IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF MALAYSIA
[SUIT NO.: WA-22NCC-813-11/2023]

BETWEEN

SCEC GROUP (MALAYSIA) SDN BHD
(COMPANY NO.: 201401048924 (1125113-W) **... PLAINTIFF**

AND

1. **WONG SIEW WOON**
(NRIC NO.: 8000304-10-5211)

2. **LEE POH WAH**
(NRIC NO.: 610716-10-6029)

3. **MOU, EN-KUANG @ TIMOTHY MOU**
(PASSPORT NO.: 308185535)

4. **IMPERO LAND SDN BHD**
(COMPANY NO.: 201901008604 (1317932-A))

5. **IMPERO MANAGEMENT SDN BHD**
(COMPANY NO.: 202001032799 (1389120P))

6. **CHAN BAOJIE**
(NRIC NO.: 881105-43-5653)

7. **TEH HAN CHEONG**
(NRIC NO.: 730202-14-5721)

8. **FIRST MILESTONE SDN BHD**
((COMPANY NO.: 201601007625 (1178553-T))

9. **SAMSON LEE SANG SUNG**
(NRIC NO.: 770629-12-5451)

10. SOON HENG LEKTRIK SDN BHD
(COMPANY NO.: 201001003645 (888235-T)

11. TEE LUNG SENG
(NRIC NO.: 831129-10-5135)

12. TEE CHEE BAN
(NRIC NO.: 481222-10-5343)

... DEFENDANTS

Abstract: 1. Essential elements of the tort of conspiracy must be pleaded in the statement of claim. A bare assertion of conspiracy based on the defendants' corporate relationship does not amount to conspiracy. A mere possibility of a conspiracy inferred from the ownership and control structure of the companies, without more, is plainly insufficient to constitute a reasonable cause of action against the defendants.

2. In a striking out application, the plaintiff must put all relevant material facts and evidence before the court and show that prima facie essential evidence in support of the claim has been exhibited in the affidavits. Where the plaintiff failed to plead the essential elements of the claim with sufficient particulars and did not produce *prima facie* evidence to support its assertions against the defendant, the proper course is to strike out the claim summarily without the need for a full trial.

3. Sections 404 and 405 of the Companies Act 2016 do not prohibit multiple judicial management applications. It follows that the mere fact that judicial management applications were filed consecutively within a short time frame does not by itself amount to proof of fraud or conspiracy.

4. The court will not dismantle the formal legal separation between a parent and subsidiary company just because there is parental control over the subsidiary through ownership and common directors. Mere ownership and control of a company is not sufficient to justify piercing the corporate veil.

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Claim premised on tort of conspiracy and fraud - Plaintiff alleged defendants have abused court process by filing baseless judicial management application with intention to defraud plaintiff and avoid payment to plaintiff - Whether plaintiff has sufficiently pleaded and established a prima facie case against defendant - Whether defendants have been wrongfully joined - Whether claim was plainly and obviously unsustainable - Whether defendants were separate legal entities - Whether claim discloses reasonable cause of action - Whether action is vexatious and abuse of process of court*

COMPANY LAW: *Separate legal entity - Lifting of corporate veil - Conspiracy - Defendants were sued based on corporate relationship - Action against parent and subsidiary companies and directors - Whether proper basis for lifting corporate veil was pleaded*

[Fifth to 7th defendants application allowed with costs.]

Case(s) referred to:

Aspatra Sdn Bhd v. Bank Bumiputra Malaysia Bhd [1987] CLJ Rep 50 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Chin Chee Keong v. Toling Corporation Sdn Bhd [2016] 6 CLJ 666 CA ***(refd)***

Dato' Ahmad Zahid bin Hamidi v. Amir Bazli bin Abdullah [2012] 7 CLJ 823 CA ***(refd)***

Eramara Jaya Sdn Bhd & Ors v. Ong Cheng Heang @ Ong Cheng Hean & Ors [2018] CLJU 1851 HC ***(refd)***

Gasing Heights Sdn Bhd v. Aloyah bte Abd Rahman & Ors [1996] 3 CLJ 695 HC ***(refd)***

Gurbachan Singh s/o Bagawan Singh & Ors v. Vellasamy s/o Pennusamy & Ors [2015] 1 CLJ 719 FC ***(refd)***

Lee Yan Chwan & Anor v. Public Islamic Bank Bhd [2023] CLJU 2016 HC ***(refd)***

Mackt Logistics (M) Sdn Bhd v. Malaysian Airline System Bhd [2014] 5 CLJ 851 CA ***(refd)***

Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors [2021] 4 CLJ 821 FC ***(refd)***

Renault SA v. Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 CLJ 32 CA ***(refd)***

Suppuletchimi Karpaya v. Palmco Bina Sdn Bhd [1994] 2 CLJ 561 HC ***(refd)***

Soo Teck Lee & Ors v. Lim Geok Kim & Ors [2021] CLJU 2353 HC ***(refd)***

Syed Ibrahim & Co (applying as a legal firm) v. Trans Fame Offshore Sdn Bhd (under judicial management) (formerly known as Transfame Sdn Bhd) (BAP Resources Sdn Bhd & Ors, interveners) [2022] CLJU 1412 HC ***(refd)***

Sapura Energy Bhd & Ors v. Martin Bencher (Malaysia) Sdn Bhd [2024] 3 CLJ 159 HC ***(refd)***

Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 CA ***(refd)***

Zamzam Arabic Food Holding Sdn Bhd & Anor v. Johanjana Corporation Sdn Bhd [2022] 6 CLJ 692 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)

Companies Act 2016, ss. 404, 405, 465(1)(e), 540(1)

JUDGMENT

[1] Before the court is an application by the 5th to 7th Defendants to strike out the Plaintiff's claim against them pursuant to Order 18

Rule 19(1)(a), (b) and/or (d) of the Rules of Court 2012. The Plaintiff's action is based primarily on allegations of conspiracy and fraud, asserting that the defendants collectively engaged in a scheme to defraud the Plaintiff through the sequential filing of multiple judicial management applications to prevent the Plaintiff from enforcing a substantial adjudication decision in its favour. At the heart of this application lies the question of whether the Plaintiff has sufficiently pleaded and established a prima facie case against these particular defendants, who maintain they have been wrongfully joined to the action despite having no direct involvement in the impugned judicial management applications.

Background facts

[2] The Plaintiff, SCEC Group (Malaysia) Sdn Bhd, was appointed as the main contractor by Surrealist Communities (M) Sdn Bhd ("*Surrealist*) for a construction project pursuant to a Letter of Award dated 8.3.2019 *(Letter of Award)*. The contract value was RM216,070,000.00. The project involved the development of three blocks of apartments ranging from 45 to 48 floors at PT15630 (Lot A), Kg. Baru Salak Selatan, Mukim Petaling, Kuala Lumpur.

[3] On 8.3.2019, Surrealist provided a Letter of Undertaking to the Plaintiff *("Letter of Undertaking)*, signed by the 1st Defendant Wong Siew Woon ("*D1*"), the 2nd Defendant Lee Poh Wah ("DZ) and the 6th Defendant Chan Baojie ("D6"), agreeing to appoint a representative from the Plaintiff as an authorised joint signatory for the Housing Development Account (HDA Account No: 14023010050237) maintained with Bank Islam Malaysia Berhad.

[4] Subsequently, Surrealist failed to make payments to the Plaintiff under the project, and the Plaintiff's services were terminated. Surrealist then appointed the 8th Defendant First Milestone Sdn Bhd *("D8")* to continue with the project.

[5] The Plaintiff initiated adjudication proceedings against Surrealist. On 21.5.2021, the Adjudicator issued a decision ordering Surrealist to pay the Plaintiff RM61,287,190.13 *("Adjudication Decision")*. The Plaintiff filed an application to enforce this decision through Originating Summons No. WA-24C-113-07/2021, while Surrealist filed an application to set it aside through Originating Summons No. WA-24C- 140-08/2021. On 18.2.2022, the Court allowed the enforcement and dismissed Surrealist's application to set aside.

[6] On 4.10.2021, the Plaintiff issued a statutory demand notice to Surrealist under Section 465(1)(e) of the Companies Act 2016. On 14.10.2021, Surrealist filed for a Fortuna Injunction through Kuala Lumpur High Court Originating Summons No. WA-24NCC-464-10/2021 to prevent the Plaintiff from filing a winding-up petition. This application was rejected by the Court on 22.10.2021.

[7] Subsequently, four judicial management applications were filed:

a) On 25.10.2021, Surrealist filed the first judicial management application (WA-28JM-20-10/2021) *("First JM Application")*, which was dismissed on 25.3.2022.

b) On 28.3.2022, the 4th Defendant Impero Land Sdn Bhd *("D4")* filed the second judicial management application (BA-28JM-1-03/2022) *("Second JM Application")*, which was dismissed on 8.3.2023.

c) 3. On 9.3.2023, the 8th Defendant First Milestone Sdn Bhd *("D8")* filed the third judicial management application (WA-28JM-5-03/2023) *("Third JM Application")*, which was withdrawn and struck out on 12.10.2023.

d) 4. On 13.10.2023, the 10th Defendant Soon Heng Lektrik *("DIO")* filed the fourth judicial management application (BA-28JM-8-10/2023) *("Fourth JM Application")*.

[8] On 29.4.2022, the Plaintiff filed garnishee proceedings against Bank Islam through Kuala Lumpur High Court Execution No. WA-37G-80-04/2022. During these proceedings, it emerged that the HDA Account had been previously assigned to Bank Islam through a Deed of Assignment of Sales Proceeds and Specific Project Debenture, both dated 4.9.2018.

[9] At the material times, D1 and D2 were directors and shareholders of Surrealist, while the 3rd Defendant Mou, En-Kuang @ Timothy Mou was its majority shareholder. D6 was a director of Surrealist from 4.10.2017 to 12.10.2021. D4 was wholly owned by the 5th Defendant Impero Management Sdn Bhd *("D5')*, which in turn was wholly owned by D6. D6 and the 7th Defendant Teh Han Cheong ("D7") were directors of both D4 and D5. D8 was 99.9% owned by the 9th Defendant Samson Lee Sang Sung ("D9"), who was also its director. D10 had the 11th Defendant Tee Lung Seng *("D1T)* and the 12th Defendant Tee Chee Ban ("D1Z) as its directors and shareholders.

The Plaintiff's case against D5, D6 and D7

[10] The Plaintiff's primary allegation was that D5, D6 and D 7 participated in a fraudulent scheme and conspiracy through their positions at D4. D5 wholly owned D4, while D5 was in turn wholly owned by D6. Both D6 and D7 served as directors of D4 and D5. The Plaintiff alleged they allowed D4 to be used as a vehicle for fraud by filing the Second JM Application without basis, immediately after the First JM Application was dismissed, with the intention of preventing the Plaintiff from enforcing the Adjudication Decision and continuing with winding up proceedings.

[11] The Plaintiff alleged that D6 and D7 jointly and/or separately caused the falsification of D4's records to support the Second JM Application. Specifically, the Plaintiff pointed to records showing transactions under the name "Surrealist" from March 2019, when at

that time the company was still operating under its previous name "Poly Ritz," with the name change only occurring on 30.1.2020.

[12] Additionally, the Plaintiff made a separate allegation against D6 relating to his role as a former director of Surrealist. The Plaintiff alleged that D6, along with D1 and D2, made fraudulent representations and gave false undertakings to the Plaintiff regarding the HDA Account. Specifically, they represented that the Plaintiff would have rights over the HDA Account when in fact it had already been assigned to Bank Islam before the Letter of Award and Letter of Undertaking were given.

[13] The Plaintiff contended that D5, D6 and D7's actions were part of a larger conspiracy involving all defendants to prevent the Plaintiff from enforcing its rights through the sequential filing of judicial management applications. Under Section 540 of the Companies Act 2016, the Plaintiff sought to hold them personally liable, jointly and/or severally, for Surrealist's debts and liabilities.

[14] Section 540 of the Companies Act 2016 states:

"Liability where proper accounts not kept

540. (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 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.

(2) Where a person has been convicted of an offence under subsection 539(3) in relation to the contracting of such a debt as is referred to in that section, 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 the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.

(3) Where the Court makes any declaration pursuant to subsection (1) or (2), the Court may give such further directions as the Court thinks proper for the purpose of giving effect to that declaration.

(4) In particular and without prejudice to the generality of subsection (3), the Court may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to the person, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in the person or any corporation or person on behalf of the person, or any person claiming as assignee from or through the person liable or any corporation or person acting on behalf of the person and may make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

(5) For the purposes of subsection (4), "assignee" includes any person to whom or in whose favour by the directions of the person liable the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(6) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business with that intent or purpose shall be guilty of an offence.

(7) The Court may grant relief if the person under this section acts honestly and reasonably, and ought fairly be excused having regard to all the circumstances of the case.

Penalty: Imprisonment for ten years or one million ringgit or both."

The application in Enclosure 32

[15] The Notice of Application in Enclosure 32 was filed by D5, D6 and D7 pursuant to Order 18 Rule 19(1)(a), (b) and/or (d) of the Rules of Court 2012 and/or the inherent jurisdiction of the Court. D5 to D7 sought orders that: (1) the Plaintiff's Writ and Statement of Claim both dated 3.11.2023 be struck out against them; (2) costs of the application and all other related costs be paid by the Plaintiff; and (3) any other orders and/or further reliefs as the Court deems fit and proper.

[16] The grounds supporting the application were that: (a) the Plaintiff commenced action against the Defendants based on allegations that they filed and/or caused to be filed various applications to place Surrealist under judicial management; (b) the Plaintiff alleged these judicial management applications were filed without basis and with intention to injure the Plaintiff and/or avoid payment to the Plaintiff; (c) D5, D6 and D7 were wrongfully brought into this action as they were not applicants in any of the judicial management applications; (d) the Plaintiff failed to plead sufficient particulars in the Statement of Claim regarding the alleged fraud and/or conspiracy purportedly committed by D5, D6 and D7, such as their roles and specific acts; and (e) therefore the Plaintiff's claim against them ought to be struck

out as it discloses no reasonable cause of action and/or is scandalous, frivolous or vexatious and/or an abuse of the Court's process.

Respective parties' submissions

[17] D5, D6 and D7's submissions emphasised that the case against them was plainly and obviously unsustainable. They argued that the Plaintiff failed to plead sufficient particulars for both the tort of conspiracy and fraud claims. They highlighted that they were not applicants in any of the judicial management applications, and that D6 was no longer a director of Surrealist when the First JM Application was filed. They contended that as directors and shareholders of D4, they were separate legal entities and should not be joined to the action. They argued that the Plaintiff failed to produce any prima facie evidence of fraud or conspiracy at this stage, and that the timeline of judicial management applications alone was insufficient to prove these serious allegations.

[18] The Plaintiff submitted that this was not a plain and obvious case warranting strike out, and that they should be given the opportunity to prove their case at trial. They argued that they had adequately pleaded the relationship between the parties, showing how D4 was used as a vehicle for fraud being fully owned by D5, which was in turn fully owned by D6, with D6 and D7 as directors. They pointed to the suspicious timing of the judicial management applications and alleged falsification of accounts by D4 as evidence of conspiracy. The Plaintiff also emphasised that D6's liability arose from two instances - the fraudulent representation regarding the HDA account when he was a director of Surrealist, and the subsequent involvement in the judicial management applications through D4. They maintained that they had produced sufficient prima facie evidence through their affidavits and that full evidence need only be adduced at trial.

Analysis and findings of the court

No reasonable cause of action and scandalous, frivolous, vexatious

[19] The Plaintiff's claim against D5 to D7 is based on two main causes of action, namely the tort of conspiracy and fraud. In summary, the Plaintiff alleges that the Defendants, including D5 to D7, have abused the court process by filing baseless judicial management applications with the intention to defraud the Plaintiff and avoid payment to the Plaintiff. The Plaintiff avers there was an agreement between the Defendants to injure the Plaintiff and the Defendants have conspired to defraud the Plaintiff.

[20] However, D5 to D7 have applied to strike out the claim against them pursuant to Order 18 Rule 19(1)(a), (b) and/or (d) of the Rules of Court 2012. The crux of their contention is that the Plaintiff's claim discloses no reasonable cause of action against them and the claim is scandalous, frivolous, vexatious and an abuse of the court's process.

[21] Having considered the written submissions of the parties and the oral arguments advanced before me, I am satisfied that D5 to D7's application to strike out the Plaintiff's claim against them ought to be allowed.

[22] The principles governing striking out applications are well settled. The oft-cited Supreme Court case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 made clear that it is only in plain and obvious cases that recourse should be had to the summary process of striking out. The degree of unsustainability of the claim must appear on the face of it without having to go into lengthy and mature consideration in detail. Applying these principles to the present case, I find that the Plaintiff's claim against D5 to D7 is plainly and obviously unsustainable for the following reasons.

[23] First, the Plaintiff has failed to plead the essential elements of the tort of conspiracy against D5 to D7. The Court of Appeal in *Renault*

SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394 laid down the four elements that must be satisfied at the interlocutory stage, the first and most important being that there must be an agreement between two or more parties to injure the Plaintiff. However, the Plaintiff has not pleaded any particulars of an agreement between D5 to D7 and the other defendants to file the impugned judicial management applications to defraud the Plaintiff. The mere fact that D5 is the holding company of D4 which filed the Second Application, and D6 and D7 are common directors, without more, is insufficient to establish an agreement to conspire. The bare assertion of conspiracy based on the Defendants' corporate relationship does not amount to conspiracy, as held in *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259 (HC).

[24] Secondly, the tort of fraud has also not been sufficiently pleaded against D5 to D7. It is trite that fraud must be specifically pleaded, stating the particulars of fraud relied upon (see *Eramara Jaya Sdn Bhd & Ors v Ong Cheng Heang @ Ong Cheng Hean & Ors* [2018] MLJU 1744 (HC)). The Plaintiff must plead the role and specific acts of the purported fraud said to be committed by each of D5 to D7. Aside from a bald allegation that D6 and D7 as directors of D4 "have jointly and/or separately allowed and/or caused the Second JM Application to be filed without basis", no other particulars have been furnished. It is pertinent to note that D5 to D7 are separate legal entities from D4. The alleged fraudulent filing by D4 cannot automatically be attributed to its holding company and directors without specific acts of fraud being pleaded. As against D6, the allegation that he signed a letter of undertaking during his directorship of Surrealist, without more, does not amount to fraud. The Plaintiff has not shown how this letter was false or fraudulent.

[25] Thirdly, and in any event, I agree with the submission of D5 to D7 that the Plaintiff has not adduced sufficient prima facie evidence in

support of its claim. Where fraud is alleged, it is incumbent on the Plaintiff to put forward prima facie evidence at the striking out stage to demonstrate a sustainable claim. This was made clear by the High Court in *Suppuletchimi Karpaya v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 which held that on a striking out application, the Plaintiff must put all relevant material facts and evidence before the court and show that prima facie essential evidence in support of the claim has been exhibited in the affidavits. Bare allegations would not suffice (see *Soo Teck Lee & Ors v Lim Geok Kim & Ors* [2022] 9 MLJ 41 (HC)). Here, the Plaintiff has not produced any prima facie evidence to show that D5 to D7, as opposed to D4, were complicit in any fraud or conspiracy. The letter of undertaking exhibited by the Plaintiff does not by itself evince any wrongdoing on the part of D6.

[26] Fourthly, insofar as the Plaintiff seeks to impugn the filing of the Second JM Application by D4 as an abuse of process, this is a matter to be determined by the court hearing that judicial management application and not in the present suit. The High Court in *Syed Ibrahim & Co (applying as a legal firm) v Trans Fame Offshore Sdn Bhd (under judicial management) (formerly known as Transfame Sdn Bhd) (BAP Resources Sdn Bhd & Ors, interveners)* [2023] 7 MLJ 399 recognised that the Companies Act 2016 does not prohibit multiple judicial management applications by creditors as long as each application is justified and meets the statutory requirements. The bona fides and merits of D4's application must be considered by the court seized of that matter. It is not for this court to pre-judge that issue in these proceedings, especially since D5 to D7 are not even parties to that application. To do so may run the risk of making inconsistent or conflicting findings.

[27] Finally, even if there is any basis to suggest that D4's judicial management application amounts to an abuse of process, D5 to D7 should not have been made parties to the present action in their personal capacities. D5 is a separate legal entity from D4, while D6

and D7 as directors are distinct from the company. It is a well-established principle of company law that a company has a separate legal personality from its members (see *Salomon v A Salomon and Co Ltd* [1896] UKHL 1 (HL)). Accordingly, if there is an issue with the propriety of the filing, D6 and D7 may at most be called as witnesses but they ought not be made defendants in their own right.

[28] For all the above reasons, I find that the Plaintiff's claim against D5 to D7 is plainly and obviously unsustainable. It discloses no reasonable cause of action and is vexatious and an abuse of the process of the court. The Plaintiff has failed to plead the essential elements of its claim with sufficient particulars and has not produced prima facie evidence to support its assertions against these defendants. In the circumstances, the proper course is to strike out the claim summarily without the need for a full trial.

Timeline of JM applications

[29] The Plaintiff alleges that the close timeline in which the various judicial management applications were filed by the Defendants demonstrates a conspiracy between them to defraud the Plaintiff. The Plaintiff contends there is a pattern of abuse whereby as soon as one judicial management application is dismissed, another defendant files a fresh application on the very next working day. This, according to the Plaintiff, could only have been achieved through the sharing of insider information between D1 and D3 and the other defendants. The repeated filing of allegedly baseless applications has prejudiced the Plaintiff by triggering automatic moratoriums and frustrating the Plaintiff's enforcement and winding up efforts.

[30] However, I accept the submissions of D5 to D7 that the mere fact that judicial management applications were filed consecutively within a short time frame does not by itself amount to proof of fraud or conspiracy.

[31] Sections 404 and 405 of the Companies Act 2016 do not prohibit multiple judicial management applications. The High Court in *Syed Ibrahim & Co* [supra] noted the Companies Act 2016 is silent on whether Parliament intended to restrict judicial management applications to a one-time application only. Had that been the legislative intent, the Act would have expressly provided for it.

[32] In a similar context, the High Court in *Sapura Energy Bhd & Ors v Martin Bencher (Malaysia) Sdn Bhd* [2024] MLJU 65, in dealing with a scheme of arrangement, held that the legislative intent behind the Companies Act 2016 inclines towards facilitating corporate reorganisations to avoid liquidation. This objective is reflected in numerous authorities, both local and foreign, that emphasise the importance of saving businesses and considering creditors' interests over liquidation. The court found that the Act does not prohibit consecutive applications for restraining orders, provided each application is justified and meets the statutory requirements. Such applications adhere to the spirit of the legislation aimed at giving companies an opportunity to restructure.

[33] Although *Sapura Energy* concerned schemes of arrangement, I agree with D5 to D7 that the underlying philosophy of facilitating corporate rescue applies equally to judicial management. Creditors have a right to file judicial management applications as long as there is a reasonable probability of rehabilitating the company or preserving its business as a going concern, or where creditors' interests would be better served compared to liquidation. The mere fact that multiple applications were filed does not in itself constitute fraud or conspiracy.

[34] In any event, I find that the Plaintiff has not shown any evidence of any agreement or understanding between D5 to D7 and the other defendants to conspire to injure the Plaintiff through the filing of these applications. No credible evidence has been shown of any insider information being shared with these defendants to enable

them to file their applications hot on the heels of the dismissal of the earlier applications. An adverse inference of conspiracy cannot be drawn from the timeline alone. Significantly, D5 to D7 are not even the applicants in any of the impugned judicial management applications.

[35] While it may be open to the Plaintiff to challenge the bona fides of the filing of the judicial management applications, that is a matter to be raised before the courts hearing those applications. It is for those courts to determine if there has been any abuse of process after considering the merits and circumstances of each application. This court cannot make a predetermination on that issue in the present proceedings, especially since D5 to D7 are not parties to those applications.

[36] In the premises, I find that the Plaintiff's allegation that the filing of the judicial management applications by the various defendants according to the timeline set out amounts to proof of conspiracy to defraud is plainly unsustainable. The Plaintiff's submission is built on conjecture and surmise without any prima facie evidence to back it up.

D8 and D9S admissions

[37] The Plaintiff seeks to rely on alleged admissions made by D8 and D9 their defence that the Third JM Application filed by D8 on 9.3.2023 was done on the suggestion of the D1. According to the Plaintiff, the D1 had represented to D8 and D9 that the outstanding payment due to D8 would be paid if not for the legal actions taken against Surrealist. It was this representation that prompted D8 to file the Third JM Application through solicitors recommended by the D1. The Plaintiff argues that if the Third JM Application was instigated by the D1, it is highly probable that the Second JM Application and the Fourth JM Application filed by D10 on 13.10.2023 were also filed on the instruction of D1 to D3. The Plaintiff contends that

whether the Defendants have conspired with each other to defraud the Plaintiff in this manner is an issue of fact to be determined at trial.

[38] In response, D5 to D7 submit that it is not permissible for the Plaintiff to simply adopt the allegations made by D8 and D9 against the D1 and then seek to apply those allegations across the board to all the other defendants, including themselves. In this regard, D5 to D7 rely on the High Court decision in *Lee Yan Chwan & Anor v Public Islamic Bank Bhd* [2023] MLJU 2282 where a claim was struck out as it was based on a mere assumption rather than facts.

[39] Having considered the matter, I find that the Plaintiff's attempt to implicate D5 to D7 in the alleged conspiracy to defraud based on the assertions of D8 and D9 to be plainly unsustainable.

[40] First, D8 and D9's allegations pertain only to the involvement of the D1 in the filing of the Third JM Application by D8. Those assertions do not extend to D5 to D7. There is no evidence of any direct act of instigation or representation by D5 to D7 to D8 and D9.

[41] Second, and more fundamentally, it is not open to the Plaintiff to simply extrapolate D8 and D9's allegations and apply them indiscriminately to D5 to D7 without more. To do so would be to engage in conjecture and speculation devoid of factual basis. The Plaintiff cannot bootstrap its claim against one set of defendants upon the unproven assertions of another set of defendants. This is the very mischief that the High Court in *Lee Yan Chwan & Anor v Public Islamic Bank Bhd* sought to prevent. There, the Plaintiff's claim was premised on a mere assumption that the bank was responsible for leaking his account details because a third party was aware of the details. In striking out the claim, the court held that an assumption is not a fact and cannot form the basis of a cause of action. Commencing proceedings based on assumptions would require the

court to enquire into those assumptions, thereby taking on the role of an investigative agency.

[42] Third, what the Plaintiff is inviting this court to do is to draw an adverse inference that all the Defendants were acting in cahoots merely because D8 and D9 have made certain accusations against the D1, even though there is no evidence linking D5 to D7 to any of the impugned acts. With respect, this is a leap of logic that the court cannot make. As stated above, it would be purely speculative to infer a conspiracy to defraud on the part of D5 to D7 based on the limited assertions regarding the D1's alleged representations to D8 and D9. No basis has been shown to suggest that D5 to D7 were involved in the instigation of D8's Third JM Application, much less the other applications. Tellingly, the Plaintiff does not even plead that D5 to D7 made any representations to D8 and D9.

[43] Fourth, I accept the submission of D5 to D7 that the allegations levelled by D8 and D9 are in any event irrelevant to D5 to D7's striking out application as D5 to D7 are not applicants in any of the judicial management applications. There is no nexus between those assertions and the present application by D5 to D7 to strike out the claim against them.

[44] As such, I find that the allegations made by D8 and D9, even if proven, do not disclose a reasonable cause of action against D5 to D7 for conspiracy to defraud. It follows that the Plaintiff's attempt to resist the striking out of its claim against D5 to D7 on this ground must fail.

Trial unnecessary

[45] The Plaintiff opposes the striking out of its claim, contending that the matter should proceed to trial as there are issues of fact that require viva voce evidence and cross-examination to be resolved. The Plaintiff argues that it should be given an opportunity to

establish its case at trial, alleging that the Defendants, including D5 to D7, knowingly participated in carrying on the business of Surrealist with the intention of defrauding the Plaintiff. The Plaintiff relies on the Court of Appeal decisions in *Dato' Ahmad Zahid bin Hamidi v Amir Bazli bin Abdullah* [2012] 6 MLJ 564 and *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473 to assert that striking out should only be ordered in plain and obvious cases and where the claim is obviously unsustainable. The Plaintiff submits this is not such a case.

[46] On the other hand, D5 to D7 argue that a trial is unnecessary as the Plaintiff has failed to establish a reasonable cause of action or a prima facie case against them to warrant a trial. D5 to D7 submit that while the Plaintiff may not be required to adduce all evidence at this interlocutory stage, it must at minimum produce prima facie evidence rather than relying on mere assertions in the affidavits. It is D5 to D7's case that the documentary evidence adduced by the Plaintiff is plainly insufficient to implicate them. D5 to D7 further argue that the authorities relied on by the Plaintiff are distinguishable as there are no issues of law requiring lengthy argument or factual disputes requiring viva voce evidence in the present application. According to D5 to D7, it is apparent that they have been wrongfully named as parties to these proceedings and to insist on their participation at trial would be unduly onerous. At most, D6 and D7 may be required to testify as witnesses in respect of the Second JM Application filed by D4, but this does not justify them being made defendants in their own right.

[47] Having considered the opposing arguments, I am persuaded that D5 to D7's application to strike out the claim against them should be allowed. The decision to strike out must be exercised with circumspection as it is a summary remedy that should only be utilised in clear-cut cases. The underlying principle is that a party

should not be driven from the judgment seat without a full hearing of the case, save in the clearest of cases.

[48] That said, this is an appropriate case for the court to intervene at an interlocutory stage to prevent D5 to D7 from being saddled with unmeritorious litigation. The court must always be vigilant to ensure that its processes are not misused to the detriment of litigants. While the threshold for striking out is a high one, this is not an absolute bar and the court must be prepared to act decisively where it is plain and obvious that the claim is unsustainable.

[49] In the instant case, there are several reasons why the claim against D5 to D7 should be struck out summarily. First and foremost, the Plaintiff has failed to plead the essential elements of its claim of fraudulent trading with sufficient particulars to implicate D5 to D7. There is a dearth of particulars on the specific acts allegedly carried out by each of these defendants in the complaint. The claim is premised on vague and generalised assertions devoid of material facts. The statement of claim does not condescend into details on the role played by D5 to D7, as directors and shareholders of D4, that would constitute them knowingly participating in the alleged fraudulent trading by Surrealist. The mere fact that D4 filed the Second JM Application, without more, cannot visit liability on D5 to D7 personally, outside the confines of the company structure. The pleaded claim discloses no reasonable cause of action against them.

[50] Secondly, the Plaintiff has failed to produce prima facie documentary evidence of its claim to warrant the matter proceeding to trial. The authorities are clear that even at the interlocutory stage, it is incumbent on the Plaintiff to put forward credible evidence in support of its claim (see *Soo Teck Lee & Ors v Lim Geok Kim & Ors)*. Bare allegations in affidavits will not suffice, especially where fraud is being alleged. However, the Plaintiff's affidavit evidence against D5 to D7 is woefully lacking. None of the exhibited documents demonstrate any wrongdoing or impropriety on their part

to constitute knowing participation in fraudulent trading. The affidavit is replete with unsubstantiated assertions and conclusory statements without any prima facie evidence to back them up.

[51] Thirdly, in the absence of particulars and evidence, there are no bona fide issues of fact raised by the Plaintiff's pleadings that require viva voce evidence for determination. The Court of Appeal decisions in *Dato' Ahmad Zahid bin Hamidi v Amir Bazli bin Abdullah* and *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* cited by the Plaintiff are distinguishable. In those cases, there were clear factual disputes raised on the face of the pleadings that warranted a full trial. Here, the statement of claim does not raise any specific issue of fact concerning D5 to D7's conduct that requires oral testimony to resolve. The pleading is largely silent on their involvement. As such, the argument that striking out should not be ordered because of the need for a trial is misconceived.

[52] Finally, I agree that in any event, it is not necessary for D5 to D7 to remain as parties to enable the Plaintiff to ventilate its claim at trial. As conceded by the Plaintiff, at best D6 and D7 may be required to testify as witnesses on behalf of D4 in respect of the filing of the Second JM Application. However, this does not necessitate them being named as defendants in their personal capacity. Their attendance as witnesses, if necessary, would suffice to meet the evidential needs of the Plaintiff's case against D4. It would be disproportionate to require D5 to D7 to incur the expense and inconvenience of defending themselves against this unmeritorious claim all the way to trial when there is simply no reasonable basis for the Plaintiff's complaint against them.

[53] In conclusion, having regard to the lack of particulars and the absence of any prima facie evidence to support the Plaintiff's allegations against D5 to D7, I find that the claim against them is plainly unsustainable both in fact and in law. It would be a travesty of justice to compel them to defend these proceedings any further.

Fraudulent trading elements not satisfied

[54] The Plaintiff contends that its claim under section 540 of the Companies Act 2016 alleging fraudulent trading by Surrealist is a matter that can only be determined at trial through viva voce evidence. The Plaintiff asserts the business of Surrealist was carried out with the intention of defrauding the Plaintiff, and the Defendants, who were knowingly parties to the conduct of the business in that manner, should be held personally liable for Surrealist's debts owed to the Plaintiff. In support of this proposition, the Plaintiff relies on the Court of Appeal decision in *Chin Chee Keong v Toling Corporation Sdn Bhd* [2016] 4 MLRA 180 which laid down the two elements required to establish fraudulent trading, namely that the company's business was carried out to defraud creditors and that the Defendants were knowingly parties to the business being carried out in that manner. The Plaintiff argues these are factual issues not suitable for disposal by way of a striking out application.

[55] However, D5 to D7 argue that section 540 is not applicable to them and therefore the Plaintiff's reliance on *Chin Chee Keong* is misconceived. In *Chin Chee Keong*, there was a contractual relationship between the Plaintiff and the company of which the defendant was a director. There, the company failed to pay the Plaintiff for goods supplied. In contrast, in the present case, there is no contractual nexus between the Plaintiff and D5 or its directors, D6 and D7. The Plaintiff had contracted with Surrealist but has no dealings with D5. As such, D5 to D7 submit that section 540 cannot be invoked against them to hold them personally liable for the debts of Surrealist. At paragraph 41 of the statement of claim, the Plaintiff pleads that the "[defendants are personally responsible and liable jointly and/or severally to the Plaintiff for the debts and liabilities of Surrealist" pursuant to section 540. D5 to D7 argue this pleading is plainly unsustainable.

[56] On this issue, I find the Court of Appeal decision in *Zamzam Arabic Food Holding Sdn Bhd & Anor v Johanjana Corporation Sdn Bhd* [2022] 5 MLJ 302 to be particularly instructive. The facts in *Zamzam* bear close similarity to the present case. There, the Plaintiff sued 11 defendants under section 540, alleging they had colluded to allow the first defendant company to avoid paying its judgment debt to the Plaintiff by transferring assets to other companies. The Plaintiff sought to hold the 2nd to 11th defendants, who were directors and shareholders of those companies, personally liable for the D1's debt. The Court of Appeal allowed the striking out of the claim, holding that section 540(1) does not apply to a company like the 2nd defendant. The provision only attaches liability to an individual person such as a director who carries on the company's business to defraud creditors. By its plain wording, section 540(1) does not encompass a corporate entity as a company does not have a mind of its own to knowingly defraud. The court also found that a director of one company cannot be made liable under section 540(1) for the allegedly fraudulent business of another company that he is not a director of.

[57] Applying the principles elucidated in *Zamzam*, I am satisfied that the Plaintiff's attempt to fix liability on D5 to D7 under section 540 for the alleged fraudulent trading by Surrealist is plainly unsustainable and liable to be struck out. First, D5 is a company and therefore not a "person" within the meaning of section 540(1). The fraudulent trading provision does not extend to corporate entities. Second, D6 and D7 are not directors of Surrealist and have no involvement in the business of Surrealist. Section 540(1) does not apply to individuals who are not directors of the company said to have been carrying on business with intent to defraud. Third, there is no allegation that D5 itself carried out any business to defraud the Plaintiff. The statement of claim contains no particulars of D5's involvement in Surrealist's alleged fraudulent trading. There is also no contract between D5 and the Plaintiff that D5 failed to honour. Fourth, even though D6 was

previously a director of Surrealist, he had ceased to be one by the time the impugned First JM Application was filed by Surrealist on 25.10.2021.

[58] More fundamentally, I accept the submission of D5 to D7 that the Plaintiff's attempt to pierce the corporate veil to make them liable for the debts of Surrealist is impermissible as this has not been specifically pleaded. It is trite that if the corporate veil is to be lifted, it must be expressly pleaded with sufficient particulars (see *Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd* [2014] 2 MLJ 518 (CA)). No request to pierce the corporate veil has been made in the statement of claim to justify the imposition of liability on D5 to D7 for Surrealist's alleged wrongdoing.

[59] For all the above reasons, I find that the essential elements of fraudulent trading under section 540 of the Companies Act 2016 have not been pleaded by the Plaintiff to constitute a reasonable cause of action against D5 to D7. The complaint is simply not sustainable on the face of the pleadings. No amount of evidence adduced at trial can cure this defect. In the circumstances, I hold that the Plaintiff's claim against D5 to D7 pursuant to section 540 alleging fraudulent trading is scandalous, frivolous and vexatious and an abuse of the court's process. On this ground, the claim is obviously unsustainable and should be struck out under Order 18 rule 19(1) of the Rules of Court 2012 without the need for a full trial.

Separate legal entity

[60] The Plaintiff argues that D5 to D7 cannot escape liability by relying on the separate legal personality of D4 to distance themselves from the filing of the Second JM Application by D4. This is because D4 is a wholly owned subsidiary of D5 which is in turn wholly owned by D6, and both D6 and D7 are directors of D4. The Plaintiff contends that given this ownership and control structure, D4 is in reality the alter ego of D5 to D7. Further, the Plaintiff points to apparent

contradictions between D5 to D7's attempt to portray themselves as separate from D4, and the averments in D6's affidavit purportedly justifying the filing of the Second JM Application by D4. The Plaintiff submits it is untenable for D5 to D7 to disclaim involvement in D4's affairs while simultaneously seeking to explain the reasons for D4's filing.

[61] D5 to D7 respond that the burden is on the Plaintiff to prove its claim and it is not for them to disprove the claim. They argue that the Plaintiff's use of the term "possibility" in describing their alleged conspiracy with the other defendants is an acknowledgment that the claim is mere conjecture and therefore liable to be struck out. D5 to D7 also refute the suggestion that they are not entitled to rely on the separate legal personality of D4. While they do not dispute they are related to D4 as its holding company, shareholder and directors, this does not ipso facto make them answerable for the acts of D4. Something more is required to pierce the corporate veil which the Plaintiff has failed to plead. D5 to D7 maintain that the averments in D6's affidavit on the reasons for filing the Second JM Application are based on his knowledge as a director and this does not derogate from the fact that D4 is a separate entity. At most, D6 and D7 say they may be witnesses in respect of D4's application but this does not justify them being made defendants in the suit.

[62] On this issue, I am persuaded that D5 to D7's submissions are well founded and that the Plaintiff's claim against them is unsustainable.

[63] It is trite law that a company is a separate legal person distinct from its shareholders and directors, and the courts will not lightly disregard this bedrock principle of company law by piercing the corporate veil *(Salomon v A Salomon and Co Ltd)*. However, the Malaysian courts, in line with the "evasion principle" adopted in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] MLJU 393 (FC) and *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 (English SC), have recognised that the corporate veil may be lifted in limited

circumstances to prevent the abuse of the corporate legal personality, particularly where a person relies on the separate legal personality of the company to evade an existing legal obligation or liability, or to conceal their own wrongful conduct (*Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors* [2015] 1 MLJ 773 (FC)). This principle has been applied to lift the corporate veil in cases involving fraud or breach of fiduciary duties by directors or persons in control of the company, such as in *Aspatra Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1988] 1 MLJ 97 (SC) and *Gurbachan Singh* itself.

[64] Applying those principles to the facts here, I find that the Plaintiff has failed to plead any proper basis for lifting the corporate veil of D4 to hold D5 to D7 liable for D4's alleged acts of filing the Second JM Application to conspire with the other defendants to defraud the Plaintiff. The statement of claim does not contain any particulars on how the separate legal personality of D4 has been abused by D5 to D7 to evade an existing legal obligation or to conceal their own conduct.

[65] The thrust of the Plaintiff's assertion of a conspiracy is hinged on the corporate relationship between D4 and D5 to D7 as pleaded at paragraphs 6, 8 and 10 of the Statement of Claim. It is not in dispute that D4 is a wholly owned subsidiary of D5 which is in turn wholly owned by D6, and that D6 and D7 are common directors of D4 and D5. However, contrary to the Plaintiff's submission, these facts alone do not provide the evidential basis for piercing the corporate veil. It is well established that the principle of separate legal personality applies as much to corporate groups as it does to individual companies (see *Adams v Cape Industries plc* [1990] Ch 433 (English CA)). The court will not dismantle the formal legal separation between a parent and subsidiary company just because there is parental control over the subsidiary through ownership and common directors. Mere ownership and control of a company is not sufficient

to justify piercing the corporate veil (see *Prest v Petrodel Resources Limited*).

[66] Here, the facts pleaded in the statement of claim are singularly lacking in any particulars on how D5 to D7 had abused the corporate structure of D4 and D5 to commit or conceal their own wrongful conduct to defraud the Plaintiff. The statement of claim does not condescend into any specifics on how these defendants had caused or directed D4 to file the Second JM Application as part of a conspiracy against the Plaintiff. All that the Plaintiff has shown is the common shareholding and directorship between these companies, which without more is an insufficient basis to ignore the separate legal personality of the companies and lump them together as one indivisible economic unit. The mere fact of ownership and control does not lead to the inexorable conclusion that D4 is the alter ego of D5 to D7 in the absence of evidence of impropriety. The Plaintiff cannot simply rely on guilt by association to attribute liability to D5 to D7.

[67] Further, I do not think that the purported contradictions in the D6's affidavit evidence highlighted by the Plaintiff assist its case. D6 and D7's attempt to explain or justify the filing of the Second JM Application by D4 is not inconsistent with the legal separation between the companies. As directors, they would undoubtedly have knowledge of D4's affairs and are entitled to depose to the circumstances leading to the filing. However, having such knowledge and deposing to it does not negate the fact that it was D4 that filed the application as a separate legal person. Just because D6 and D7 are in a position to testify on behalf of D4 does not mean they should therefore be personally impleaded as defendants. This is in fact D6 and D7's alternative case, that at best they may be witnesses for D4 but they ought not be sued as parties in their own right.

[68] Accordingly, for the reasons above, I find that the Plaintiff has not shown any basis for lifting the corporate veil of D4 to fix liability on

D5 to D7. The facts pleaded in the statement of claim are bereft of any suggestion that the separate legal personality of D4 has been misused by these defendants to conceal or further any impropriety on their part. A mere possibility of a conspiracy inferred from the ownership and control structure of the companies, without more, is plainly insufficient to constitute a reasonable cause of action against D5 to D7. As such, I am satisfied that the Plaintiff's claim against D5 to D7 on this ground falls within the category of cases that are obviously unsustainable and should therefore be struck out under Order 18 rule 19(1) of the Rules of Court 2012.

Conclusion

[69] Based on all the foregoing reasons, I am satisfied that the Plaintiff's claim against D5 to D7 is plainly and obviously unsustainable. The Plaintiff has failed to plead the essential elements of its claim for conspiracy and fraud with sufficient particulars, has not produced prima facie evidence to support its assertions, and has not shown any basis for piercing the corporate veil of D4 to fix liability on these defendants. The mere possibility of a conspiracy inferred from their corporate relationship with D4, without more, cannot sustain a cause of action against them. In these circumstances, it would be a waste of judicial time and resources, and unfair to D5 to D7, to allow this unmeritorious claim to proceed to trial. Accordingly, Enclosure 32 is allowed with costs of RM8,000.00 to be paid by the Plaintiff to D5 to D7.

Dated: 6 JANUARY 2025

(ATAN MUSTAFFA YUSSOF AHMAD)
Judge
Kuala Lumpur High Court
(Commercial Division)

Counsel:

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