

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR IN
THE STATE OF FEDERAL TERRITORY, MALAYSIA
(COMMERCIAL DIVISION)**

[SUIT NO. WA-22NCC-158-04/2021]

BETWEEN

SIXTY FIVE DEGREE SDN BHD

(Company No. 930724-M)

... PLAINTIFF

AND

1. TAN KAM MENG

(NRIC No. 590903-06-5175)

2. TAN HON PENG

(NRIC No. 791105-06-5139)

3. TAN SUNG LING

(NRIC No. 830629-06-5040)

... DEFENDANTS

JUDGMENT

A. Introduction

[1] In this claim, the plaintiff sought inter alia a declaration under section 540(1) of the Companies Act 2016 (“CA 2016”) that the business of Baiduri Jayamas Sdn Bhd (“Company”) was carried out with intent to defraud its creditors and/or for a fraudulent purpose, and that the defendants, being directors of the Company, are personally liable for amounts due by the Company to the plaintiff.

[2] I allowed the plaintiff’s claim, for the reasons set out below.

B. Background Facts

[3] The plaintiff’s claim arises from the Company’s breach of an agreement dated 25 March 2014 for the sale and purchase of iron

ore (“SPA”), which was entered into between the plaintiff and the Company.

- [4]** The plaintiff instituted an action against the Company, via Johor Bahru High Court Suit No. 22NCVC-185-11/2014 (“Suit 185”). Parties entered into a consent judgment on 21 September 2015 (“Consent Judgment”). Pursuant to the Consent Judgment, the SPA was ordered to be specifically performed.
- [5]** However, the Company did not comply with the Consent Judgment, and on 23 January 2018, the Johor Bahru High Court allowed the plaintiff’s application to dissolve the Consent Judgment. The court further ordered that the plaintiff was entitled to consider the SPA as having been terminated, and for damages sustained by the plaintiff to be assessed by the senior assistant registrar.
- [6]** The plaintiff then filed a notice for direction at the Johor Bahru High Court for assessment of damages. On 7 May 2019, the plaintiff obtained a judgment against the Company in the sum of RM6,214,000 (“Judgment Sum”). The Judgment Sum was affirmed by the judge of the Johor Bahru High Court on 24 November 2019.
- [7]** Upon the Company’s failure to pay the Judgment Sum, the plaintiff issued a winding-up notice and subsequently presented a winding-up petition against the Company. The Company was wound up pursuant to an order of the Kuantan High Court dated 28 August 2020.
- [8]** The plaintiff seeks the following:

 - a. a declaration that the business of the Company was carried out with intent to defraud its creditors and/or for a fraudulent purpose;
 - b. a declaration that the defendants, the directors of the Company, were knowingly parties to the carrying on of the

Company's business with intent to defraud its creditors;

- c. a declaration that the defendants are personally liable for all sums due by the Company to the plaintiff including the Judgment Sum;
- d. further, or alternatively, damages to be assessed against the defendants for the tort of conspiracy; and
- e. in the further alternative, judgment against the defendants jointly and severally for the sum of RM6,407,907.67.

[9] In the course of submissions, learned counsel for the plaintiff informed the court that the plaintiff will not be pursuing the relief in item (d) above.

C. Assessment and Findings

[10] The issues to be determined by the court are as follows:

- a. Whether the business of the Company was carried out with intent to defraud its creditors;
- b. Whether the defendants, as directors of the Company carried on the business of the Company with intent to defraud its creditors; and
- c. Whether the defendants unlawfully conspired to injure the plaintiff.

[11] In its claim, the plaintiff relies on section 540 of the CA 2016, which provides as follows:

*“(1) If in the course of the winding up of a company or in any proceedings against a company **it appears that any business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose**, the Court on the application of the liquidator*

*or any creditor or contributory of the company, may, if the Court thinks proper so to do, **declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.***”

(emphasis added)

[12] Two elements must be met for section 540(1) of the CA 2016 to apply:

- a. The business of the Company must have been carried on with the intent to defraud creditors, or for any fraudulent purpose; and
- b. The defendants were knowingly a party to the carrying on of the business of the Company in such manner.

[13] Once these elements are met, the court has the power to declare that the defendants are personally liable for the liabilities of the Company.

[14] Section 540(1) refers to the carrying on of a company’s business with intent to defraud its creditors. As such, the first question that must be answered is whether the plaintiff is a creditor of the Company.

[15] I am of the view that the status of the plaintiff as a creditor of the Company cannot be disputed, as the Company owed amounts under the SPA to the plaintiff. Actions were taken by the plaintiff to recover the amounts owing and ultimately, the Company owed the Judgment Sum to the plaintiff.

[16] In *Dato’ Prem Krishna Sahgal v. Muniandy Nadasan & Ors* [2017] 10 CLJ 385, the Federal Court considered the term “creditor” in section 304 of the Companies Act 1965 (“CA 1965”), which is in

pari materia with section 540 of the CA 2016.

- [17] The court referred to *Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors* [2006] 7 CLJ 364 and *Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd* [2002] 3 CLJ 10. In considering the reference to the term “creditor” in section 304 of the CA 1965, the court in both cases relied on the term “creditor” in section 217(1)(b) of the CA 1965 (now in section 464(1)(b) of the CA 2016), which reads:

“(1) A company (whether or not it is being wound up voluntarily) may be wound up under an order of the Court on the petition of –

...

*(b) any creditor, **including a contingent or prospective creditor**, of the company;”*

(emphasis added)

- [18] Thus, it was held in these cases that the word “creditor” in section 304 of the CA 1965 must include contingent and prospective creditors in line with section 217(1)(b) of the CA 1965.

- [19] The Federal Court in *Dato’ Prem Krishna Sahgal* (supra) agreed with the findings in *Premium Vegetable Oils Bhd* (supra) and *Emporium Jaya (Bentong)* (supra) and held as follows:

*“[75] We agree with the view that the word "creditor" in s. 304 of the Act must be taken to also include "contingent or prospective creditor" as being used in s. 217(b) of the Act **and the word "prospective creditor" refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in future.***

*[77] It is important to determine when a person becomes a creditor for the purpose of s. 304 of the Act. This is because **a cause of***

action grounded on the said section is available only to a person who is a creditor and who has been defrauded as such.

(emphasis added)

- [20] Applying *Dato’ Prem Krishna Sahgal* (supra), a “creditor” in section 540(1) of the CA 2016 must include contingent and prospective creditors referred to in section 464(1)(b) of the CA 2016 (which is *in pari materia* with section 217(1)(b) of the CA 1965). A prospective creditor, as explained by the Federal Court, refers to a creditor whose claim for debt or right to enforce such a claim is expected or is likely to happen in the future.
- [21] In this case, the plaintiff’s right to enforce its claim against the Company arises under the SPA, and upon the breach of the SPA by the Company. At the point of execution of the SPA, and with amounts that would become due once the plaintiff delivers iron ore to the Company, the plaintiff became a prospective creditor of the Company.
- [22] Thus, the plaintiff qualifies as a “creditor” under section 540(1) of the CA 2016.
- [23] The next question follows, namely whether the business of the Company was conducted with the intent to defraud the plaintiff, a creditor of the Company. Taking available evidence into account, I answered this question in the affirmative.
- [24] In answering the question as such, I considered the passage at page 53 of *Re Gerald Cooper Chemicals Ltd* [1978] 2 All ER 49, which was referred to by the Federal Court in *Dato’ Prem Krishna Sahgal* (supra):

“In my judgment, when Mr Cooper on behalf of the Cooper company sought from Harrisons an order for indigo on advance payment terms, Mr Cooper was carrying on the business of the

Cooper company. When the Cooper company accepted the advance payment of £125,698 odd, Mr Cooper knowing that there was no prospect, or no reasonable prospect or intention of supplying indigo, and no intention of returning the money to Harrisons, the business of the Cooper company was carried on fraudulently. The subsequent payment to Jimlou of £110,000 made the fraudulent carrying on of the business irremediable and constituted a fraud on the then creditor, Harrisons. The whole transaction between the Cooper company and Harrisons constituted the carrying on of the business of the Cooper company with intent to defraud a creditor of the company. Save that only one creditor was involved, the situation appears to meet the requirements of s. 332 set forth by Oliver J in *Re Murray-Watson Ltd* to which I have already referred, namely that the section is contemplating a state of facts in which the intent of the person carrying on the business is that the consequence of carrying it on (whether because of the way it is carried on or for any other reason) will be that creditors will be defrauded; 'intent', of course, being used in the sense that a man must be taken to intend the natural or foreseen consequences of his act.”

(emphasis added)

- [25] In the present case, the Company had entered into the SPA on 25 March 2014. The final audited accounts filed by the Company are accounts as at 30 June 2014. These accounts show that the Company had an accumulated loss of RM4,072,471, with its current liabilities exceeding its current assets by RM6,788,515 and its total liabilities exceeding its total assets by RM3,072,471. These figures cast doubt on the ability of the Company to continue as a going concern.
- [26] Despite such status, the Company continued to carry on business and incurred debts at a time when there would not have been any reasonable prospect of the Company being able to pay the debts.

- [27] I acknowledge that the financial status of a company in a particular period does not necessarily show that the company is not able to pay its debts. The period of poor financial performance may be temporary, and the company may nonetheless enter into commercial dealings with third parties as a means to generate revenue and profit. In such situations, the directors cannot be said to be acting fraudulently.
- [28] In this case, however, the conduct of the directors has led me to conclude that it is more probable than not that they were acting in a fraudulent manner. These are outlined below.
- [29] First, the defendants being directors of the Company, would have been aware of the financial status of the company. Yet, they did not disclose the true financial position of the Company to the plaintiff at the time the SPA was entered into.
- [30] Secondly, the business of the Company was subsequently carried on and assumed by Mujur Jayamas Sdn Bhd (“Mujur Jayamas”). The plaintiff’s witness, Lee Seng On, testified that he discovered that the property used as the Company’s business address (“Air Putih Property” was occupied by Mujur Jayamas. The Company’s signboard had been noted that the 1st and 2nd defendants are shareholders and directors of Mujur Jayamas. They appeared to have been continuing the Company’s business through Mujur Jayamas. Thus, I find the conduct of the defendants in this regard to be reflective of the carrying on of the business the Company with intent to defraud the plaintiff.
- [31] The third and final conduct relates to the handling of the that the assets were removed from the Company while Suit 185 was pending. In this regard:
- a. The final audited accounts filed by the Company for the financial year ended 30 June 2014 reflect the current assets of the Company to be RM14,666,410. However, to date, the

assets have not been accounted for, and the defendants have not been able to sufficiently explain what happened to these assets.

- b. One such asset is a land in Mukim Hulu Jabur (“Hulu Jabur Property”), with a net book value of RM850,000 as reflected in the 2014 audited accounts of the Company. The Hulu Jabur Property was sold to Lihua Engineering & Trading Sdn Bhd (“Lihua”), as part of a settlement pursuant to a consent order dated 9 July 2019, involving Lihua and the Company. Records show that the balance of the proceeds of the sale of the Hulu Jabur Property amounting to RM454,146.69 was banked into the Company’s account on 5 August 2019, but an amount of RM450,000 was promptly withdrawn within two days, on 7 August 2019.
- c. The Company also charged another asset, the Air Putih Property, to Bizcap Solutions Sdn Bhd (“Bizcap”) as security for a loan of RM600,000. This was also done while Suit 185 was pending. There is no evidence provided by the defendants to show that the loan was disbursed to the Company.
- d. There is a lack of cogent explanation from the defendants on how monies of the Company were spent. In addition to the withdrawal of RM450,000 on 7 August 2019, and the lack of evidence on the disbursement of the loan from Bizcap, the plaintiff had demonstrated by way of documentary evidence, the withdrawal of monies out of the Company’s account, which the defendants have not been able to account for.

[32] The defendants argued that the plaintiff had only relied on the audited accounts of the Company in putting forward the claim that the defendants had intended to defraud the plaintiff. I am of the view that this argument is misconceived. The evidence relied on by the plaintiff to prove its claim is not limited only to the audited

accounts of the Company, but also to the conduct of the defendant whilst Suit 185 was still pending, as I have explained above.

[33] With these considerations, I find the elements in section 540(1) of the CA 2016 have been met. The plaintiff has proven on the balance of probabilities that the business of the Company had been carried out with the intention to defraud creditors, including the plaintiff.

[34] The defendants were knowing parties to the carrying on of business in such manner and must be made responsible for any liabilities arising. As directors of the Company, they are part of the alter ego of the Company and are not entitled to argue that they were not aware of the way the business of the Company was being conducted (see *Zaheran bin Hj Zakaria v. Redmax Sdn Bhd and other appeals* [2016] 5 MLJ 91, at paragraph [62]).

[35] I am of the further view that the conduct of the defendants as described also meets the elements of conspiracy to injure, in that:

- a. There was an agreement between the defendants;
- b. The purpose of the agreement was to injure the plaintiff;
- c. Acts had been done by the defendants in the execution of the agreement; and
- d. The acts had resulted in damages to the plaintiff,

(see *Renault SA v. Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394).

[36] For conspiracy to injure to be proven, it is not necessary to show an express agreement between alleged conspirators. It is sufficient to show common intention between them, and that they had deliberately combined their intentions and actions to achieve a common end (see *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v. Intrared Sdn Bhd (previously known as Reetaj City Centre*

Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437).

[37] In this case, I find the defendants' conduct in allowing the Company to enter into the SPA at a time when the Company would not have been able to pay its debts as they fall due, in allowing Mujur Jayamas to assume the business of the Company and in removing the assets of Company while Suit 185 was still pending, point to deliberate collusive intention and actions on the part of the defendants to defraud the plaintiff, including to deprive the plaintiff of the Judgment Sum. Following ***Zaheran bin Hj Zakaria*** (supra), as directors of the Company, the defendants cannot feign ignorance or argue that they were not aware of these events. As such, it is my considered view that the tort of conspiracy to injure had been proven on a balance of probabilities in this case.

D. Decision

[38] As the elements in section 540(1) of the CA 2016 have been met, I am of the view that personal liability may be imposed on the defendants. I am of the further view that the elements of the tort of conspiracy have been established in the conduct of the defendants.

[39] As such, the plaintiff's claims in prayers (a), (b), (c), (e) and (f) of the statement of claim, namely:

- a. a declaration that the business of the Company was carried out with intent to defraud its creditors and/or for a fraudulent purpose;
- b. a declaration that the defendants, the directors of the Company, were knowingly parties to the carrying on of business of the Company with intent to defraud its creditors;
- c. a declaration that the defendants are personally liable for all sums due by the Company to the plaintiff including the

Judgment Sum; and

- d. judgment against the defendants jointly and severally for the sum of RM6,407,907.67.

are allowed, with costs.

Dated: 22 MAY 2023

(ADLIN ABDUL MAJID)

Judicial Commissioner

High Court of Malaya

Commercial Division (NCC6)

Kuala Lumpur

Counsel:

For the plaintiff - Michael Chow & Wendy Yeong; M/s. Michael Chow

For the defendants - T. Raja; M/s. T. Raja & Co

Cases referred to:

Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors [2017] 10 CLJ 385

Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors [2006] 7 CLJ 364

Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd [2002] 3 CLJ 10

Re Gerald Cooper Chemicals Ltd [1978] 2 All ER 49

Zaheran bin Hj Zakaria v. Redmax Sdn Bhd and other appeals [2016] 5 MLJ 91

Renault SA v. Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394

Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v. Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437