for the issuance and/or listing of new shares in the Company howsoever arising including but not limited to the placement of shares, employee share issuance schemes and any related or non-related party transactions;"

Defendants' Case For Striking Out

[8] The Defendants' basis for striking out in essence are similar:

8.1. no reasonable cause of action based on conspiracy; the Plaintiff's failed to plead the necessary and essential elements of the tort of conspiracy; and

8.2. the Plaintiff has no right of a private cause of action for breach of statutory duty under the CMSA or TOM in the absence of a ruling by the Securities Commission ('the SC') on the alleged breach; as such the Plaintiff does not have the *locus standi* to make the claim.

[9] D8 additionally contended that the only relief sought by the Plaintiff in relief (4) against D8 being injunctive in nature, tantamounts to:

9.1. approbating and reprobating as the Plaintiff had voted in favour of Ordinary Resolution 5 authorising D8's Board of Directors to allot and issue shares;

9.2. interfering with the internal management of D8 as the private placement of shares is a business decision; as a shareholder, Plaintiff has no right to dictate the management of D8, a public company;

9.3. a collateral attack on the High Court decision in Suit 95 and therefore an abuse of process as prayer 3 and 4 in Suit 95 were not allowed. These prayers read:

"3. a declaration that all and any decision of the 1st Defendant, whether taken at the board of directors' meetings or otherwise, where the Plaintiffs or any of them have been excluded or otherwise not been informed of, including any decision to convene any meetings of the 1st Defendant **or the placement of shares** of the 1st Defendant, are null and void in law;

4. an injunction to restrain the Defendants or any of them from adopting or in any way giving effect to any decision of the 1st Defendant, whether taken at the board of directors' meetings or otherwise, which have been arrived at without the involvement of the Plaintiffs or where the Plaintiffs or any of them have been excluded from participating including any decision to convene any meetings of the 1st Defendant **or the placement of shares** of the 1st Defendant;" (own emphasis)

No Reasonable Cause Of Action Based On Conspiracy

[10] The Defendants contended as follows: 10.1 D8:

10.1.1. The Plaintiff failed to plead:

10.1.1.1. what agreement to conspire had D8 entered into;

10.1.1.2. precisely the purpose or object of the said conspiracy which D8 entered into;

10.1.1.3. with clarity and precision, what over acts were done by D8 against the Plaintiff in pursuance or in furtherance of the said conspiracy.

10.1.2. D8 being a corporate entity, the Plaintiff is required to plead further particulars as held by the High Court in *Chen Khai Voon v. Lim Beng Guan & Ors* [2020] MLJU 2251:

10.1.2.1. in the case of individual directors who are parties to the agreement, whether the individual directors participated in the agreement in their personal capacity or in their capacity as directors of the corporate entity;

10.1.2.2. in the case of the corporate entity, how the corporate entity had the requisite knowledge and intention to enter into the agreement;

10.1.2.3. in the case of the overt acts, what are the distinct acts by each of the co-conspirators and whether the individual directors in performing the acts were merely discharging their duties as directors of the corporate entity;

10.1.2.4. where the individual directors were acting in their capacity as directors, the facts relied upon to support or form the basis for the claim that the individual directors are personally co-conspirators with the corporate entity or that tortious liabilities ought to be imposed on them;

10.1.2.5. in the case of conspiracy by unlawful means, whether the overt acts involved the corporate entity's contractual breach or a tortious act.

10.1.3. D8's role in the conspiracy is only mentioned in passing without stating its precise wrong doing and lumped together with the other Defendant shareholders.

10.2. D1 and D2:

10.2.1. the Plaintiff has failed to plead all the elements to justify his claim for conspiracy - there are no particulars showing any "agreement" between the Defendants and how the Defendants had "worked together" to cause harm to the Plaintiff;

10.2.2. the conspiracy as pleaded was purportedly formed by the 1st – 4th Defendants **in or around August 2020** which happened before the Plaintiff's appointment as a director of D8; the Plaintiff only became a director of D8 on **29.1.2021**; the agreement to injure, if any, must relate to the Plaintiff's removal as Director and could only happen after the Plaintiff's appointment on 29-1-2021 whereas the alleged unlawful act of acquiring a "controlling" stake happened before any agreement to remove him;

10.2.3. the shareholders of a public listed company's right to vote as they deem fit in the appointment and/or removal of a director should not be interfered by the Court;

10.2.4. the claim for conspiracy herein should have been raised by the Plaintiff in suit 95 which relates to the EGM to remove him as a director where he alleged his suspension was with the ulterior motive of taking control of D8, dilute his shares in D8 and to exclude his participation in D8; the conspiracy is raised as an afterthought and a collateral attack on the decision of the learned Judge in Suit 95.

10.3. D3 to D5:

10.3.1. the Plaintiff pleaded the existence of "unlawful conspiracy involving D1 to D7 by themselves and other parties whom the Plaintiff is unable to conclusively identify at this stage; the failure to plead the identities of **all** the persons to the alleged agreement and their relationship with each other is fatal; D3-D5 cannot possibly mount a defence properly without knowing exactly whom they are alleged to have conspired with and/or the relationship that they are supposed to have;

10.3.2. the Plaintiff failed to provide any particulars of the conspiracy that was allegedly formed in or around August 2020 by the 1st – 4th Defendants which the remaining Defendants allegedly subsequently joined; nor plead how the conspiring parties came together and/or there was a meeting

of minds and a consensus between them to commit the unlawful act to cause injury to the Plaintiff;

10.3.3. the Plaintiff failed to plead the overt acts which were alleged to have been done by each and every conspirator in pursuance of the conspiracy; it is not possible for a conspiracy to be formed by the 1st – 4th Defendants in or around August 2020 joined by D5 on 1.12.2020 to commit the unlawful act to cause injury to the Plaintiff by removing the Plaintiff and Marianna as directors of D8 when both were only appointed on 29.1.21;

10.3.4. there was no unlawful act or an unlawful objective that resulted in injury to the Plaintiff - the Plaintiff and Marianna do not have an unassailable right to be directors of D8;

10.3.5. as shareholders, D3 to D5 have every right to vote freely and independently to remove the Plaintiff and Marianna as Directors;

10.3.6. if the overt acts are those pleaded in paragraph 21 of the SOC which are essentially alleged breaches of statutory duties by the 1st – 7th Defendants under CMSA and TOM Code, such breaches cannot give rise to a private right of action; in other words not actionable when the body tasked with overseeing compliance of those statutory duties have not made a determination on whether there have been breaches.

10.4. D6:

10.4.1. the SOC did not condescend upon any particulars to show that the D6 has done any act to injure the Plaintiff except for stating that D6 was involved in the issuance of the Notice of Intention to Requisite for the Removal of Dr Christopher which has no relevancy to this action and the relief herein;

10.4.2. S. 357 of the CMSA for claim of damages/loss and s. 360 (1)(d) of the CMSA for the reliefs such as restraining order, declaratory and etc cannot be commenced unless the so-called contravention of Section 218(2) and (3) under CMSA has been determined by Securities Commission (which is not the case herein); the Plaintiff has also not pleaded whether the Security Commission has determined the alleged contravention of 218(2) and (3) CMSA by the Defendants;

10.4.3. since the SOC shows no unlawful means i.e. contravention of Section 218 (2) and (3) CMSA, there is no reasonable cause of action under the Tort of Conspiracy To Injure By Unlawful Means.

10.5. D7:

10.5.1. there is no unlawful means conspiracy as D7's vote at the EGM is a valid exercise of a legal proprietary right recognised in Section 71 Companies Act 2016;

10.5.2. there is no express plea of any overt act levelled against D7 apart from D7 having voted in favour of the resolutions; such absence is terminal to the

Plaintiff's case based on unlawful means conspiracy;

10.5.3. the critical omission to plead who are the "other parties whom the Plaintiff is unable to conclusively identify at this stage" makes the action unsustainable; D7 is not expected to face trial without knowing who "*other Unidentified Parties*" are, or whether they actually exists;

10.5.4. if the Plaintiff cannot identify the names of the other parties said to have triggered the 33% MGO threshold, that itself is proof that the Plaintiff does not even have any factual basis to allege that there was *an arrangement, agreement or understanding, to co- operate*, an element critical to a charge of persons acting in concert.

[11] The Plaintiff on the other hand argued that he has a cause of action against the Defendants under the tort of unlawful means conspiracy, which is actionable. According to the Plaintiff:

11.1. D8 is a necessary and proper party that will be directly impacted by any order or relief this Court makes:

11.1.1. relief (4) is directly against D8;

11.1.2. D8 joined the conspiracy after D1, D2, D4 took stewardship of D8;

11.1.3. D8's announcement on 9.4.2021 of a proposal to execute a private placement exercise prejudices him and destroys the subject matter of the litigation.

11.2. As for the other Defendants D1 to D7, they illegally conspired to injure the Plaintiff including that of wresting the control he had in the Company:

11.2.1. the conspiracy was formed in or around August 2020 and reflected in the voting pattern which occurred at the AGM 2020 and subsequently at the EGM on 30.3.2021 where the Plaintiff and his daughter were removed as directors of the Company. The Plaintiff and his family were in control of the Company since 1989;

11.2.2. after taking control of the Company, the conspirators acted to injure the Plaintiff by the overt acts done as particularised in paragraphs 20 to 25 of the SOC with the resultant damages to the Plaintiff set out in paragraph 26;

11.2.3. the Plaintiff's has sufficiently laid the claims against the Defendants based on the tort of conspiracy and the breaches of the laws pursuant to the overt acts done;

11.2.4. conspiracy is an actionable tort once it has caused loss citing the UK Supreme Court in *JSC BTA Bank v. Kharapunov* [2018] UKSC 19;

11.2.5. not all joint-tortfeasors need to be made parties - *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v. Intrared Sdn Bhd & Anor* [2013] 7 MLJ 437; the Plaintiff does not have details of other persons to properly name them as parties and the Plaintiff requested for information from D8 which was not entertained;

11.2.6. conspiracy is shrouded in secrecy, sufficient overt acts were pleaded to make out a conspiracy claim, quoting *Deepak Jaikishan*;

11.2.7. the act of increasing the share capital of D8 was to further dilute the Plaintiff's interest whilst strengthening the equity interest of the Defendants in the Company. These acts done pursuant to the conspiracy are an improper exercise of powers by D1, D2 and D4 as directors.

[12] In my determination of this issue, I would first deal with what needs to be pleaded in a conspiracy claim. I begin by referring to the leading authority of the Court of Appeal case of *Renault SA v. Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394, where the Court of Appeal allowed the appellants' appeal to strike out and held 4 elements must be satisfied in a claim for conspiracy at the interlocutory stage:

> "[32] In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:
>
> (a)) an agreement between two or more persons (that is an agreement between Tan Chong and others);
>
> (b)) an agreement for the purpose of injuring Inokom and Quasar;
>
> (c)) the acts done in execution of that agreement resulted in damage to Inokom and Quasar;
>
> (d)) Damage is an essential element and where damage is not pleaded the statement of claim may be struck out."

.....

[34] It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement.

[42] There is no allegation of any overt acts carried out by TC Euro in the pleadings and by necessary implication TC Euro had not carried out any overt acts.

The gist of the tort of conspiracy is not the conspirational agreement alone but that agreement plus the overt acts causing damage (*Marrinam v. Vibart* [1963] 1 QB 234; affirmed [1963] 1 QB 528).

Pleading. The Statement of Claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damages occasioned to the plaintiff thereby. (THE COMMON LAW LIBRARY — Number 5 — PRECEDENTS OF PLEADINGS — Section 26 — CONSPIRACY).

[13] In *Peralta Eugenio Sarmiento v. Compass Technology Co Ltd and Another* [2010] HKCA 70 at [17] the Hong Kong Court of Appeal spelled out what the pleadings for conspiracy must contain:

"As a matter of pleading, a case based on conspiracy, must contain the following elements: -

(1) The agreement between two or more persons. The means of carrying out the agreement, whether lawful or unlawful, must be set out.

(2) The intention to injure the Plaintiff, whether predominant (in the case of a lawful means conspiracy) or merely an intention to injure (in the case of an unlawful means conspiracy).

(3) The acts that were carried out pursuant to the agreement and the stated intention.

(4) The damage caused to the Plaintiff."

[14] It follows from *Peralta* that the distinction between lawful and unlawful means conspiracy must be set out in the pleadings. It has not escaped my attention that the Plaintiff has pleaded in Paragraph 24 of the SOC that the "said conspiracy has as its sole or predominant purpose the injury of the Plaintiff to him personally, the Plaintiffs reputation and the Plaintiff's business interest." This, to me does not change the fact that the crux of the Plaintiff's claim is based on unlawful means conspiracy. The same act cannot be both "unlawful" and "lawful" at the same time.

[15] In lawful means conspiracy, a predominant purpose to injure must be alleged. In unlawful means conspiracy, an intention to injure suffices. In *Cubic Electronic Sdn Bhd vs. MKC Corporate & Business Advisory Sdn Bhd and Another Appeal* [2016] 3 MLJ 797, the Court of Appeal succinctly explained the difference between unlawful means conspiracy and lawful means conspiracy:

"[11] There are **two kinds of conspiracy**, the **elements of which are distinct**:

(a) **unlawful means conspiracy**: a conspiracy in which the participants combine to **perform acts which are themselves unlawful** (under either criminal or civil law); and

(b) **lawful means conspiracy**: **a combination to perform acts which, although not themselves per se unlawful, are done with the sole predominant purpose of injuring the claimant** — it is in the fact of the conspiracy that the unlawfulness resides (see *Milicent Rosalind Danker and Anor v. Malaysia-Europe Forum Bhd & Ors* [2012] 2 CLJ 1076 (HC); *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 (CA)).

[12] The distinction between the two was succinctly elucidated by *Lord Bridge in Lonrho plc v. Fayed* [1991] 3 All ER 303 as follows:

Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

[13] The elements required to bring an action for **unlawful means conspiracy** are as follows:

> A combination or agreement between two or more individuals
>
> It is not necessary to show that there was anything in the nature of an express agreement, whether formal or informal. **The court looks at the overt acts of the conspiracy and infers from those acts that there was agreement to further the common object of the combination**. It is sufficient that two or more persons combine with the necessary intention or that they deliberately *co-operate, albeit tacitly, to* achieve a common end (*R v. Siracusa* [1990] Cr App R 340). Neither is it necessary that all those involved should have joined the conspiracy at the same time; but all those said to be parties to the conspiracy should be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they are acting in concert. The question in relation to any particular scheme or enterprise in which only one or some of the alleged conspirators can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design (*R v. Simmonds* [1969] 1 QB 691).
>
> It is possible for a conspirator to join later. However, a person is only liable for the damage that is suffered from the time that they join the conspiracy; they are not liable retrospectively for the damage that has been suffered prior to their joining (*Keefe v. Walsh* [1903] 2 IR 681).

[14] In these instant appeals, we are concerned with lawful means conspiracy. **The element of lawful means conspiracy are the same as for unlawful means conspiracy detailed**

> **above, with the exception of the intention to injure requirement.**" (own emphasis)

[16] An allegation of conspiracy requires the strictest pleading and has to be supported by full particulars - see the Singapore Court of Appeal case in *KarahaBodas Co LLC v. Pertamina Energy Trading Ltd* [2006] 1 SLR (R) 112 at [30], *Repco (Malaysia) Sdn Bhd v. Tan Toh Fatt & Ors* [2013] 7 MLJ 408 at [64].

[17] That strict particularity is necessary appears to be accepted by Shankar J (as he then was) in *Gasing Heights Sdn Bhd v. Aloyah bte Abd Rahman* [1996] 3 MLJ 259 at 269:

> "However, apart from the **bare assertion of conspiracy** based on the joint filing of the action, **no particulars** of any kind were alleged against these six defendants to **show how they were** linked to the **misdemeanours alleged against the fifth defendant. Just as fraud must be pleaded with great** particularity, so also **all the constituent ingredients going to make up the conspiracy, must be pleaded.** On this ground alone, the claim for conspiracy fails." (own emphasis)

[18] The type of conspiracy alleged must be in the body of the pleading and not in the particulars because particulars cannot enlarge a pleaded cause of action – *Sivakumar Shanmugaratnam v. Strasburger Enterprises (Properties) Pty Ltd* [2004] NSWCA 229 at [13].

[19] The proper function of particulars is not to state the material facts omitted from the statement of claim, in order, by filling the gaps, to make good an inherently bad pleading, however common that pernicious practice may have become - per Scott LJ in *Pinson v. Lloyds and National Provincial Foreign Bank* [1941] 2 KB 72 at p 75; [1941] 2 All ER 636 at p 638.

[20] Hasnah Mohammed Hashim J (now FCJ) in *A Santamil Selvi Alau Malay & Ors v. Dato' Seri Mohd Najib Tun Abdul Razak & Ors* [2015] 4 CLJ 1035 held:

> **"**[55] **Therefore, for conspiracy to take place, there must be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means.** There must also be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tortious act is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs.
>
> [56] The principle of pleading conspiracy has been illustrated and explained in *"Bullen & Leake & Jacob's Precedents of Pleadings"* 13th edn. at p. 221 states as follows:-
>
> > The gist of the tort of conspiracy is not the conspirational agreement to injure alone, but that agreement plus the over acts causing damage (*Marrinan v. Vibart* [1963] 1 Q.B. 234, affirmed [1963] 1 Q.B. 528). **The statement of claim should describe who the several parties to the conspiracy are and their relationship with each other.** It should allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued, and the intent to injure... there is no call for a general plea of "acting wrongly and maliciously" (*Sorrell v. Smith* [1925] A.C. 700, at 714) nor is that sufficient. **It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy**, and lastly, the injury and damage occasioned to the plaintiff thereby.

……

[69] The failure of the plaintiffs to plead any agreement nor the particulars of the agreement, and failure to plead with clarity of the alleged overt acts of the first and second defendants in committing the alleged conspiracy in pursuance of their agreement proves fatal to the said allegation. The lack of particulars in the amended SOC as to the tort of conspiracy may prove difficult for the defendants to answer to the charge.

……

[101] **The allegations of conspiracy is regarded as serious and grave. The standard of proof is high and must commensurate with the severity of the charge. Allegation of such an act of conspiracy must be clearly pleaded and the overt acts must not be disjointed. Therefore, the bare allegation of conspiracy against the defendants as pleaded by the plaintiffs is clearly frivolous and vexatious.**

…….

[103] **The main objective of particulars in pleadings is to ensure that the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without any surprises. This objective is to inform the other side of the nature of the case that they have to meet, as distinguished from the manner in which that case is to be proved, to limit the generality of the allegations in the pleadings, or to define the issues which have to be tried and for which discovery is required. Each party is entitled to know the case that is intended to be made against him at the trial and have such particulars of his**

opponent's case as this will prevent him from being taken by surprise.

However, the purpose of pleadings is not to play a game at the expense of the litigants. The particulars pleaded is to enable the other party to decide what evidence he ought to be prepared with and to prepare for the trial." (own emphasis)

[21] In *Datuk Hj Ishak bin Ismail v. Kenanga Investment Bank Bhd & Ors* [2012] 7 MLJ 740, Zabariah Mohd Yusof J (now FCJ) allowed the defendants' application to strike out the plaintiff's writ and statement of claim due to the failure of the plaintiff to plead with clarity of the tort of conspiracy:

"[97] These are general allegations of conspiracy in the statement of claim. The Respondent failed to plead particulars showing:

(a) that there was an agreement between two or more persons;

(b) the agreement was for the purpose of injuring the Respondent; and

(c) the acts done in execution of the agreement which resulted in injuring the Respondent

Refer to the case of *Yap JH v. Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960 where Mohamed Pzaiddin J'cited the House of Lord's decision in *Lornho Ltd v. Shell Petroleum Co Ltd* [1981] 2 All ER 456 which was subsequently reaffirmed by the Court of Appeal in *Renault SA v. Inokom Corporation Sdn Bhd & Anor & Other Appeals* [2010] 5 MLJ 394).

[98] The aforesaid are material facts which must be pleaded by the Respondent.

[101] Further, nowhere in the statement of claim did the Respondent plead of any agreement between the first defendant and Dato' Ramli and/or the third defendant to injure him. No factual averments of any overt acts purportedly done by the three Appellants in execution of the agreement.

[102] In essence there is no particularisation as to the purported conspiracy pleaded ie:

(a) when was the agreement, between the three Appellants hatched bearing in mind that Dato' Ramli and the third defendant ceased to be with the first defendant at the time when the suppressed evidence was made known to the Respondent;

(b) what was the agreement and what was the intention of the agreement;

(c) what were the purported overt acts of the Appellants in pursuance of the agreement; and

(d) how does the overt acts affected the Respondent and resulted in injury to the Respondent.

[105] Therefore, the failure of the Respondent to plead any agreement nor the particulars of the agreement, and failure to plead with clarity of the alleged overt acts of each of the Appellants in committing the alleged conspiracy in pursuance of their agreement proves fatal to the said allegation.

[106] The lack of particulars in the statement of claim in the suit herein, as to the tort of conspiracy may prove difficult for the Appellants to answer to the charge. The Respondent thus failed to plead material facts necessary to disclose a reasonable cause of action against the Appellants.

[107] Therefore, the bare allegation of conspiracy of the three Appellants is a frivolous and vexatious one."

[22] Applying the principles in the above cases, I find the pleading at paragraph 20 and 21 of the SOC are in general terms, patently short on particulars and conspicuously failed to plead with precision and clarity the following which kills the claim and makes it frivolous:

22.1. the particulars of the agreement between the 8 Defendants, how the conspiring parties came together and/or there was a meeting of minds and a consensus between them to commit the unlawful act to cause injury to the Plaintiff;

22.2. the identities of all the persons to the alleged agreement and their relationship with each other rather than a mere "unlawful conspiracy involving D1 to D7 by themselves and other parties whom the Plaintiff is unable to conclusively identify at this stage"; the Plaintiff could have availed itself of discovery but did not do so. This omission is fatal. In *Ng Ah Ba & Ors v. Ramanda Sdn Bhd* [1996] 1 MLJ 62, the Court of Appeal affirmed a summary judgment by the High Court due to insufficient particulars of the conspiracy alleged by the Defendants and held that the mere mention of a so-called conspiracy entered between the Plaintiff's manager and 2 others without disclosing the name nor identity of the manager and the role played by him was held fatal;

22.3. the overt acts to injure alleged to have been done by each and every Defendant in pursuance of the agreement.

[23] Conspiracy is a serious allegation. Viewed holistically, the Plaintiff merely made sweeping and general allegations of the alleged conspiracy without condescending to any particulars. This

unquestionably is grossly insufficient to satisfy a plea of conspiracy and not possible for the Defendants to answer such general allegations.

[24] As concern D8, a company, I also share the views of the High Court in *Chen Khai Voon v. Lim Beng Guan & Ors* [2020] MLJU 225 that the Plaintiff ought to set out in the pleading whether the individual directors participated in the agreement in their personal capacity or in their capacity as directors of the corporate entity.

[25] From the pleading, the Plaintiff's grievance appears to be his being ousted as a director of D8 and excluded from the management of D8. With all due respect, the Plaintiff has no permanent right to a directorship nor should he expect to be able to remain on the board unless his directorship is entrenched specifically in the Memorandum and Articles of association. An illustration of this is the case of *Re Chi Liung & Sons Ltd.* [1968] 1 MLJ 97 where the founding director *Chi Liung's* position was ensconced as a permanent director until she resigns the office or dies.

[26] In addition, s. 128 Companies Act 2016 provides a shareholder (such as the Defendants herein) a statutory right to remove directors. S. 128 reads:

> **"**128. Removal of Directors
>
> (1) A director maybe removed before the expiration of the director's period of office as follows:
>
> (a) subject to the constitution, in the case of a private company, by ordinary resolution; or
>
> (b) in the case of a public company, in accordance with this section.

(2) Notwithstanding anything in the constitution or any agreement between a public company and a director, the company may by ordinary resolution at a meeting remove the director before the expiration of the director's tenure of office. "

[27] D1 to D7 as shareholders in the Company, owe no duty to the Plaintiff how they exercise their votes - *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 at 696:

"The submission here is that, **a public company cannot contract out of its right to remove a director by ordinary resolution notwithstanding anything in its articles and notwithstanding anything in any agreement between the company and the director that he should not be removed**. H ere, the Lau brothers had no such agreement with KFCM. If it was being suggested that the first three respondents had entered into such an agreement as agents of KFCM, that would not be of any assistance to Leong Hup either. I t has not been suggested that the first three respondents entered into the so-called agreements as agents of the fourth to the seventh respondents; but **even if that were so it could not affect the overriding effect of s. 128(1) of our Act. The Lau brothers held office as directors of KFCM by virtue of a contract with KFCM, and KFCM alone, an office to which they could only be elected by the shareholders of KFCM alone**.

Kenanga Nominees and TA Nominees, the sixth and seventh respondents, were not directors of KFCM. Even assuming that they as shareholders would vote along with the other shareholders to expel the Lau brothers, **the power to vote in general meeting is not a fiduciary power, and a shareholder owes no duty to anybody as to how he exercises his vote:**

Northern Counties Securities Ltd v. Jacks on & Steeple Ltd [1974] 2 All ER 625."

[28] In *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corp (M) Bhd & Anor* [2010] 6 CLJ 72; [2010] MLJU 269, the Federal Court stated:

> [34] …A share is a property which its holder as of right is entitled to utilize it in any manner he may wish. (*See: Pender v. Lushington* [1877] 6 Ch D 70; *Foss v. Harbottle* [*supra*]). (*See also: 'Fairness and Good Faith as a precept in the Law of Corporations and other Business Organizations by Charles W. Murdock-Vol. 36 Loyola University Chicago Law Journal 551[2004-2005]*')..

[29] D1 to D7 in exercising their proprietary and inviolate rights to vote, are entitled to vote in any manner they wish. Even if the voting is in unity, it is not unlawful as held by the Court of Appeal in *Tuan Haji Ishak Ismail's* case (*supra*):

> "As to the allegations of intermeddling and conspiracy. I think it is elementary that an actionable conspiracy can only arise where there is a combination to do an unlawful act. The facts stated in the petition leave it equally open that the real and predominant purpose of the respondents was to advance their own lawful interests in the franchise agreements by remedying the breaches of which KFC International and Lane were complaining and they believed those interests would suffer if they did not vote the Lau Brothers off the KFCM board. **Their unity of purpose** thus **would not be unlawful even if damage is so caused to Leong Hup**.
>
> See *Crofter Hand-Woven Harris Tweed Co. v. Veitch* [1942] AC 435 *Gower on Company Law* 3rd edition at page 562 says:

> Scattered throughout the reports are statements that members must exercise their votes "bona fide for the benefit of the company as a whole", a statement which suggest that they are subject to precisely the same rules as directors. But it is clear that this statement is highly misleading, and that the decisions do not support any such rule as a general principle. **On the contrary, it has been repeatedly laid down that votes are proprietary rights, to the same extent as any other incidents of the shares, which the holder may exercise in his own selfish interests even if these are opposed to those of the company**. (*North-West Transportation v. Beatty* [1887] 12 App. Cas. 589 PC; *Burland v. Erle* [1902] AC 83, PC; *Goodfellow v. Nelson Line* [1912] 2 Ch. 324)." (own emphasis)

[30] In *Meretz Investments NV v. ACP Ltd* [2002] 2 WLR 904, [2007] EWCA Civ 1303 at [174], the UK Court of Appeal held that the relevant intention for conspiracy to injure by unlawful means was not established in circumstances where the defendants acted not only to protect their own interests but also in the belief, based on legal advice, that they had the right to act the way they did notwithstanding that the loss or detriment to the claimant was an intended consequence of their action.

[31] A similar pronouncement was made in *Taz Logistics Sdn Bhd v. Taz Metals Sdn Bhd & Ors* [2019] 2 CLJ 48, [2019] 3 MLJ 510 at [128] where the Court of Appeal speaking through Nallini Pathmanathan JCA (as her Ladyship then was) quoted the English Supreme Court case of *JSC BTA (Bank) v. Kharapunov* [2018] UKSC 19 (which in turn quoted *Bowen LJ in Mogul Steamship Co v. McGregor Gow & Co* [1889] 23 QBD 598) as follows:

> … **A person has** a right to advance his own interests by lawful means **even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse.** Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of the defendant was to injure the claimant **rather than to further some legitimate interest of his own**. This is because in that case it cannot be an answer to say that he was simply exercising a legal right. He had no interest recognised by the law in exercising his legal right for the predominant purpose not of advancing his own interests but of injuring the claimant. In either case there is no just cause or excuse for the combination. "(own emphasis).

[32] As made clear by the above authorities, D1 to D7's exercise of their voting rights to remove the Plaintiff and Marianna cannot therefore be unlawful. This critical element of an unlawful object or unlawful means which resulted in injury to the Plaintiff to sustain the Plaintiff's cause of action on unlawful means conspiracy is not met by the Plaintiff.

[33] I agree with D8's counsel that Relief (4) is an interference of D8's internal management pursuant to a duly passed resolution to allot and issue shares. Indeed, in my opinion, the execution of private placement, which is essentially a business decision, belongs to the internal management or affairs of D8. The Plaintiff cannot bring court proceedings to stop such matters for the following reasons:

33.1. Courts will not interfere with the internal management of a company. In *Burland v. Earle* [1902] AC 83 at p 93, Lord Davey, when delivering the advice of the Privy Council expressed the proposition in the following words:

"It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so."

33.2. it is not the business of the Court to manage the affairs of a company. That is for the shareholders and directors - *Shuttleworth v. Cox Brothers and Company (Maidenhead) Limited* [1927] 2 K.B. 9;

33.3. powers of management are vested in directors and the only way shareholders can control the exercise of such powers is to refuse to re-elect the directors - *John Shaw and Sons (Salford), Limited v. Peter Shaw and John Shaw* [1935] 2 K.B. 113, CA, where Greer LJ pithily stated:

"If powers of management are vested in the directors, they and they alone can exercise those powers. The only way in which the general body of shareholders can control the exercise of the powers vested in the directors is by altering their (constitution), or by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the (corporation' constitution is) vested in the directors any more than the directors can usurp the powers vested in the general body of shareholders."

33.4. In *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, the Federal Court stated:

"Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies. Through a series of decisions of the Court of Chancery in the mid-nineteenth century, they

> administered unto themselves a jurisdictional prohibition from entering upon domestic disputes between corporators. Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v. Harbottle* [1843] 67 ER 190; the second was *Mozley v. Alston* [1847] 41 ER 833."

[34] In addition, it is trite that those who take interests in companies limited by shares have to accept majority rule - *Re Kong Thai Sawmil* [1978] 2 MLJ 227. A mere dissatisfaction with the wishes of the majority in my view is not conspiracy.

Breach Of Securities Laws

[35] At paragraph 21 (b) of the SOC, the Plaintiff alleged that pursuant to the conspiracy, the Defendants unlawfully breached securities laws namely the CMSA, the TOM Code, Bursa Listing Requirements as well as the Companies Act 2016 because during the AGM, D1 to D7 had in control more than 44% of the voting shares of D8; that D1 to D7 failed to make a MGO for the remaining shares not held by them pursuant to Section 218(2) of the CMSA and the TOM Code.

[36] It is the common stand of the Defendants that this is not so, and even if so, the Plaintiff has no right of a private cause of action for breach of statutory duty under these laws in the absence of a ruling by the SC and/or Bursa on the alleged breach; as such the Plaintiff does not have the *locus standi* to make the claim. I agree.

[37] To begin with, by the Plaintiff's own pleading, D1 to D7's combined shareholding is 32.789%:

> 37.1. D1 - 12.50%;

37.2. D2 - 5.045%;

37.3. D3- 8.296%;

37.4. D4- 1.138%;

37.5. D5 - 4.97%;

37.6. D6 - 0.01%;

37.7. D7 - 0.83%

[38] S. 216 CMSA defines "controlling power" as having total shareholdings of 33% and above, as follows:

> "…" control", means the acquisition or holding of, or entitlement to exercise or control the exercise of, voting shares or voting rights of more than thirty-three per centum, or such other amount as may be prescribed in the Code in a company, howsoever effected…"

[39] With respect to the Plaintiff, based on pleaded percentage of 32.789%, D1 to D7 cannot be said to have acquired "control" of D8 as the threshold is not met.

[40] However, at paragraph 21(a)(ii) of the SOC, the Plaintiff asserted that D1 to D7 had control of 44% of the voting shares of D8 by acting in concert with "**other unidentified parties**":

> "(ii) the total votes or shares controlled by D1 to D7 and other unidentified parties forming "Persons Acting in Concert" as defined under the CMSA is 212,028,360 or 44.10% of the voting shares of the Company. "

[41] Section 216 (2) of the CMSA defines "persons acting in concert" as:

"…(2) For the purposes of this Division, a reference to "persons acting in concert" shall be construed as a reference to persons who, pursuant to an agreement, arrangement or understanding, co-operate to– (a) acquire jointly or severally voting shares of a company for the purpose of obtaining control of that company; or (b) act jointly or severally for the purpose of exercising control over a company…"

[42] Section 216 (1) of CMSA defines the term "acquirer" as:

"…

(a) a person who ac quires or proposes to acquire control in a company whether the acquisition is effected by the person or by an agent; or

(b) two or more persons who, acting in concert with one another, acquire or propose to acquire control in a company, whether the acquisition is effected by the persons or by an agent…"

[43] Even if it is assumed as true that D1 to D7 have control of more than 44% of the voting shares of D8, it begs the burning question of law whether there is a private law cause of action for breach of statutory duty, which will be decisive of whether this Court has power to make an order to compel compliance of the CMSA or TOM Code ; in this case particularly to compel D1 to D7 to make an MGO.

[44] For convenience, s. 218 CMSA is produced:

"218.(1) A person who makes a take-over offer shall do so in accordance with the provisions of the Code and any ruling made under subsection 217(4).

(2) Subject to section 219, an acquirer who has obtained control in a company shall make a take-over offer, other than in respect of voting shares of the company or voting rights which at the date of the offer are already held by the acquirer or which the acquirer is entitled to exercise, in accordance with the provisions of the Code and any ruling made under subsection 217(4).

(3) Subject to section 219, an acquirer who has obtained control shall not acquire any additional voting shares in that company or voting rights, as the case may be, except in accordance with the provisions of the Code and any ruling made under subsection 217(4).

(4) Any person who contravenes subsection (1), (2) or (3) commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding ten years or to both."

[45] Section 218(2) and (3) of the CMSA is to be read together with the TOM of which the relevant rules state:

"Rule 4.01

4.01. Unless otherwise exempted by the SC, a mandatory offer shall apply to an acquirer in the following situations: (a) Where the acquirer has obtained control in a company; or (b) Where the acquirer has triggered the creeping threshold irrespective of how control has been effected or the creeping threshold has been triggered, including by way of a scheme.

Rule 2.01

Creeping threshold means securities such as warrants, options and other securities that are issued by the offeror or offeree

which are capable of being converted into voting shares or voting rights of the offeror or offeree;

Mandatory offer means a take-over offer made or to be made under subsections 218(2) and 218(3) of the CMSA;"

[46] For breaches of s. 218 (2) and (3) of CMSA cause of action, s.357 of the CMSA and s. 360 (1) (d) of the CMSA will be relevant for the respective claim for damages/loss and for reliefs such as restraining order, declarations, etc. These relevant sections read as follows:

"357. (1) A person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part VI or any regulations made under this Act may recover the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.

(2) Notwithstanding the provisions of any written law relating to limitation of time, an action under subsection (1) may be begun at any time within six years from the date on which the cause of action accrued or the date on which the person referred to in subsection (1) became aware of the contravention, whichever is the later.

"360. (1) Where–

……

(d) on an application by any person aggrieved by an alleged contravention by another person of a relevant requirement, it appears to the court that–

(i) the other person has contravened the relevant requirement; and

(ii) the applicant is aggrieved by the contravention, the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders:

(A) an order restraining or requiring the cessation of the contravention;

…

(G) an order restraining a person from making available, offering for subscription or purchase, or issuing an invitation to subscribe for or purchase, or allotting any securities that are specified in the order;"

[47] In this case, it is imperative to bear at the forefront of the mind that:

47.1. the Plaintiff merely pleaded that he has complained to the SC;

47.2. whether there was a contravention of the securities law has not been determined by the SC.

[48] The principles encapsulated in the following cases makes plain that until the SC has determined there is any contravention of the relevant statutory provisions, the Plaintiff's claim fail *in limine* as it is not the Court's function to usurp the role of the regulators.

[49] In *Tuan Hj Zulkifli bin Hj Hussain & Ors v. IOI Corp Bhd & Ors* [2012] 7 MLJ 215 at 245 Nallini Pathnamanthan J (now FCJ) exhaustively referred to various cases and held that the civil court does not have the power to make an order concerning violation of

CMSA provision arising from gaining control, neither does the Court have any power to compel a party to make the MGO. In the case, the defendant triggered the MGO requirement. The plaintiff filed an action for breach of statutory duty, in respect of the failure to make a MGO. At paragraphs 75 and 76, Her Ladyship held that breach of the Code did not give rise to a private law cause of action.

[50] In *Shahidan Shafie v. Atlan Holding Sdn Bhd & Anor* [2017] 4 CLJ 587 at 598 - 599, the Court of Appeal dealt with a similar issue of a plaintiff suing in the civil court for an order to compel the defendants to make a Mandatory Take-Over Offer as per the terms set out in the Securities Commission Act 1983 and the Take-Over Code and decided that any breach of the Securities Commission Act does not give rise to a private cause of action unless there was a ruling by the SC. It was held by the Court of Appeal that:

> "[21] **Breach of statutory duty per se does not give rise to a private law cause of action**. It is best explained by the learned authors in *Tort Law* (3rd edn) by Nicholas J. MacBride and Roderick Bagshaw where they lucidly put it this way:
>
> > "By definition the breach of a statutory duty that is owed to no one in particular cannot amount to a tort. But even the breach of a statutory duty that is owed to another will usually not amount to a tort. The breach of a statutory duty that is owed to another will only amount to a tort if when Parliament created that duty it intended that breach of that duty should be treated as a tort by the courts and therefore that all the remedies that are normally available when someone has committed a tort should apply to the breach of that statutory duty. As this is a bit of a mouthful, let's just say that **the breach of a statutory duty owed to another will only amount to a tort if Parliament**

intended, when it created that duty, that breach of that duty should be 'actionable in tort.

……

[26] It is our view that premised on the afores aid provisions, it can be said that it is the intention of Parliament f or the Securities Commission to be tasked to supervise, regulate, issue rulings from time to time and enforce the practices of companies bound by the SC Act 1993 and the Take-Over Code. The learned Judge in the High Court in fact found that the only remedy available to the Plaintiff was to complain to the Securities Commission about the conduct of the defendants and if the Securities Commission failed to act or makes a ruling unfavourable to the plaintiff, his only option was to apply to the court for judicial review of the decision of the Securities Commission. In short, the plaintiff's remedy was one of public law.

…

[28] As we have intimated earlier, in construing s. 153 we must take into consideration of other provisions in the SC Act to discern the context. Hence in doing so, **we agree with learned counsel for the defendants that the plaintiff's right to sue can only exist when the Securities Commission had made a ruling. In the case before us, the Securities Commission must first make a ruling that the defendants had acquired control of Naluri in the context of the relevant law and was required to make the mandatory take-over offer to the shareholders of the Naluri.** From the record of Appeal, it is undisputed that the Securities Commission was aware of

the allegation of the defendants having "acquired control" of Naluri and had sought clarification from the Board of Directors of Naluri. The Securities Commission after considering Naluri's clarification took no further action. As intimated above, the plaintiff should have sought a review of the Securities Commission decision in Court. This he did not do.

[29] If we were to adopt the interpretation of section 153 SC Act of the Plaintiff, it would amount to the Court stepping into the shoes of the Securities Commission which is tasked to supervise and regulate the conduct of companies. As we have said earlier, that is not and cannot be the intention of Parliament. Our interpretation reconciles section 153 with the other provisions in the SC Act and that is **the private cause of action for breach of statutory duty is preserved to the extent only after the Securities Commission has made a specific ruling**. This would avoid a situation where there would be two decisions, one of the Court and the other the Securities Commission. This scenario would bring uncertainty to the business world which must be avoided. **Our interpretation allows only one decision at one time and that is the decision of the Securities Commission until the same is either set aside or substituted by the Courts."**

[51] 2 years later, the Court of Appeal examined the same issue in *Lai Soon Onn v. Chew Fei Meng and other appeals* [2019] 2 MLJ 96. The facts similar to the present case are as follows:

51.1. the plaintiff initiated a suit at the civil court to seek for *inter alia* an order to compel D1-D4 to undertake a MGO

allegedly because the Defendants has a collective shareholding of 33.74%;

51.2. the plaintiff contended that D1-D4 had breached their statutory duties under the CMSA, TOM Code for failing to make a MGO upon assuming control of the company;

51.3. the plaintiff also contended that D1-D4 are persons acting in concert to obtain control of the company and together with unknown parties had unlawfully conspired prejudicing the plaintiff's economic interest through unlawful means;

51.4. at the date of filing of the suit, the SC did not make any ruling on the alleged contravention / breach of the CMSA / TOM Code.

[52] In *Lai Soon Onn*, the suit was struck out by the High Court. In affirming the High Court decision (reported as *Lai Soon Onn v. Tan Tian Sin & Ors* [2017] 11 MLJ 476) and dismissing the plaintiff's appeal, the Court of Appeal inter alia held:

"[42] Similarly, **it is not for the courts to usurp the function of the market regulatory bodies in carrying out its objective as stipulated under the law**. **The functions of the SC are statutorily provided in s. 15(1)(d) of the SCA, where it is tasked to regulate the take-over and mergers of companies**. Section 217(4) of the CMSA provides that:

The Commission shall administer the Code and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code and without limiting the generality of the foregoing-

(a) issue rulings ---

(i) to interpret this Division and the Code;

(ii) on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition; and

(b) enquire into any matter relating to any take-over offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission thinks fit with respect thereto.

[43] **Gleaning through the provisions of the CMSA, it is the intention of the Act that the bodies established under the Act are regulatory bodies and it is not the function of the court to usurp their function nor to second guess their decisions.** In *R v. International Stock Exchange of UK and Ireland, ex parte Else Ltd; R v. International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else* [1982] Ltd and another; *R v. International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Roberts* [1993] 1 All ER 420; [1993] QB 534, Lord Bingham observed that 'the court will not second guess the informed judgment of responsible regulators steeped in knowledge of their particular market'. **This court applied the same principle in Shahidan Shafie in arriving at its decision when interpreting s. 153 of the SCA.** To interpret otherwise would result in a situation where there would be two decisions, one of the court and the other from the SC. That cannot be the position in law (refer to para 29 of Shahidan Shafie). **The courts have shown a reluctance to interfere with the decision of regulatory bodies in carrying out its objective in the absence of *mala fide* or acting in excess of jurisdiction**. A similar stance was taken by

this court in *Bursa Malaysia Securities Berhad and also in Khiudin bin Mohd & Anor v. Bursa Malaysia Securities Bhd and another application* [2012] 6 MLJ 131 which had referred to various commonwealth jurisdictions, which demonstrated the attitude of the courts in reviewing the decision made by the regulators in different jurisdictions. **Therefore, it is not within this court's jurisdiction to interfere with the duties mandated to the market regulatory bodies in maintaining and promoting the interests of the public in dealing on the exchange and these bodies should be left to carry out its objective as stipulated under the Act**.

…

[55] Therefore, guided by the principle of construction in the above case, as the word 'requirement' is not found in ss. 217–220 of the CMSA, it must therefore follow that **it was never the intention of Parliament when it legislated s. 360 of the CMSA to confer on the plaintiff a right to apply to court to compel the defendants to undertake an MGO**. **This is fortified further if one is to examine the provisions of Division 2 of Part VI of the CMSA (comprising of ss. 217–220). This is in *pari materia* with Division 2 Part IV of the SCA (comprising of ss. 33–34C)**

[56] "**Division 2 Part VI of the CMSA does not provide for any right of a dissenting shareholder to apply to the courts for an order to compel the defendants to undertake a MGO**. These rights of the minority shareholders are provided for under s. 223 and 224 of the CMSA, however the provisions do not provide for a private right to enforce the Take-Over Code. **If Parliament intended for a private right to enforce the Take-Over Code, it would have been provided for in either ss. 223**

or 224 or in any of the provisions in Division 2 of Part VI of the CMSA.

…

[60] **Therefore, it is our conclusion that it was never the intention of the legislature that s. 360 of the CMSA is to confer a private right to compel the defendants to undertake a MGO**…" (own emphasis)

[53] The High Court in *Apex Equity Holdings Berhad & Anor v. Lim Siew Kim & Ors* [2019] MLJU 1667 in allowing a striking out of a claim in relation to a breach of section 218 of the CMSA held that:

"[23] *Lai Soon Oon's* case (*supra*) is binding on this Court.

[24] **Sections 217, 219 and 220 of the CMSA expressly confer upon the Securities Commission the jurisdiction to ensure and enforce compliance with the provisions of, amongst others, Section 218.** Not only is the Securities Commission conferred with the powers to direct compliance and impose sanctions or penalties in the event it finds any non-compliance, the Securities Commission is also empowered to grant any exemptions from, amongst others, such compliance. This includes that of Section 218. **Therefore, the proper forum for the determination of the Plaintiff's complaint is in fact with the Securities Commission, and not this Court.** Indeed, the Plaintiff's very complaints are now before the Securities Commission…" (own emphasis)

[54] As for the alleged breach of Listing Requirements, in my view, the short answer is found in the Court of Appeal case of *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698 adopting

R v. Securities and Futures Authority ex p Panton (unreported 20 June 1994) which stated as follows:

> "While the Bursa remains a body vested with statutory powers there are peremptory requirements that the Bursa itself has to observe and implement to sustain the required orderly and fair market in respect of securities or future contracts. Uppermost it has to act in public interest singularly for the protection of investors in the financial sectors. There is therefore here a spectrum of matters in the realm of financial implications and complexities. In effect there is a homogenised issue of a public duty and private law matters. The situation warrants a reference to the judicial statement in *R v. Securities and Futures Authority* ex p Panton (unreported; 20 June 1994) per Sir Thomas Bingham: - It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but recognition of that jurisdiction must in my judgment be combined with a recognition that **the clear intention of the Act is that the bodies established under that Act should be regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were to look over their shoulder**".

[55] Justice Rohana Yusuf (now President of the Court of Appeal) adopted a similar stance in *Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case* [2012] 7 CLJ 407 where Her Ladyship said:

> "The Court had shown reluctance in interfering with Bursa decision in enforcing its objective done in good faith. The principle of non-interference is premised on the basis that Bursa is a regulatory body mandated under the law to maintain and

promote the interests of public members dealing on the exchange, and should be left to carry its objectives unless it acted in excess of jurisdiction.

[56] The same case also examined and found uniformity in the policy of non-interference in other Commonwealth jurisdiction such as United Kingdom, Australia and New Zealand. In the Australian case of *Kwikasair Industries Ltd v. Sydney Stock Exchange Limited BC 6800002* [1968] CCH ASLC 30, the court refused to overturn the decision of the Exchange and Street CJ in that case observed that the stock exchange is not only entitled but duty bound to be concerned with maintaining of fair market which is predominant amongst all its objectives. In the UK, in *R v. International Stock Exchange of UK and Ireland Ltd, ex parte Else LTd* [1993] 1 QB 534, it was observed by Lord Bingham that, "the court will not second-guess the informed judgment of responsible regulators steeped in knowledge of their particular market". These cases demonstrate the reluctance and/or non-interference policy of the courts in reviewing the decision made by the exchange in different jurisdictions.

[57] The Plaintiff's learned counsel has placed heavy reliance on *Kharapunov's* case which they argue has "recharacterized conspiracy" but I do not think the case assists the Plaintiff's case at all. The United Kingdom Supreme Court reiterated:

> "[9] Conspiracy is both a crime, now of limited ambit, and a tort. **The essence of the crime is the agreement or understanding that the parties will act unlawfully, whether or not it is implemented. The overt acts done pursuant to it are relevant, if at all, only as evidence of the agreement or understanding.** It is sometimes suggested that the position in tort is different. Lord Diplock, for example, thought that "the tort, unlike the crime, consists not of agreement but of concerted

> action taken pursuant to agreement": *Lonrho Ltd v. Shell Petroleum Co Ltd* [1982] AC 173, 188. This is true in the obvious sense that **a tortious conspiracy, like most other tortious acts, must have caused loss to the claimant, or the cause of action will be incomplete**. It follows that a conspiracy must necessarily have been acted on. But there is no more to it than that. The critical point is that the tort of conspiracy is not simply a particular form of joint tortfeasance. **In the first place, once it is established that a conspiracy has caused loss, it is actionable as a distinct tort**. **Secondly, it is clear that it is not a form of secondary liability, but a primary liability…"**

[58] However, in my respectful view, the UK Supreme Court did not conclude on whether breach of civil statutory duties can form an unlawful means conspiracy:

> "[15] The reasoning in Total Network leaves open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems. Compliance with the criminal law is a universal obligation. By comparison, legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from case to case. They do not lend themselves so readily to the formulation of a general rule. Breaches of civil statutory duties give rise to yet other difficulties. Their relevance may depend on the purpose of the relevant statutory provision, which may or may not be consistent with its deployment as an element in the tort of conspiracy. For present purposes it is unnecessary to say anything more about unlawful means of these kinds."

[59] As such, this Court is bound by *stare decisis* by the cases of *Shahidan Shafie, Lai Soon Onn* and *Bursa Malaysia*.

[60] In my opinion, if contravention of Section 218(2) and (3) CMSA and the Listing requirements is to form the unlawful means, sans the SC and Bursa's determination that there is such contravention, there is no unlawful means to form a reasonable cause of action under the tort of conspiracy to injure by unlawful means. The claim collapses.

[61] As pleaded at paragraph 21 of the SOC, the Plaintiff has already submitted a complaint to the SC. There is nothing to prevent him from applying to the SC for the same direction he seeks in Relief (1) for the Court to direct D1 to D7 to *"make an application to the Securities Commission to seek direction to undertake a mandatory general offer"*.

[62] Ergo, there is no basis for Relief (1). Relief (3), and (5) being consequential relief fall. Following the cases discussed, the Plaintiff's recourse is with the Securities Commission and/or Bursa, not the Court.

[63] On the facts as pleaded, I also agree with Defendants' counsel that:

63.1. the Plaintiff does not have the necessary *locus standi* or standing to bring this action;

63.2. D1, D2 and D8's postulation that this action is a collateral attack on the High Court decision in Suit 95 and therefore an abuse of process is not without merits by any means.

[64] I agree with the Defendants' counsel's submission that if the calling of an EGM is to further the alleged "conspiracy" to deprive the Plaintiff of control over D8, it ought to have been brought up in Suit 95 when he sought to injunct the EGM. In my opinion, not only is

there multiplicity of proceedings, *res judicata* also applies. See the Federal Court decision in *Kerajaan Malaysia v. Mat Suhaimi bin Shafiei* [2018] 2 MLJ 133 which aptly quoting *Wigram VC in the case of Henderson v. Henderson* [1843] 3 Hare 100 at p 115:

> *"The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time…"*

[65] It must be remembered that in prayer 3 and 4 in Suit 95 (set out at [9.3] above), the Plaintiff had previously sought to injunct *inter alia* the placement of the shares which were not granted. Suit 95 is pending appeal by the Plaintiff's own admission in Paragraph 19 (g) of the SOC. Can the Plaintiff then seek relief [4] in this present proceedings? The short answer is a resounding "No!". In this regard, I refer to *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062] where the Court of Appeal held as follows:

> "[17] HTF had elected to commence the HTF suit against Cosmotine which ended with the summary judgment being recorded. The continuation of these proceedings against the appellant has clearly violated the doctrine of election, the concept which is ingrained in our legal system and common law that an individual can either opt for the choice of remedies or relinquish it. **It is trite law and, indeed, a fundamental tenet of law that where a person has determined to follow one of his remedies and has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can**

go no further (see the *House of Lords decision in Benjamin Scarf v. Alfred George Jardine* (1881-82) 7 Appeal Cases 345).

[18] The options which were available to HTF and the respondent were either:

(a) an action by the respondent against the appellant and KAH for the purported breach of the agreement as in the present appeal; or

(b) an action in the HTF suit by HTF against Cosmotine following the dishonour of the cheque, for the recovery of the sum of RM2.3 million. The respondent should go no further after the summary judgment was recorded as that was the choice for remedies it had made. It should not be allowed to make a further claim for the said sum based on the breach of contract, a remedy from which it is precluded by virtue of the election.

[29] We would further add at this point that**, even if there has been no actual decision as to the issues involved in the instant action, but if the respondent did not raise these issues in the earlier proceedings which it could and should have done so, in our view the plea of this doctrine of res judicata in its amplified and wider sense is available to the appellant to prevent an abuse of the process of the court.** We would refer to the Federal Court decision in *Superintendent Of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256:

> It would suffice in this regard to refer to the judgment of the Privy Council in *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney General for Queensland* [1979] AC 411 [at p. 425]. The second defence is one of *res judicata*. There has, of course, been

> no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of *Wigram V-C in Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this *Board in Hoystead v. Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581. It was, in the judgment of the Board, there described in these words
>
> ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.
>
> The attempt by way of the instant proceedings to relitigate and re-open the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the Court...

[30] **The present suit as we have said earlier could have been included in the HTF suit and the issue in the present case could have been ventilated there for it to be specifically determined. The respondent chose not to do so and it is now estopped from coming to the court to seek to raise the issue which might have been put but was not raised in the HTF suit at their option** (see *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534 and *Arnold v. National Westminster*

Bank Plc [1991] 2 AC 93). The plea of *res judicata* in this appeal is, without question, well taken and is supported by authority. In the end, we have no hesitation in accepting it." (own emphasis)

[66] Of important pertinence, the Court of Appeal also affirmed that the doctrine of *estoppel* applies to a non-party:

"[25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of *res judicata* as the preferred and correct legal position, the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue *estoppel* to bar the respondent from relitigating a specific issue that had been decided in the prior separate action. **The doctrine also applies to a non-party. It is therefore not necessary for parties to be the same in both actions. What the doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the Respondent to relitigate its cause for the same relief and based on the same subject matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents** (see *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur, supra*)." (own emphasis)

[67] In dealing with the applications before me, I have reminded myself of the trite principle that a pleading can only be struck out in a plain and obvious case, or where the pleading is obviously unsustainable – *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, at p 43:

> "The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules of the High Court 1980 are well settled. If is only in plain and obvious cases that recourse should be had to the summary process under this rule … and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' …"

[68] When considering the applications for striking out under O. 18 r. 19(1)(a), I have reminded myself of whether on the face of the statement of claim, the court is prepared to conclude that it is patently clear that the cause of action is obviously unsustainable - see the Federal Court's decision in *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226. I did however consider the affidavits in respect of striking out under the other limbs of O. 18 r. 19.

[69] In deciding the applications, I also stand guided by the approach of the Court of Appeal in *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd (Formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309 that "When a QUESTION OF LAW BECOMES AN ISSUE, THIS IN ITSELF WILL NOT PREVENT the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question."

[70] In my judgment, the present case can be decided on questions of law whether the elements of the tort of conspiracy has been made out and whether there is a private cause of action for breach of the relevant securities laws.

[71] I have also considered the exhortation of Seah FJ in the Federal Court case of *CC Ng & Brothers Sdn Bhd v. Government of State of Pahang* [1985] 1 CLJ 235; [1985] CLJ (Rep) 45; [1985] 1 MLJ 347 as

well as that of the Court of Appeal in *See Thong & Anor v. Saw Beng Chong* [2013] 3 MLJ 235; [2012] 1 LNS 817 that a striking out is "draconian" and ought to be "sparingly exercised".

[72] On balance, having considered the material and the arguments before the Court, I am of the clear view that the instant suit is manifestly unsustainable. The Federal Court in *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 2 MLJ 240 at p 244 decided that where a plaintiff does not have a reasonable cause of action, the plaintiff's suit is therefore vexatious and frivolous, and an abuse of the court process.

[73] The categories of abuse of process are not closed. When abuse is revealed, the court has a duty, not a discretion, to dismiss the action: *Hunter v. Chief Constable of Midlands Police* [1982] AC 529, per Lord Diplock at 536D. Following Lord Diplock, the inevitable consequence in the instant action must be a striking out of the Plaintiff's claim.

[74] In my judgment, justice demands that the action should be struck out. There is simply no reason for the matter to go to trial. In the circumstances as admit here, *viva voce* evidence of witnesses at a full blown trial will serve no useful purpose. Neither in my respectful view should the Defendants be put through the costly process of a full trial in the circumstances as obtained here.

[75] For the sake of completeness, I should mention that even if, as alleged by the Plaintiff, there are breaches of director's duties, it is my respectful view that, again, he has no locus to file any action for such breach as directors' duties are owed to the Company. The Plaintiff's SOC does not speak of a derivative action nor an oppression action. The Plaintiff cannot "travel beyond" his pleading.

[76] Accordingly, for reasons given, Enc. 11, 15, 17, 26 and 33 are allowed with costs subject to allocator.

[77] I must not conclude without recording my appreciation to the respective parties' counsel for their research on several of the points covered in this judgment.

Dated: 23 NOVEMBER 2021

(LIZA CHAN SOW KENG)
Judicial Commissioner
High Court of Malaya at
Kuala Lumpur

COUNSEL:

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For the 1st & 2nd defendants - Yap Boon Hau & Ong Kai Rou; M/s Mah-Kamariyah & Philip Koh

For the 3rd - 5th defendants - Douglas Yee & Chua Pei Nee; M/s Douglas Yee

For the 6th defendant - Lee Kok Phong; M/s The Law Office Of Wong & Ang

For the 7th defendant - Terence Chan & Charmaine Lim; M/s Lim Kian Leong & Co

For the 8th defendant - Chan Shao Kang; M/s Foo & Chan

Case(s) referred to:

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See Thong & Anor v. Saw Beng Chong [2013] 3 MLJ 235; [2012] 1 LNS 817

Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 2 MLJ 240 at p 244

Legislation referred to:

Companies Act 2016, ss. 71, 128

Capital Markets and Services Act 2007, ss. 216 (1)(2), 218 (2)(3), 357, 360 (1)(d)

Rules of Court 2012, O. 18 r. 19 (a)(b)(d), O. 92 r. 4