

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
GUAMAN SIVIL NO. : BA - 22 NCC - 153 - 11 / 2023**

ANTARA

MACRO RESOURCES SDN BHD

... PLAINTIF

DAN

- 1) TAN SHIE KHAI**
- 2) HO SUE LENG**
- 3) TAM AH CHAI @ TAM YOKE KEE**
- 4) SAHIMI BIN AHMAD**
- 5) HORNTIAN GROUP SDN BHD**
- 6) POH CHIN CHYE (Beramal di Tetuan C C Poh & Co)**
- 7) LIM MOI YOKE (Beramal di Skrin Corporate Services Sdn Bhd)**

... DEFENDAN - DEFENDAN

GROUND OF DECISION

Introduction

1. These four striking out applications were heard together (collectively **“striking out applications”**) :

- (a) Enclosure 9 dated 2.1.2024 filed by the 7th Defendant (**“D7 (company secretary)”**);



- (b) Enclosure 19 dated 20.2.2024 filed by the 6th Defendant (“**D6 (auditor)**”);
- (c) Enclosure 24 dated 12.3.2024 filed by the 1st and 2nd Defendants (“**D1 & D2 (former directors)**”); and
- (d) Enclosure 63 dated 31.5.2024 filed by the 5th Defendant (“**Horntian**”);
2. By way of the striking out applications, the relevant Defendants applied to strike out the Plaintiff’s (“**P**”) writ and statement of claim. The striking out applications are made under Order 18 rule 19 (1) (a), (b) and (d) of the Rules of Court 2012.
3. On 10.9.2025, I allowed the striking out applications and struck out P’s suit against the relevant Defendants. Here are the grounds of my decision.

Background facts

4. In the year 2011, Milsonland Development Sdn Bhd (“**MDSB**”) entered into a joint venture with Horntian to develop Horntian’s land (“**project**”). On 24.2.2011, MDSB appointed P as a primary contractor for some of the project works. P says that these works were completed, amounting to the sums of RM 4,016,560.61 for Phase 1 and RM 14,075,713.53 for Phase 2 of the project (“collectively **project sums**”).



5. MDSB was later wound up on 26.4.2017. On 24.4.2019, the Official Receiver certified the sums of RM 3,744,029.89 and RM 5,320,238.48 as debt payable to P pursuant to P's proof of debt.
6. On 17.11.2023, P commenced this suit against :
 - (a) the former directors of MDSB, i.e. the 1st and 2nd Defendants;
 - (b) the current directors of MDSB, i.e. the 3rd and 4th Defendants;
 - (c) the 5th Defendant i.e. Horntian;
 - (d) the 6th Defendant, i.e. the proprietor of the audit firm appointed by MDSB to audit its financial statements for the financial years ending 30.6.2014 and 30.6.2015; and
 - (e) the 7th Defendant, i.e. the company secretary of MDSB.
7. P alleges that the 1st to 4th Defendants had carried on the business of MDSB with intent to defraud P by intending that P never be paid the project sums. And that the 5th to 7th Defendants conspired with and assisted the 1st to 4th Defendants in relation to the fraud. Via this action, P seeks damages from the Defendants in respect of the works carried out for the project ("**project works**").

The law on striking out

8. The law pertaining to striking out of a party's pleading under Order 18 rule 19 of the Rules of Court 2012 is settled. It is only in a plain and



obvious case that recourse should be had to the summary process under this rule. This summary procedure should only be adopted when it can be clearly seen that a claim is on the face of it obviously unsustainable. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action. (See the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 2 AMR 1969; [1993] 4 CLJ 7; [1993] 3 MLJ 36).

9. The court must be satisfied that there is no reasonable cause of action or that the claim is frivolous or vexatious. The court is not concerned at this stage with the merits of the claim. So long as the pleadings disclose some cause of action or raise some questions fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.
10. In *Raja Zainal Abidin bin Raja Haji Tachik & 3 Ors v British - American Life & General Insurance Bhd* [1993] 3 CLJ 606 at 612, the Supreme Court remarked that the lower court should have scrutinized the evidence in order to decide whether the action was bound to fail. The Supreme Court said that an action can be summarily disposed if there is an absence of conflict of material evidence or of conflict of affidavits on material points. So that seemingly triable or difficult issues could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.
11. In a suit involving complex questions of law but where the essential facts are not in dispute, the complexity of the questions of law should



not be a reason for refusing relief under Order 18 rule 19 of the Rules of Court 2012. If satisfied that the questions of law are unarguable, the court is not prevented from granting summary relief merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See the Court of Appeal decision in *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173 at 182).

Decision

12. Applying these legal principles, I find that P's claim against the relevant Defendants is obviously unsustainable. P's action has no chance of success. Hence, this is a plain and obvious case for striking out. Here is my explanation.

Plaintiff's claim is time barred

13. At the outset, P's claim ought to be struck out as it is statutorily time barred pursuant to section 6 and section 29 of the Limitation Act 1953. The limitation period for actions founded on contract or tort is six years from the date the cause of action accrues. Failure to commence legal action in court within the stipulated limitation period would result in the claim being time barred.
14. Before filing this suit, P had initiated action against MDSB under the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**"). P secured an award on 4.8.2016 for non - payment of the project sums. P enforced this award through a High Court judgment on 25.10.2016, which led to the winding up of MDSB under Shah Alam



High Court Companies (Winding Up) Petition No. : BA - 28 NCC - 560 - 12 / 2016. MDSB was wound up on 26.4.2017, with the Official Receiver appointed as provisional liquidator.

15. Thereafter, P filed an application to appoint a private liquidator vide Shah Alam High Court Post Winding Up No. : BA - 28 PW - 196 - 07 / 2019. Horntian also filed a competing application vide Shah Alam High Court Post Winding Up No. : BA - 28 PW - 212 - 07 / 2019. Both the aforesaid applications were dismissed and the Official Receiver was appointed as the liquidator of MDSB on 18.12.2019.
16. P filed the present suit on 17.11.2023. P alleges that fraudulent trading was only discovered during the creditors meeting on 24.4.2019. Such contention is unsustainable. P could have reasonably discovered the purported fraudulent activity at various earlier stages as follows :
 - (a) P's claim for the non - payment of certificates no. 29 and no. 30 under Phase 1 of the project accrued on 21.4.2014 and 31.3.2015 respectively, when its claim was disputed by MDSB. Time started running then and expired on 21.4.2020 and 31.3.2021 respectively. But P failed to commence a civil suit against MDSB to date.
 - (b) P's claim for Phase 2 of the project accrued around late 2016, when it issued a payment claim for RM 14,075,713.53 against MDSB on 25.1.2017. Time started running then and expired on 25.1.2023. P commenced a second CIPAA proceeding against



MDSB for the Phase 2 work on 20.2.2017. But subsequently abandoned this claim when it wound up MDSB on 26.4.2017.

- (c) P wound up MDSB via Winding Up Petition No. : BA - 28 NCC - 660 - 12 / 2016 dated 29.12.2016. P had knowledge of the financial status of MDSB as early as the year 2014 due to the non - payment of certificate no. 29. P could have reasonably discovered the purported fraudulent trading as recent as the year 2017, when it commenced winding up proceeding and the second CIPAA proceeding against MDSB;
- (d) P deposed to statements in relation to the insolvency of MDSB and raised similar particulars in its affidavits filed in the winding up proceeding in the year 2016. Those are similar to the averments pleaded in the present statement of claim dated 16.11.2023.
- (e) P conducted:- (i) a CCM (Companies Commission of Malaysia) company search on MDSB on 2.3.2017, which depicted a net dividend of negative RM 17.5 million; and (ii) a CCM company charge search on MDSB on 20.3.2017, which showed unsatisfied charges totalling RM 66 million. These very same allegations are raised in the present statement of claim dated 16.11.2023. But were never made the subject matter of a civil suit against MDSB.
- (f) Despite being aware of the insolvency of MDSB and the breach of contract in failing to pay the amounts certified in progress claim no. 29 and no. 30, P chose not to initiate civil proceeding



against MDSB. But elected to pursue its remedies under the first CIPAA proceeding and proceeded to wind up MDSB instead. The first CIPAA decision was subsequently overturned by the Federal Court on 21.9.2020 on the basis that CIPAA did not apply to the dispute. As mentioned earlier, the second CIPAA proceeding was abandoned due to the winding up of MDSB on 26.4.2017.

17. Although similar allegations forming the subject matter of the present suit were made in the year 2017 during the winding up proceeding against MDSB, P chose to only file this suit on 17.11.2023. Which is approximately six years and ten months after the date of the affidavit verifying petition by P.
18. P could have at any time between 2014 to 2022 filed a civil suit against MDSB for the debt, but elected not to. Instead P opted to recover its claims through the CIPAA procedure. I think P is aware that its claim against MDSB is time barred. But is attempting to circumvent the Limitation Act 1953 by alleging fraudulent trading for the first time in late 2023 instead, some three years after the Federal Court decision.
19. The present suit is based primarily on the same set of facts and documents from the first CIPAA proceeding. There is no significant change in the nature of this fresh suit, which is intended to now claim for outstanding certificates no. 29 and no. 30 from the Defendants instead of MDSB.



20. P was able to access and obtain the necessary company searches and financial statements from the public records of CCM. The statements and records were staring in P's face. P should have sought explanation if there was any discrepancy, whether in 2014 or 2017 and commence civil proceeding to claim for the project sums from MDSB or allege fraudulent trading. P's failure to file a civil suit within the limitation period is due to its own lack of diligence.

21. On this aspect, the observation of the Court of Appeal in *Tan Mei Li & Ors v KSCH Property Sdn Bhd (previously known as Bluefire Development Sdn Bhd)* [2019] 1 LNS 1186 is instructive :

*"[106] ... The Court must ensure that the **essential element under Section 29 of the Limitation Act 1953, that the fraud could not have been discovered with reasonable diligence is in fact made out** by the party seeking to extend time. Where this element is not satisfied, section 29 is not engaged and the limitation period under Section 6 will apply to bar the claim.*

*[107] This was precisely what happened in *Lin Kai Wing & Anor v. Lin Kai Lam & Ors* [supra] where the Court of Appeal held that the trial judge must ensure that the **party who is seeking to rely on section 29 of the Limitation Act 1953 is obliged to prove that he could not, without reasonable diligence, have discovered the fact that there was fraud**, or that there were wrongful or fraudulent payments. If that essential element is not proven, then there cannot be any reliance on section 29 and the claim is time - barred."*

22. In other words, a bare allegation of fraud does not assist P who seeks the shelter of section 29 of the Limitation Act 1953. The burden of proof is on P to prove that it could not, with reasonable diligence, have discovered that there was fraud. On the present facts, P cannot assert that it only discovered the purported fraud for the very first time at a creditors meeting in the year 2019. When P had deposed to similar statements during the winding up petition in the year 2016, three years earlier.



23. P sat on its rights for more than ten years. Its claim is now time barred. P cannot rely on section 29 of the Limitation Act 1953 to postpone the limitation period. In addition, P also commenced the first CIPAA proceeding on 8.4.2016 claiming for the same project sums from MDSB, but failed to file a civil suit against MDSB at the time. Now that the Federal Court has overturned the previous CIPAA award, P finds itself time barred from filing a civil suit against MDSB.

24. The defence of limitation is a complete defence to a claim. The Court of Appeal in *Sykt Hing Lee Fishing (Sabah) Sdn Bhd v Lin Yun Thai & Ors* [2019] 4 MLJ 511 at 525 - 526 said :

*“[41] On this issue of limitation, we agree with the submissions of learned counsel for the appellant. **Even on the assumption that there was a fraud, which the appellant denies and to which we agree for reasons which will be discussed in due course, the counterclaim and thereby the defence mounted to challenge the appellant’s title to the said land, was clearly time - barred and ought to have been dismissed. Limitation, if proved, is a complete defence to the counterclaim. And, as we shall soon see, the appellant’s defence of limitation is of merit and ought to have been so considered** by the learned Judge. We are of the firm view that the counterclaim ought to have been dismissed on the sole ground of limitation and the appellant’s claim, thereby, allowed. This is how the limitation argument ought to have been addressed.”*

25. Once a defence of limitation is established, the court has no choice but to strike out the action. The Court of Appeal in *Alias bin Ismail v Hairuddin bin Mohamad & Anor* [1997] 3 MLJ 724 at 728 said :

*“The court has no discretion to set aside a defence of limitation. In *Riches v. Director of Public Prosecutions* [1973] 1 WLR 1019, it was held that it was **open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court to show***



that the plaintiff's cause of action was statute barred and must inevitably fail for that reason."

26. I will now proceed to deal with each of the relevant Defendants, in the order in which their respective striking out applications were filed.

I. The 7th Defendant

27. First, D7 (company secretary). P filed this action against her on the basis of fraudulent trading pursuant to section 540 of the Companies Act 2016. P alleges that D7 (company secretary) conspired with the other Defendants with the intention to defraud P.

28. I accept the defence of D7 (company secretary) as follows :

(a) She is only a company secretary to MDSB. She does not participate in any of the decision - making process nor the business activities of MDSB. The controller of MDSB are the directors or the shareholders of MDSB. Her role in MDSB is purely administrative only.

(b) P failed to plead with sufficient particulars concerning the assistance given by D7 (company secretary) to D1 and D2 (former directors) in relation to the declaration of dividend. Save for a general statement that she has provided some form of assistance to D1 and D2 (former directors).

(c) The decision to declare dividend, the resignation of director and the appointment of director rest with the directors and the



shareholders of MDSB. D7 (company secretary) was not involved in any such decision - making process regarding dividend declaration for the shareholders.

- (d) D7 (company secretary)'s consent is not required in any declaration of dividend, resignation of director or appointment of new director. Indeed, she did not provide any consent in this matter.
- (e) D7 (company secretary) does not have any control over the finances and accounts of MDSB.
- (f) D7 (company secretary) is obligated to inform any change of directorship within 14 days from the change to the CCM pursuant to section 58 of the Companies Act 2016.
- (g) In any event, any change in directorship does not affect the debt owing to P by MDSB. Further, the statement of affairs has been filed by MDSB and accepted during the creditors meeting on 24.4.2019. Hence, the change of directorship prior to the winding up order does not affect the liquidation process of MDSB. Nor does it cause any party to gain an unfair advantage over any creditor.
- (h) P's claim is barred by limitation and laches.

29. P's case against D7 (company secretary) can be found in two parts of the statement of claim. Firstly, at paragraphs 27 to 31 of the statement of claim, where P alleges that D7 (company secretary)



assisted MDSB with the declaration of dividend. But P did not plead any particulars of the alleged assistance given. Secondly, at paragraphs 39 to 41 of the statement of claim, where P alleges that D7 (company secretary) registered the change of directors of MDSB on the same day that MDSB was wound up, namely on 26.4.2017.

Change of directorship in MDSB

30. It must be pointed out that D7 (company secretary), being the company secretary of MDSB, is statutorily obligated to register the change of director in MDSB within 14 days from the date of the change. This is pursuant to section 58 of the Companies Act 2016.
31. The right to resign, remove or appoint any new director rest with the directors of MDSB. It has nothing to do with D7 (company secretary). Section 208 of the Companies Act 2016 stipulates that the directors of MDSB have the power to appoint any person to be a director to fill vacancies in the board of directors. In addition, the shareholders of MDSB also have rights over the appointment of directors under section 71 of the Companies Act 2016.
32. Thus, D7 (company secretary) plays no role in the appointment, resignation or removal of any director in MDSB. She did nothing more than what she is statutorily obligated to do under section 58 of the Companies Act 2016. Namely, to register the change of directorship with the CCM. The registration of the change of directorship, being a statutory obligation of D7 (company secretary), cannot be ignored by her. Otherwise, she will be liable to a fine not exceeding RM 50,000 and in a continuing offence, a further fine of not more than RM 500



for each day during which the offence continues after conviction under section 58 (4) of the Companies Act 2016.

33. Further, the change of directorship does not affect the debt owing by MDSB to P. The statement of affairs had been filed and accepted by the creditors during a creditors meeting on 24.4.2019. In other words, the change of directorship does not bring any effect or create any unfair advantage for any parties involved in this matter over P in a manner or with the intent to defraud P. Therefore, it cannot be said that the registration of the change of directorship by D7 (company secretary) with the CCM constitute a fraudulent trading by her.
34. In order to prove fraudulent trading, P must plead the necessary particulars. To wit:- (a) D7 (company secretary) has carried out the business of the company with the intent to defraud creditors or for any fraudulent purpose; and (b) D7 (company secretary) is knowingly a party to the company's carrying on of the business in that manner with intent to defraud creditors or for any fraudulent purpose. (See the Court of Appeal case of *Tetuan Sulaiman & Taye v Wong Poh Kun & Anor and another appeal* [2023] 4 CLJ 699 at 706). However, P has failed to plead the necessary particulars in the statement of claim, other than D7 (company secretary) carrying out a statutory obligation in this matter.
35. I find that D7 (company secretary), who did not participate in any business of MDSB and not being a director of MDSB, should not have been named in this action. I am guided by the Court of Appeal decision in *Zamzam Arabic Food Holding Sdn Bhd & Anor v Johanjana Corp Sdn Bhd* [2022] 5 MLJ 302 at 316, which held :



*“[32] In this case, the first defendant was a company who had allegedly carried on its restaurant business with intent to defraud the plaintiff. The tenth defendant is **not a director** of the first defendant. The tenth defendant is a director of the second defendant. The tenth defendant had **no involvement at all in the business** of the first defendant. This being the case, it is our considered view that **s 540 (1) is not applicable to an individual who is not a director** in a company that carries on business with intent to defraud a creditor. For this reason, we find the learned JC had erred in holding s 540 (3) of the Companies Act enabled any person who is not a director in the company used to trade fraudulently to be named as a party in s 540 Suit. In our opinion s 540 (3) is not applicable simply because that section applies only after the court finds the elements in s. 540 (1) have been satisfied which is not the case here. Accordingly, we hold that the plaintiff had **no cause of action** against the tenth defendant and he **should not be named as a party** in this action.”*

Declaration of dividend

36. P alleges that D7 (company secretary) assisted D1 and D2 (former directors) to declare a dividend of RM 17.5 million. However, there are no particulars as to what kind of assistance or how it was given to D1 and D2 (former directors). On this aspect, the following observation of the Court of Appeal in *Zamzam Arabic* (supra) is instructive :

*“[33] Consequent to our findings that the plaintiff had no cause of action against the second and tenth defendants, it must, therefore, follow that the plaintiff’s claim against the second and tenth defendants are plainly unsustainable and must fail. In this regard, we find that the learned JC had erred in his finding that sufficient particulars of fraudulent trading were pleaded against the second and tenth defendant. To the contrary, **we find there were no particulars of the second and tenth defendant’s involvement in the first defendant’s business** which purportedly had been carried on with intent to defraud the plaintiff. We find that **para 28 (k) and (o) of the statement of claim are insufficient to bring a case under s 540 (1)** against the second defendant and the tenth defendant.”*



37. Here in paragraphs 27 to 31 of the statement of claim, there are no particulars concerning the assistance that was given by D7 (company secretary) in relation to the declaration of dividend. Nothing was pleaded other than “dengan bantuan Defendan Ke - 6 dan Defendan Ke - 7”. P has failed to plead any particulars in relation to D7 (company secretary)’s involvement in relation to the declaration of dividend. I conclude that the averments in paragraphs 27 to 31 of the statement of claim are insufficient to mount a case under section 540 of the Companies Act 2016 against D7 (company secretary).
38. Furthermore, the right to declare dividend lies with the directors of MDSB. The consent of D7 (company secretary) is not required at all. Thus, it is rather perplexing for P to argue that D7 (company secretary) has rendered assistance to D1 and D2 (former directors), since it is not a right to be exercised by her as the company secretary but to be exercised by the directors of MDSB alone.
39. Under section 132 of the Companies Act 2016, it is the directors who decide and authorize any distribution of dividend to the shareholders. The Companies Act 2016 has placed the right to declare dividend on the directors. The directors are required to take all necessary steps to prevent the distribution being made if the company is not solvent.
40. Nothing in the Companies Act 2016 requires D7 (company secretary) to act as a medium to stop or prevent any declaration of dividend. Nor does the Companies Act 2016 require D7 (company secretary)’s consent or assistance before the declaration of dividend. The Companies Act 2016 stipulates that it is for the directors to decide



and be satisfied that the company is solvent immediately after distribution is being made.

41. Interestingly, based on the audited financial statement for the year 2015, MDSB retains a total sum of RM 12,936,990 as profit even after the declaration of dividend to the shareholders. In any event, even if there is anything done by D7 (company secretary), any action taken by her is purely administrative. She was not involved in the decision - making process of declaring dividend in this matter.

Limitation

42. It bears reiterating that P's claim is barred by limitation. The party who wound up MDSB was P, based on the debt as pleaded in paragraph 24 of the statement of claim. In other words, P's debt had already accrued prior to 26.4.2017, being the date of winding up of MDSB. However, P only filed this suit more than six years after the winding up of MDSB. Consequently, P's claim is barred by limitation.
43. In respect of the declaration of dividend, P alleges that the act was done by D7 (company secretary) on 30.6.2015. In which case, the last day for P to file any action would have ended six years thereafter on 30.6.2021. Whilst for the registration of the change of directors, P alleges that the act was done by D7 (company secretary) on 26.4.2017. In which case, the last day would be on 26.4.2023. Therefore, P's action (filed on 17.11.2023) is time barred and ought to be dismissed in limine.

Plaintiff's claim for unjust enrichment



44. P's alternative claim premised on unjust enrichment is also lacking in particulars. P has failed to satisfy the requisite test meriting an unjust enrichment.

45. The principle of unjust enrichment as the basis to justify an award of restitutionary relief can be found in the High Court case of *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229 at 248 - 249, which held :

"Restitution means to cause the restoration of a thing, the enrichment or benefit, or its money's worth received by the defendant from the plaintiff and at the expense of the plaintiff. Three inquiries must be posed, in the context of the present appeal, to determine unjust enrichment on the part of the appellant:

- (a) was the appellant enriched by receiving a benefit?*
- (b) if the answer is in the positive, the next question would be : was that benefit received at the respondent's expense?*
- (c) if the answer is also in the affirmative, then the question to pose would be : was the retention of the benefit unjust?"*

46. The leading Malaysian authority in this respect is the Federal Court case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 at 487 - 488, which held :

"[130] On the factual matrix of the present case, in our judgment, injustice has occurred to such an extent that the defendant has not only suffered a loss, but the plaintiff is at the same time made richer by the defendant's loss by the same amount. On that note, the point to make here is this. This sense of injustice at the defendant's expense is central to the foundation of the relief of restitution based on the law of unjust enrichment. The plaintiff should not be allowed to reap the windfall at the expense of the defendant. The defendant lawfully constructed the mall on the land not intending to do so gratuitously with the plaintiff enjoying its benefit. On this basis, it warrants judicial intervention as a legal response triggered by an unjust enrichment in the fact situation of the present case.



[131] To conclude, we hold that the defendant had made out a cause of action in unjust enrichment in that the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, and that the plaintiff's enrichment was unjust."

47. At paragraph 50 of the statement of claim, P made a sweeping statement alleging that there is unjust enrichment on the part of the Defendants. But failed to provide any particulars to substantiate its claim for reliefs based on unjust enrichment. On this ground alone, P's claim for unjust enrichment cannot stand.
48. With regard to the professional service providers, there are no particulars in the statement of claim as to what benefit was received by D7 (company secretary) and D6 (auditor). The project works were performed by P for the benefit of MDSB, and not D7 (company secretary) or D6 (auditor). P has admitted the debt owing by MDSB to it in the proof of debt. In other words, the contract is between MDSB and P. It has nothing to do with D7 (company secretary) or D6 (auditor). Therefore, P's claim based on unjust enrichment is also obviously unsustainable.

II. The 6th Defendant

49. Second, D6 (auditor). P's case against him is based upon the following three factual contentions, which P alleges links D6 (auditor) to the alleged fraud :
- (a) the declaration and payment of the dividends of RM 17.5 million by MDSB to D1 and D2 (former directors) for the financial year



ended 30.6.2015 in disregard of MDSB's creditors, including P's payment for the project works. This is despite the records of the CCM showing MDSB was insolvent at the material time;

(b) the preparation of the financial statements of MDSB for the years ending 30.6.2014 and 30.6.2015; and

(c) D6 (auditor)'s failure to lodge the financial statements of MDSB for the 2016 financial year.

(Notwithstanding that D6 (auditor)'s appointment as auditor ended on 26.12.2016, when he resigned. As such, he was no longer responsible for the filing of the financial statement for 2016. This alone puts an end to this contention).

50. I see no substance to P's allegations above. There is no nexus between D6 (auditor) and any involvement in the purported fraud. His involvement in MDSB is simply limited to auditing the financial statements of the company as prepared by its directors. He has no control or influence over the management or operations of MDSB, including the payment of dividend.

No nexus to the fraud complained of

51. D6 (auditor) was appointed as the external auditor of MDSB to audit the financial statements of MDSB for the years ending 30.6.2014 and 30.6.2015. In doing so, his role was limited to the following :

(a) He examined the financial statements for the said financial years. These statements were prepared by MDSB, its directors



and management. Such examination entails verifying the statements as against audit evidence and supporting documents, and based on representations made to him by MDSB and its directors.

(b) Upon examining the financial statements as against the supporting documents, he would then provide an opinion by way of an audit report. On whether the financial statements of MDSB had been prepared in accordance with the approved applicable auditing and reporting standards. And whether they provided a true and fair view of the financial position of MDSB.

(c) At no point in time was he involved in or responsible for the preparation or maintenance of the financial records of MDSB. Nor was he obligated to investigate or disclose any irregularities.

52. In short, D6 (auditor):- (a) was not involved in, and indeed had no control over, the declaration of dividend; and (b) did not have a duty to conduct any investigation beyond his audit role to ensure that the financial statements are supported by contemporaneous records.

53. The above scope of D6 (auditor)'s involvement in MDSB is made clear through the terms of his engagement with MDSB, as well as in law. Due to the passage of time, D6 (auditor) no longer retains his letter of appointment with MDSB. However, based on his subsequent letters of engagement with other clients which are upon similar terms as the engagement with MDSB, the relevant terms are as follows :



(a) Our function as auditors under the Companies Act, 2016 is to examine the financial statements presented to us by the directors. As auditors, we are not responsible for the preparation of the financial statements, nor for the maintenance of the accounting records of the company, which duties are imposed on the directors by the Companies Act. Any accounting services we may provide are to assist the directors in discharging their responsibilities under the Act and are distinct from our function as auditors.

(b) We shall, as required by law, have a statutory responsibility to report to the members whether in our opinion:

- (i) the financial statements which we have audited comply with the Companies Act and give a true and fair view of the state of affairs at the date of the balance sheet and of the profit or loss for the period ended on that date;
- (ii) the accounting and other records (including registers) examined by us have been properly kept in accordance with the provisions of the Companies Act, 2016.

(c) In arriving at our opinion, we are required by law to consider the following matters but only to report specifically to the shareholders on any in respect of which we are not satisfied:

- (i) Whether proper accounting and other records (including registers) have been kept by the company and proper returns adequate for our audit have been received from branches not visited by us;
- (ii) Whether the company's balance sheet and income statement are in agreement with the accounting and other records;

(iii) Whether we have obtained all the information and explanations which we think necessary for the purposes of our audit.

(d) In accordance with normal practice, our audit will be planned primarily to enable us to express our professional opinion. It should not be relied on to disclose defalcations or other irregularities, but their disclosure, if they exist, may well result from the audit tests we undertake.

54. As for the law, the following is the position :

- (a) It is the duty of the directors of MDSB to prepare and lodge the financial statement of the company. An auditor is not responsible for this.
- (b) The declaration of dividend or distribution of profits can only be authorized by the directors of MDSB. In doing so, the directors must be satisfied that the company will be solvent immediately



after the distribution is made. An auditor is not responsible for this.

- (c) The auditor's duty is also statutorily enshrined in section 266 of the Companies Act 2016. An auditor's role is limited to examining the financial statements as against the contemporaneous record kept and provided by the company.

55. I refer to the following authorities.

- (a) *In re London and General Bank (No 2)* [1895] 2 Ch. 673 at 682 - 683.

*"It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is **nothing to him whether dividends are properly or improperly declared**, provided he discharges his own duty to the shareholders. **His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that.**"*

- (b) *In re Kingston Cotton Mill Company (No 2)* [1896] 2 Ch. 279.

*"But in determining whether any misfeasance or breach of duty has been committed, it is essential to consider **what the duties of an auditor are**. They are very fully described in *In re London and General Bank (2)*, to which judgment I was a party. Shortly they may be stated thus : It is the duty of an auditor to bring to bear on the work he has to perform that skill, care, and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is **not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong**. He is a **watch - dog, but not a bloodhound**. He is **justified in believing tried servants of the company** in whom confidence is placed by the company. He is **entitled to assume that they are honest, and to rely upon their representations**, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the*



*absence of anything of that kind he is **only bound to be reasonably cautious and careful.***"

56. In sum, D6 (auditor) was not involved in and is not responsible for the declaration of dividend. There is neither evidence nor plea to the contrary, other than the fact that he was the auditor of MDSB. As for his role as auditor, it cannot be said that he had failed in ensuring that the declaration of dividend as recorded in the financial statement was properly supported by the necessary audit evidence. It is not in dispute that the dividend was indeed paid out. Critically, the payment is contemporaneously supported by the directors' resolutions dated 20.1.2015 and 18.2.2015 of MDSB.
57. What the above makes plain is that there is simply no nexus between D6 (auditor) and P's claim of fraud. P's attempt to create one merely by virtue of D6 (auditor) being the external auditor of MDSB is obviously unsustainable.

The 1st and 2nd Defendants

58. Third, D1 and D2 (former directors). I agree with them that P's claim is engineered to circumvent the winding up of MDSB by P itself on 26.4.2017. Upon realizing that it can no longer claim against MDSB, P engineered this claim more than six years later for purported fraudulent trading. Nevertheless, P has failed to satisfy the ingredients for a fraudulent trading claim.
59. In order to establish an intent to defraud creditors, the Federal Court in *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2017]



10 CLJ 385 at 402 held that the element of dishonesty is an essential ingredient. Dishonesty is a question of fact which has to be ascertained from a consideration of the entirety of the relevant circumstances.

60. The Court of Appeal in *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 2 CLJ 261 at 274 shed light on establishing dishonesty. In order to establish dishonesty under section 304 (1) of the Companies Act 1965 (the predecessor provision and currently section 540 (1) of the Companies Act 2016), the court must find that:- (a) according to the ordinary standard of reasonable and honest people, what was done was dishonest; and (b) that the actor himself must have realized that the act was by those standards dishonest.
61. The phrase ‘with intent to defraud’ was considered by the Court of Appeal in *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal* [2016] 2 CLJ 563 at 576 - 577, which held :

*“[43] The phrase, “with intent to defraud” is the most problematic element of s. 304 (1). The general proposition from the seminal case of Morphis v. Bernasconi [2003] Ch 552 is that for behavior to fall under s. 213 (1) of the English Insolvency Act (which is in pari materia with our s. 304 of the Companies Act 1965), **there must be dishonesty in the form of incurring company debts by those in charge when either they know that they will not be repaid or there is a substantial and unreasonable risk that they will not be.***

...

*[46] ... In our view, a **mere failure to fulfil contractual obligation cannot support a claim in fraud.** Rather, it is merely a breach of contract claim, which does not by itself constitute a claim in fraud.*

[47] There was no cogent and convincing evidence to suggest that the second and third defendants had the intention of not performing their contractual obligations to the plaintiff when they approached and invited the plaintiff to undertake the contract works. ...



[48] This was not a case where the company was already in financial difficulties, and in debts, but continued to invite the plaintiff to undertake the contract works despite its directors having knowledge that the company had no reasonable prospect of paying the plaintiff for work done.

[49] We were not prepared to conclude, based on the evidence on the record that the second and third defendants from the very beginning had decided not to pay the plaintiff when they invited the plaintiff to commence work at the site."

Continuous payment for Phase 1 and Phase 2 work of the project

62. For the elements of fraudulent trading to be fulfilled, the intention to defraud the creditors should start from the very beginning of contract. MDSB must possess the intention not to pay P when it approached P to become its contractor for the project. That is not the case here. Instead, D1 and D2 (former directors) had caused MDSB throughout the project, to progressively make payments to P for certificates no. 1 to no. 28, which amounts to about 90 % of the project works.
63. Following from the above, I consider that a mere failure to fulfil a contractual obligation, i.e. the outstanding payment of progress claims certificates no. 29 and no. 30, cannot support a claim in fraud. At most, it constitutes a breach of contract claim. The very payment of certificates no. 1 to no. 28 over a span of few years negates any intention to defraud P. The non - payment of the last two certificates merely signifies a breach of contract by MDSB.
64. The proper recourse for P was to commence a civil suit for breach of contract against MDSB. But P lost the chance to do so when it



commenced the first CIPAA proceeding on 8.4.2016 and went all the way to the Federal Court, but did not file a civil suit at the same time. On 21.9.2020, the Federal Court overturned the CIPAA decision. P was time barred from commencing a fresh civil suit against MDSB, which P wound up on 26.4.2017.

65. It seems to me that P's motive is to circumvent the Limitation Act 1953 by alleging fraudulent trading for the first time in late 2023, when the claim for non - payment had accrued in the year 2014. The present claim for fraudulent trading is simply a tactical manoeuvre to circumvent the inability to file a civil suit against MDSB which is time barred.

66. Furthermore, for a person to be liable personally pursuant to section 540 (1) of the Companies Act 2016, the person must participate, concur in or take some positive steps in the matter. The High Court in *Linear Profile Sdn Bhd & Ors v Khor Guet Lin* [2019] MLJU 1364 cited the following :

"... furthermore, in order to be a party to the carrying on of the business of a company within the meaning of s. 332 (1) a person must have taken some positive steps; mere inertia was not enough

... I do not think it can be said that someone is party to carrying on a business is he takes no positive steps at all. So in order to bring a person within the section one must show that he is taking some positive steps in carrying on of the company's business in a fraudulent manner."

67. Similarly, the High Court in *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors* [2016] 1 LNS 592; [2016] 11 MLJ 38 cited the following :



“Fraudulent intent must be established subjectively after a careful examination of all the evidence. Even in what appear to be water - tight cases, fraud may not be found - simply an unjustified albeit honest “chasing of the rainbow.”

...

*This was a case in which the judge had held a director of a company carrying on a retailing business liable because, according to the decree, he had caused the company to continue to trade and incur liabilities ‘without any reasonable prospect of being able to pay or provide payment therefor’. The High Court of Australia said that this was not enough. The question was not whether there was a reasonable prospect of payment but whether the director was personally dishonest. Dixon CJ said (at 461) that **although he had ‘struggled on with the business after a time when in fairness to others and in wisdom’ he should have wound it up, he had not been shown to be fraudulent.** Kitto J said (at 464) that **‘although he was clearly unjustified in his chasing of the rainbow’ he was not shown to have had any intent other than to try to carry the business through its difficulties.** Menzies J said (at 467) that :*

*‘... even if the chances of payment of all creditors in full were so remote that it belonged to the realms of hope rather than belief, it seems to me that the fault, grievous though it may be, falls short of **fraud** unless it is coupled with something else, such as misrepresentation of the position or an intention to use goods purchased on credit for the purposes of dishonest gain, which gives it a fraudulent character.’*

68. I conclude that P, in seeking to recover the non - payment of certificates no. 29 and no. 30 by MDSB, does not satisfy the elements of fraudulent trading. P is unable to fulfil the main ingredients of fraudulent trading as the Defendants did not have any intention to defraud MDSB’s creditors.
69. On the facts, MDSB had paid progressively to P for the work done on the project. The fact that MDSB had paid in full for certificates no. 1 to no. 28 is not in dispute. This demonstrates that there is intention on the part of MDSB to comply with its contractual obligation, instead of intending to defraud P as alleged. If D1 and D2 (former directors) intended to defraud P, they would not have caused MDSB to pay P certificates no. 1 to no. 28, or any certificate for that matter.



70. Apparently, MDSB's inability to pay for certificates no. 29 and no. 30 was due to P's failure to complete Phase 1 of the project and there were numerous defects which were never resolved. As such, P's contention does not hold water as D1 and D2 (former directors) would not have caused MDSB to pay for certificates no. 1 to no. 28 in the first place if there is an intention to defraud P.

71. It seems to me that P's action for fraudulent trading is an afterthought to enable it to claim for the project sums owing by MDSB from its former directors after P wound up MDSB on 26.4.2017 and realised it could not recover the amount in the winding up proceeding. P raised the same grounds in the present suit in 2023, as it raised in its affidavit in the winding up proceeding back in 2017 and in its affidavit for the appointment of its own private liquidator in 2019.

No fraudulent trading

72. P alleges that D1 and D2 (former directors) operated the business of MDSB with the intention to commit fraud and deceived P to enable MDSB to avoid paying the debt amounting to RM 4,016,560.61 for Phase 1 and RM 14,075,713.53 for Phase 2 of the project.

73. P deduced the above from the following instances :

- (a) The payment of dividend by MDSB in the sum of RM 17.5 million;
- (b) The release of the charges over the development land owned by Horntian;



(c) The payment of RM 91,162,088 to Horntian; and

(d) The resignation of D1 and D2 (former directors) as directors.

74. P's allegation on the Defendants' conspiracy to defraud is misconceived. The alleged fraudulent trading activities accused by P are ordinary commercial occurrences in business. They have nothing to do with an intention to defraud P or operating the business in a fraudulent manner.

75. In amplification of the foregoing :

(a) The payment of dividend was approved by MDSB's directors or shareholders during which time MDSB also paid P's certified claims. Further, the payment of dividend is an internal matter of MDSB. MDSB was not compelled by any court order or adjudication decision to pay the dividend to P. P has no standing to question the internal workings of MDSB.

(b) D1 and D2 (former directors) are not privy to the loan granted by Ambank (M) Bhd to Horntian. The bank loan obtained by MDSB was to fund the project, including to make payment to P who was the main contractor of the project. The sourcing for and being granted loans to carry out the project is an ordinary commercial activity which has nothing to do with the alleged fraudulent trading.



- (c) As for the release of the charges over the development land, there is nothing suspicious about the bank deciding to release its own securities in 2016 upon being satisfied that MDSB had repaid its loan. MDSB was servicing the loan from the bank timeously throughout the duration of the project resulting in the charges being ultimately discharged.
- (d) MDSB never made any payment of RM 91,162,088 to Horntian, as alleged by P. There is no corresponding entry in the audited accounts of Horntian depicting it had received the sum of RM 91,162,088 from MDSB.
- (e) The resignation of directors in a company is an ordinary occurrence when there is a change in the board of directors. In any event, the resignation of D1 and D2 (former directors) is validated by the relevant resolutions of MDSB.
- (f) The allegation of D1 and D2 (former directors) conspiring with the 3rd and 4th Defendants is untenable. Bearing in mind that the 3rd and 4th Defendants as new directors had no dealings with P, and were not involved in the project prior to or post their appointment.

III. The 5th Defendant

76. Fourth, Horntian. Recall that the basis of P's claim is due to non - payment by MDSB for work done in respect of the project. MDSB appointed P as the main contractor for the project sometime in the year 2011 ("**contractor appointment**").



77. P's case against Horntian is summarised as follows :

- (a) Horntian influenced D1 and D2 (former directors), together with the 3rd and 4th Defendants and with the assistance of D6 (auditor) and D7 (company secretary), having control of the management of MDSB;
- (b) Horntian influenced D1 and D2 (former directors), as the alter ego and manager of MDSB, and that resulted in a purported payment of RM 91,162,088 to Horntian in the year 2014;
- (c) Horntian influenced D1 and D2 (former directors), together with the 3rd and 4th Defendants and with the assistance of D6 (auditor) and D7 (company secretary), with intention to conspire in failing to monitor and supervise the financial affairs and administration of MDSB;
- (d) Horntian was the recipient of dividend paid illegally by MDSB;
- (e) Horntian is the owner of the development land for the project vide a joint venture agreement between it and MDSB; and
- (f) in view of the participation of Horntian in the purported fraudulent trading, P prayed for Horntian to be made liable, jointly and severally, to satisfy the debt due to P.

78. I find that there is no nexus of P's claim pertaining to the project towards Horntian due to the following reasons :



- (a) The contractor appointment has no relation to Horntian, who is not a party to the same. No references to Horntian were made in P's pleadings at paragraphs 23 to 26 of the statement of claim.
- (b) Horntian is a separate legal entity, and its directors and shareholders are not common with MDSB.
- (c) There was never any payment of dividend from MDSB to Horntian. Indeed at paragraph 37 of the statement of claim, P admitted that such payment was not made.
- (d) The joint venture agreement between Horntian and MDSB is not relevant to the contractor appointment. Nor is it relevant to P's claim, which is for the debt owed by MDSB pursuant to the contractor appointment.
- (e) P failed to plead sufficient particulars for a sustainable claim to link Horntian to the purported fraud. Mere familial references and vague references to the joint venture agreement is insufficient. Even the purported payment of dividend to Horntian was admitted by P to not exist (see paragraph 37 of the statement of claim).

No reasonable cause of action

79. P alleges that Horntian influenced the decision making of MDSB with the intention to commit fraudulent trading against P. The main bone of contention of P's claim against Horntian is premised on the fact



that the directors of Horntian are the parents of D1 (former director). Hence, Horntian is capable of influencing the decision making in MDSB.

80. However, MDSB and Horntian are separate legal entities. Horntian was not a shareholder of MDSB, nor did it have common shareholders or directors. In the statement of claim, P did not make any direct reference to Horntian. P did not disclose any contractual nexus between it and Horntian. At all material time, Horntian was not privy to the contractor appointment. P also failed to plead specific facts to show that Horntian is supposedly capable of influencing the actions of MDSB.

81. P failed to show any relation between Horntian and the debt owed to P by MDSB. P's misguided attempt in referencing the letter of award dated 25.10.2016 only serves to show that Horntian was not involved in the contractor appointment. There is not even a single reference of Horntian, nor of its shareholders or directors, in the said letter of award. The fact that P's proof of debt (against MDSB, not Horntian) was approved by the Official Receiver does not give rise to a sustainable claim against Horntian.

Delay by Horntian in filing the striking out application

82. Before ending, I would mention that P raised a preliminary objection to Horntian's striking out application. P complains that Horntian has caused a delay by filling its striking out application two months after the court had given the final date to file any interlocutory application.



83. Be that as it may, I would allow the striking out application even if there is a delay in filing the application. After all, an application under Order 18 rule 19 (1) of the Rules of Court 2012 can be made at any stage of the proceedings. (See the Court of Appeal case of *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672 at 682).
84. Moreover, P did not show how it was prejudiced by the late filing of the striking out application. I consider that the delay on the part of Horntian did not cause any prejudice to P, especially since the trial date for this suit has not been fixed.

Voluminous affidavit is not the test of triable issues

85. Finally, P submitted that Horntian's affidavit which contains more than 2000 pages has automatically disclose that there are triable issues. I diasgree. Voluminous or lengthy affidavits per se does not automatically give rise to triable issues. A striking out application is fact sensitive and should be determined by the court on a case - to - case basis. Substance prevails over form.
86. I accept that the voluminous affidavit filed was mainly to disclose the relevant information and background facts to assist the court in deciding the striking out applications on merit. By disclosing numerous cause papers, decisions from the appellate courts and the documents available in public records, they further corroborate that P's claim is time barred having sat on its rights.



87. I concur with the sentiment expressed by the High Court in *Matang Integrated Sdn Bhd v Usahasama SPNB - LTAT Sdn Bhd* [2010] MLJU 937 :

*“I set out the above partly in response to the defendant’s counsel assertion that as the arguments had gone on for about 2 ½ hours from 3.30 pm to 6.00 pm, there must then be of necessity some triable issues on the face of the plaintiff’s claim. If such is the test then every counsel would just have to file in thick affidavits and exhibits with thicker still bundle and supplemental bundles of authorities and all would be well as tending to show at least a triable issue! Truly **nothing turns on thickness of affidavits and exhibits** nor of authorities but on the truth or otherwise of the totality of traverse in the context of undisputed contemporary documents that do not lie.”*

Conclusion

88. For the reasons above, it is plain and obvious that P’s claim is obviously unsustainable. I therefore allowed the striking out applications and struck out P’s action. I awarded costs of:- (i) RM 10,000 in favour of D7; (ii) RM 10,000 in favour of D6; (iii) RM 10,000 in favour of D1 and D2; and (iv) RM 5,000 in favour of Horntian.

Dated 9 October 2025

sgd

QUAY CHEW SOON

JUDGE

HIGH COURT OF MALAYA

SHAH ALAM

CIVIL DIVISION NCvC 11



Counsels

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