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1. [Abdul Wahid bin Mataring v Ditali Palm Oil Mill Sdn Bhd & Ors \[2024\] MLJU 3018](#)

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# ABDUL WAHID BIN MATARING v DITALI PALM OIL MILL SDN BHD & ORS

CaseAnalysis  
| [2024] MLJU 3018

## [Abdul Wahid bin Mataring v Ditali Palm Oil Mill Sdn Bhd & Ors \[2024\] MLJU 3018](#)

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)  
ATAN MUSTAFFA YUSSOF AHMAD J  
ORIGINATING SUMMONS NO WA-24NCC-659-11 OF 2023  
18 March 2024

*Azzan Aznan (**Syazwan Hasim** & Azeel Eskandar) for the plaintiff.  
Celine The (Haris Ibrahim Kandiah Partnership) for the defendant.*

### Atan Mustaffa Yussof Ahmad J:

#### BROAD GROUNDS OF DECISION

[1] Enclosure 6 is allowed with costs in the cause. The court will direct pleadings to be delivered.  
**Plaintiff's claim for unlawful termination as director**

[2] The present issue under consideration is whether the Plaintiff's claim for unlawful termination as director of the 1st Defendant company can be determined based on the affidavit evidence and contemporaneous documents, or if the matter necessitates the taking of oral evidence by way of a full trial.

[3] The Plaintiff contends that his removal as director at the Extraordinary General Meeting ("**EGM**") held on 29.03.2023 was unlawful as he was wrongfully denied the opportunity to participate in the online meeting to defend himself against the resolution for his removal. To support this assertion, the Plaintiff relies on his affidavit evidence stating that he had attempted to enter the virtual meeting room from 2.30pm to 2.45pm but was not granted access. It is the Plaintiff's case that the issue can be determined based on the documentary evidence, primarily the notices, resolutions and minutes pertaining to the EGM, without the need for oral testimony.

[4] The Defendants strenuously object to the Plaintiff's position. It is contended that notwithstanding the documents relied on, there are clear disputes on the material facts relating to the Plaintiff's alleged denial of participation in the EGM which can only be resolved with the benefit of viva voce evidence. The Defendants in the 2nd Defendant's Affidavit in Reply exhibited the Zoom Session Report which shows that there were no other parties in the waiting room seeking access to the meeting besides the 2nd and 3rd Defendants who entered at 2.27pm and 2.29pm respectively. This casts serious doubt on the veracity of the Plaintiff's claim. The Plaintiff subsequently exhibited a screenshot purportedly showing his attempt to enter the meeting room. However, this was met with the Defendants raising discrepancies as to the date and time of the creation of the exhibit.

[5] It is the Defendants' submission that given the centrality of the disputed facts, particularly the Plaintiff's participation or lack thereof in the EGM which led to his removal, the matter cannot be appropriately determined by way of affidavit evidence alone. It was argued that the Plaintiff's bare assertion cannot stand in the face of the

contemporaneous documentary evidence put forward by the Defendants. The truth of the competing claims can only be tested by way of cross-examination as the credibility of the deponents is at the heart of the dispute.

[6] I am persuaded by the reasoning of the Defendants on this issue. The Court of Appeal in the instructive case of *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 held that:

*“Unquestionably, these conflicts in the evidence can only be properly and satisfactorily resolved if oral evidence is adduced and witnesses cross-examined on their evidence which, however, is not possible in proceedings begun by originating summons. To add to the uncertainty of the facts the deponents of both affidavits of the appellants and the respondents were not cross-examined to ascertain the veracity or otherwise of their evidence. It would seem that both parties were contented to rest their case on their affidavits only where such affidavits do not unequivocally bear testimony conclusively and positively to the various allegations but are themselves open to more than one interpretation. In such a case as the present where fraud or intention to defraud is the central issue we agree that the particulars of fraud must be specifically pleaded and it is obvious that the particulars of the fraud are absent in the affidavit of the manager of the respondent company.”*

[7] In the present case, it cannot be said that the affidavits filed unequivocally resolve the dispute as to whether the Plaintiff had been wrongfully deprived of the chance to participate in the EGM. The evidence is clearly at odds. The Plaintiff makes an assertion which is denied by the Defendants, who have put forward credible documentary evidence in the form of the Zoom Session Report which prima facie contradicts the Plaintiff’s version of events. There are also doubts raised as to the veracity of the Plaintiff’s attempt to introduce screenshot evidence to support his claim. In such circumstances, I agree with the Court of Appeal’s observation in *Yebet Saman & Ors v Foong Kwai Long & Ors* [2015] 2 CLJ 929 that:

*“The various affidavits filed contain issues of fact that need to be resolved by viva voce evidence and the learned judge should have converted this matter to a writ and justice could have been better served. It is our view this matter should have been disposed of by way of oral evidence.”*

[8] I find that this is precisely the position here. The factual dispute regarding the Plaintiff’s alleged denial of entry to the EGM is a critical issue that goes to the heart of his claim for unlawful termination. It would be an affront to justice to make a conclusive finding based on a consideration of the affidavit evidence alone, particularly in light of the documentary evidence put forward by the Defendants which raises serious questions as to the Plaintiff’s assertion. The veracity of the allegations can only be properly tested by subjecting the deponents to cross-examination.

[9] Support can also be found in the decision of the Privy Council in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, where Lord Templeman in delivering the judgment of the Board held:

*“If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent’s affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.”*

[10] Applying the above principle to the instant case, the Defendants have raised a credible denial of the Plaintiff’s allegation that he was prevented from attending the EGM by exhibiting evidence which shows an absence of any other party seeking access. In such circumstances, the court would be constrained to ignore the Plaintiff’s disputed assertion in the absence of oral evidence or cross-examination to test the veracity of the same.

[11] In the circumstances, the irresistible conclusion is that the factual dispute pertaining to the events of the EGM is wholly unsuitable to be determined by way of affidavit evidence alone. The interests of justice demand that the matter be ventilated by way of a full trial with the opportunity for cross-examination of the deponents. The proceedings are therefore ordered to continue as if begun by way of Writ action.

#### **Validity and purpose of the issuance of new shares**

[12] The present issue under consideration is whether the validity and purpose of the issuance of new shares in the 1st Defendant company can be ascertained by construing the relevant provisions in the Shareholders Agreement dated 11.07.2020 (**“Shareholders Agreement”**) and the notices, or if oral testimony is required to establish the facts.

[13] The Plaintiff opposed the conversion application on this issue, arguing that the construction of the relevant clauses in the Shareholders Agreement is sufficient to dispose of the challenge to the issuance of the 300,000 new shares to the 2nd Defendant. Specific reference was made to clause 4.6 of the Shareholders Agreement which stipulates that any proposed increase in the paid-up capital of the company during the currency of the agreement shall only be made upon the collective agreement of all shareholders. It is the Plaintiff's contention that the unilateral issuance of shares to the 2nd Defendant over the Plaintiff's objection vide a letter dated 28.03.2023 was a clear breach of clause 4.6 and [section 75](#) of the [Companies Act 2016](#), thus rendering the share issuance invalid. The Plaintiff submitted that this question can be determined based on the construction of the written agreement and contemporaneous documents, and the calling of oral evidence is unnecessary as held in *Hass Holdings Sdn Bhd v BCC Development Sdn Bhd* [2021] 1 LNS 1458.

[14] On the other hand, the Defendants argued that notwithstanding the terms of the Shareholders Agreement, the facts disclose that the Plaintiff had at all material times prior to the letter dated 28.03.2023 agreed to and/or acquiesced to the issuance of the new shares, which was necessary for the purposes of securing additional banking facilities from Affin Islamic Bank Berhad ("**Affin Bank**") to raise working capital for the company. The Defendants highlighted that on 11.10.2022, the Plaintiff together with the other directors had signed a Directors' Written Resolution accepting Affin Bank's Letter of Offer dated 11.10.2022 for additional facilities totaling RM14 million. Crucially, one of the conditions imposed was for the 1st Defendant to provide security in the form of an upfront cash deposit of RM2 million. It is against this backdrop that the Notice of Requisition dated 01.03.2023 was issued to raise the necessary funds via the issuance of the 300,000 new shares, which the 2nd Defendant undertook to fully subscribe to in the event of non-subscription by the other shareholders. The Defendants further contended that the Plaintiff was fully aware of the circumstances and had voiced no objections, as evidenced by his participation in meetings and receipt of notices. As such, the Plaintiff is now estopped from challenging the share issuance.

[15] Upon a thorough evaluation of the affidavit evidence and the submissions of the parties, I am inclined to agree with the Defendants that the question of the validity and purpose of the share issuance cannot be satisfactorily determined by merely looking at the Shareholders Agreement in isolation. Clause 4.6, while clearly requiring collective agreement of the shareholders for any increase in share capital, must be considered in light of the entire factual matrix and the contemporaneous conduct of the parties. The evidence suggests that the Plaintiff, who was at the material time a director of the 1st Defendant, had knowledge of the financial constraints faced by the company and the need to raise capital via the issuance of new shares for purposes of fulfilling the conditions imposed by Affin Bank for the grant of additional facilities. This is clear from the Plaintiff's acceptance of the Letter of Offer by signing the Directors' Written Resolution dated 11.10.2022, which was well before the Notice of Requisition for the share issuance was issued on 01.03.2023.

[16] While the Plaintiff may have a different view on whether he had agreed to the share issuance, it is not appropriate for this court to make a finding on his affidavit evidence alone, particularly in light of the 2nd Defendant's assertions in her affidavit that the Plaintiff had at all times expressed agreement verbally and had knowledge of the notices and resolutions pertaining to the share issuance. The Plaintiff's bare denial of the same in his affidavit is insufficient to resolve this critical question of fact.

[17] I am thus in agreement with the reasoning of the learned High Court judge in *ISM Sendirian Berhad v Queensway Nominees (Tempatan) Sdn Bhd* [2015] 1 LNS 757, where it was aptly observed that in cases involving the construction of an agreement, where there are conflicting or disputed facts on major issues supported by oral evidence as opposed to pure documentary evidence, the matter can be best resolved and determined by way of a Writ action instead of an Originating Summons as "the disputed facts would only mean that witnesses ought to be called not only to allow for their version of events to be narrated in court but more importantly for this court to make an assessment on the veracity of their oral testimony."

[18] Reverting to the present case, given the clear conflicts between the Plaintiff's and the 2nd Defendant's version of events regarding the circumstances leading to the share issuance, it would be unsafe for this court to make a finding based on affidavit evidence alone. The credibility of the deponents must be tested by cross-examination and the court must be apprised of all relevant facts and evidence to determine the true purpose and validity of the impugned share issuance. A consideration of the provisions of the Shareholders Agreement, while relevant, is not conclusive and cannot be looked at in a vacuum. The construction of clause 4.6 and its applicability is a mixed question of fact and law that warrants the taking of oral evidence at a fully ventilated trial.

[19] For the foregoing reasons, I find that there are serious issues to be tried with regard to the validity and purpose of the new share issuance that render the Originating Summons unsuitable for a final determination of the Plaintiff's claim.

**Plaintiff's breach of fiduciary duties and non-disclosure of competing interests**

[20] Another issue that arises for consideration in this application is whether the allegations made by the Defendants regarding the Plaintiff's breaches of fiduciary duties and non-disclosure of competing interests are relevant to the Originating Summons and if they raise triable issues that require viva voce evidence.

[21] The Plaintiff mounted a strong objection against the conversion application, contending that the Defendants' allegations set out in paragraphs 41 to 54 of their Affidavit in Reply affirmed on 26.09.2023 concerning the Plaintiff's purported breaches of duties and involvement in competing businesses are not germane to the Originating Summons. It was submitted that the primary focus of the Originating Summons is on the legality of the Plaintiff's removal as director of the 1st Defendant and the validity of the new share issuance. The Plaintiff argued that the matters raised by the Defendants are a mere afterthought calculated to delay the proceedings, given that they were never raised prior to the filing of this action despite the Defendants being aware of the alleged wrongdoings while the Plaintiff was still a director. It was also highlighted that the issues pertaining to the allegedly unauthorised transactions with Maju Aliran (M) Sdn Bhd ("**Maju Aliran**") are already the subject of a separate suit commenced by Maju Aliran against the 1st Defendant in the High Court of Sabah and Sarawak at Tawau vide Suit No. TWU-22NCVC-4/4-2023 ("**Maju Aliran Suit**") and therefore ought not to be ventilated in the instant proceedings.

[22] The Defendants on the other hand strenuously argued that the allegations against the Plaintiff are highly relevant as they pertain to the Plaintiff's conduct as a director of the 1st Defendant which led to the decision to remove him, and therefore have a direct bearing on the challenge against his removal which forms the subject matter of the Originating Summons. The Defendants alleged that the Plaintiff had, in breach of his fiduciary duties, exceeded his authority as director by issuing a Letter of Offer dated 15.07.2022 to Maju Aliran and acknowledging receipt of invoices without the knowledge or approval of the 1st Defendant. This led to the filing of the Maju Aliran Suit which has exposed the 1st Defendant to a potential liability of RM1.4 million.

[23] On the issue of non-disclosure, it was the Defendants' assertion that the Plaintiff had failed to disclose the existence of an arrangement between Jeneri Oil Products Sdn Bhd, a company related to him, and SP Palm Oil Industries Sdn Bhd for the purchase and processing of oil palm products from the 1st Defendant's mill to the exclusion of the 1st Defendant's interest. It was contended that these matters only came to light in December 2022 and the reason they were not raised earlier was because investigations were still ongoing. The Defendants submitted that the bare denials of the Plaintiff in his affidavits do not satisfactorily address the detailed particulars pleaded and the contemporaneous documentary evidence exhibited by the Defendants, thereby raising clear triable issues that necessitate a full trial with the benefit of oral testimony.

[24] I have anxiously considered the respective submissions of the parties. The Court of Appeal in the instructive case of *Delta-Pelita Sebakong Sdn Bhd v Golden Cash Harvest Sdn Bhd & Ors* [2020] 1 LNS 475 had occasion to consider the principles relating to breach of fiduciary duties in the context of directors of a company. Referring to the seminal decision in *Bristol & West Building Society v Mothew* [1998] Ch 1 [📄](#), the Court of Appeal adopted the definition of a fiduciary espoused by Millet LJ, the relevant excerpt of which bears reproducing:

*"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of the fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal..."*

[25] Bearing the above principles in mind and having regard to the evidence presented, I am of the view that the Defendants' allegations regarding the Plaintiff's breaches of fiduciary duties and non-disclosure of conflict of interest are properly raised and cannot be dealt with in a summary fashion by merely relegating them to the realm of irrelevancy. It is well established that a director owes fiduciary obligations to the company and must at all times exercise his powers for a proper purpose and in the best interest of the company. The allegations mounted by the Defendants strike at the heart of this duty of loyalty owed by the Plaintiff as a director of the 1st Defendant.

**[26]** I do not think that the Defendants' evidence in support of their allegations can be said to be frivolous or unmeritorious. With respect to the Maju Aliran transactions, the 1st Defendant has exhibited in enclosure 5 a copy of the impugned Letter of Offer dated 15.7.2022 bearing the Plaintiff's signature together with the relevant invoices and demand letters from Maju Aliran. It was also deposed that as a result of the Plaintiff's alleged wrongful acts, the 1st Defendant has incurred legal expenses to the tune of RM80,120 to defend the Maju Aliran Suit.

**[27]** As for the allegation of non-disclosure of competing interest, a copy of the profit sharing agreement dated 19.12.2019 entered between Jeneri Oil Products Sdn Bhd (a company related to the Plaintiff) and SP Palm Oil Industries Sdn Bhd which enabled SP Palm Oil to purchase oil palm products from the 1st Defendant's mill to the exclusion of the 1st Defendant has been exhibited by the Defendants. Minutes of meetings and correspondence evidencing the Plaintiff's knowledge of the arrangement were also produced.

**[28]** I am unable to agree with the Plaintiff's contention that the issues pertaining to the Maju Aliran transactions are only appropriate to be ventilated in the Maju Aliran Suit. The 1st Defendant is clearly entitled to rely on the Plaintiff's conduct in those transactions as a justification for his removal as director, which is a central issue in the present action. I find that the matters complained of by the Defendants relating to the Plaintiff's conduct as director are properly in issue in the instant proceedings as they have a direct and inextricable link to the decision to remove the Plaintiff, which decision is being assailed in the Originating Summons. In the circumstances, it would be wholly unsatisfactory for a determination of these issues to be made based on a consideration of affidavit evidence alone sans the opportunity for cross-examination, particularly since the Plaintiff's affidavits do not traverse in any meaningful detail the particulars and documentary evidence relied on by the Defendants. I am therefore of the considered view that there are obvious triable factual issues in relation to the Plaintiff's alleged breaches of duties and conflict of interest that warrant the calling of oral evidence in a fully ventilated trial.

**[29]** For the reasons set out above, I find that this issue must be answered in favour of the Defendants. The Originating Summons is clearly unsuitable as a means to resolve the serious issues of fact raised and in the circumstances, it is only appropriate that the present proceedings be converted to a Writ action to enable the determination of the Plaintiff's alleged breaches of duties and conflict of interest by way of viva voce evidence.