METRAMAC CORPORATION SDN BHD v. FAWZIAH HOLDINGS SDN BHD; TAN SRI HALIM SAAD & CHE ABDUL DAIM HJ ZAINUDDIN (INTERVENERS)
FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ, CJ; RICHARD MALANJUM, CJ SABAH & SARAWAK; ABDUL HAMID MOHAMAD, FCJ; ALAUDDIN MOHD SHERIFF, FCJ; NIK HASHIM, FCJ
CIVIL APPEALS NOS: 02-19-2006(W) & 02-20-2006 (W)
19 JULY 2007
[2007] 4 CLJ 725

***CONTRACT**: Breach - Damages - Compensation - Whether compensation unreasonably high and extortionate in nature - Whether a penalty - Whether not genuine estimate of damage likely to be suffered for breach thereof - Whether only entitled to damages to be assessed - Sum named in contract - Intention of parties - Contracts Act 1950 s. 75*

***CONTRACT**: Formation - Prerequisites - Element of certainty - Payment to respondent of income earned by appellant under "future contracts" - Whether ambiguous - Whether lacking consideration - Whether void for uncertainty - Contracts Act 1950 s. 30*

***CIVIL PROCEDURE**: Judgment - Adjudicative independence of judges - Duty to render impartial decisions - Court of Appeal - Making adverse remarks on conduct of third parties and holding appellant beneficiary of such conduct - Whether remarks and findings baseless - Whether turning private claim for breach of contract into public interest litigation - Whether real danger of bias apparent in judgment - Whether judgment to be set aside*

***CIVIL PROCEDURE**: Judgment - Written judgment - Court of Appeal - Expunction of contents of judgment - Applicable test - Whether remarks and findings offensive and unwarranted - Persons rebuked not parties or witnesss to suit - Whether comments unfair - Whether to be expunged*

***TRUSTS**: Express trust - Requirements - Whether satisfied - Allegation that appellant holding money on trust for benefit of respondent - Confusion as to what respondent was claiming under purported trust - Whether void for uncertainty - Whether amounting to illegal reduction of appellant's share capital - Companies Act 1965 ss. 64, 365(1)*

Syarikat Teratai KG Sdn Bhd ('STKG') and the respondent in this case shared common shareholders and directors in the persons of Dato' Fawziah and her mother, Maimoon Bee. In 1986, STKG secured a contract from Dewan Bandaraya Kuala Lumpur ('DBKL') to construct certain roads in Kuala Lumpur and to collect toll thereat for a period of 12 years ('the concession'). STKG signed with DBKL the First Concession Agreement herein, and pursuant thereto a Licence Agreement granting it exclusive rights to erect advertisements and signage within the concession area and period ('advertising right'). To undertake the concession project, STKG further: (i) signed a Restructure Sale Agreement with the respondent agreeing to sub-license the advertising right to the respondent, and secondly, by cls. 9 & 10 thereof, to sub-contract all contracts and future contracts to the respondent or otherwise to hold any monies, profits and benefits derived therefrom on trust for the benefit of the respondent; and

(ii) courted in new shareholders to its fold, raised a capital of RM65 million therefrom and took a loan of RM204 million from the banks.

In 1990 STKG completed the Cheras section of the concession, but was forced by DBKL to suspend toll collections due to public demonstrations against the same. Thereupon STKG sought a RM764-million compensation from DBKL, and even approached the then Finance Minister, Tun Daim Zainuddin for the purpose, but the effort proved futile. Be that as it may, on 2 November 1990, as agreed on in the Restructure Sale Agreement, STKG signed a Signage Sub-License Agreement with the respondent granting it the advertisement right for a yearly fee of RM1000. This agreement also provided that in the event that the agreement is terminated, STKG would compensate the respondent for its loss of potential revenue of RM7,797,000 per year thereunder, albeit in accordance with the formula as set out in cl. 8.2 ('cl. 8 formula'), and further admit of a debt payable to the respondent (cl. 8.3). Thereafter, STKG received and accepted an offer from one UEM to purchase its shares for RM97.5 million. However, before the formal takeover deal was executed, STKG signed a Signage Sub-Licence Amending Agreement with the respondent amending the triggering point for a claim to arise under the cl. 8 formula to include the mutual termination of the First Concession Agreement or the termination of the Signage Sub-Licence Agreement by STKG.

On 23 January 1991, an agreement was executed on the sales of STKG shares to Metro Juara Bhd, a nominee of UEM owned by one Anuar Othman and Dato Halim Saad, whereupon STKG assumed its present name, Metramac Corporation Sdn Bhd (the appellant). Having taken over the appellant, the new owners, however, terminated the First Concession Agreement and replaced it with a Replacement Concession Agreement, rescinded the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement and assigned the advertising right to some third parties. It was also evident that, a few months later, on account of the termination the First Concession Agreement, a sum of RM405 million (eventually RM756.7 million) was paid by DBKL to the appellant. The respondent alleged that the acts of the new owners constituted breach of contract and trust, and in the circumstances applied to the High Court *inter alia* for the following orders, namely: (i) damages for breach of the advertising right or alternatively damages in the sum of RM65,182,920 for breach of the Signage Sub-Licence Agreement; and (ii) a declaration that the appellant was holding the RM405 million and other sums received from DBKL on trust for the respondent pursuant to cls. 9 & 10 of the Restructure Sale Agreement. The appellant denied the allegations, and in any case counter-claimed that the agreements were null and void and of no effect. The learned judge held that: (i) the appellant was liable for breach of the contract for the advertising right; (ii) the sum of RM65,182,920 calculated pursuant to cl. 8 formula was a penalty that contravened s. 75 of the Contracts Act 1950 ('Contracts Act'), such that the respondent was only entitled to be paid damages to be assessed; (iii) the claim for loss of profits, monies or other benefits arising from 'future contracts' pursuant to cls. 9 & 10 of the Restructure Sale Agreement was void for uncertainty under s. 30 of the Contracts Act and for lack of consideration, and therefore no question of a trust account under the said agreement could arise; and (iv) the counterclaim of the appellant should also be dismissed. Dissatisfied, both parties appealed.

The Court of Appeal, *vide* the judgments of his lordship Gopal Sri Ram JCA, with which his lordship Hashim Yusoff JCA was in agreement ('main judgment'), and of his lordship Zulkefli Makinudin JCA ('supplementary judgment'), ruled that s. 75 of the Contracts Act did not apply as the cl. 8 formula is not a penalty, that that section had no application to an action for a simple debt like the respondent's claim, that cl. 9.5 of the Restructure Sale Agreement

had in law created an express trust and that s. 30 of the Contracts Act 1950 did not apply to the facts and circumstances of this case. The intermediate appellate court hence dismissed the appellant's appeal, affirmed the High Court's finding of liability in respect of the claim for loss of advertising right and allowed the respondent's claim for the sum of RM65,182,920 as loss of profits derived from future contracts. The facts further showed, however, that, upon the evidence before it, the Court of Appeal deemed it appropriate to rebuke certain personalities who were not parties to this suit, including Tun Daim Zainuddin and Dato Halim Saad, the interveners herein. Among others, the main judgment remarked: (i) "so why pay RM97.5 million for the shares of such a company? The answer is simple enough. Anuar Othman dan Dato Halim Saad had something which the plaintiff did not. And that was the patronage of the then Minister of Finance, Tun Daim Zainuddin"; (ii) "I think it is a fair question to ask why taxpayers' money was channelled into the hands of two private individuals - to profit them - instead of a wider section of the general public. It is not at all clear why the Minister of Finance used his power to favour Anuar Othman and Dato Halim Saad"; (iii) "for the sake of completeness, it must be mentioned that the RM32.5 million mentioned earlier was siphoned out of the defendant's account by Anuar Othman and Dato Halim Saad"; (iv) "in this context, it is clearly wrong to treat even a private limited company with only two shareholders any different from any other company. An intentional misappropriation of such a company's property, movable or immovable, is a criminal breach of trust within s. 405 of the Penal Code and, if the misappropriation is done by directors, as was the case here, it is the aggravated form of criminal breach of trust under s. 409"; and (v) "they are the ones who, with the support of Tun Daim, oppressed the previous shareholders into parting with their shares. They are the one ones who took advantage of the ideas of Dato' Fauziah and used it for their own benefit and obtained huge payments from DBKL and the Federal Government".

Aggrieved, the appellant applied for and was granted leave to appeal on the following questions, namely: (i) whether the creation of a trust by a company amounts to an illegal reduction of its capital; (ii) whether the test adopted by the Court of Appeal in determining whether cl. 8 of the Signage Agreement is a stipulation by way of a penalty and/or a sum named in the contract for the purpose of s. 75 of the Contracts Act is the correct test and/or is exhaustive; and (iii) whether the Court of Appeal's adverse remarks/findings in the circumstances of this case, when viewed objectively, shows a real danger of bias on the part of the Court of Appeal in the judgment arrived at against the appellant. The interveners too were given leave to apply to expunge the adverse remarks of the Court of Appeal aforesaid, *albeit* in different and separate applications, and in the event, an additional question arose as to whether the remarks were offensive, unfair and unwarranted and ought to be expunged from the record.

Per Abdul Hamid Mohamad FCJ (delivering the judgment of the court in respect of the applications by the interveners):

> **(1)** The sensible approach for this court to take is to first consider whether the statements on the face of it are offensive, objectionable, disparaging, unjust, unjustified and so on, and if so, to consider: (i) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (ii) whether there is evidence on record bearing on that conduct justifying the remarks; and (iii) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert to that conduct.

(*State of Uttar Pradesh v. Mohd Naim*). (paras 164 & 165)

(2) We have before us a case where the unwarranted and disparaging statements were made by the learned judge in his judgment where Tun Daim was neither a party nor a witness; where he had no opportunity whatsoever to explain or defend himself; where there was no cogent evidence on record to support such statements; where he was neither referred to in the pleadings nor in the judgment of the trial judge; where in the notes of evidence of the trial judge even though his name was mentioned it was inconsequential and where such comments are altogether unnecessary for the learned judge to decide the case, even to arrive at the same conclusion he did. Reading those parts of the judgment objected to, there is no doubt that at least some of them are unwarranted and objectionable and this applies as well to Tan Sri Halim Saad's application. Accordingly, the relevant offensive statements that formed part of the main judgment and embodied as it were in paras 13, 16, 17, 18 and 34 of the judgment should be expunged from the records. No part of the supplementary judgment however needs be expunged (paras 169, 170, 171, 172 & 173)

(3) What happened here was that the learned judge made the objectionable statements on a frolic of his own, that the interveners had to intervene and incur expenses through no fault of theirs, and that Fawziah Holdings needed to object to the applications to intervene because it is an attack on a judgment in their favour. Hence, while it is unfair to the interveners that they have to bear their own costs of making the applications, it is also not fair that Fawziah Holdings should bear their own costs of defending the judgment, and even more unfair to ask them to bear the costs of the interveners. In the circumstances, the court would allow the applications but would make no order as to costs. (paras 175 & 177)

[Appeal and applications partly allowed. Order accordingly]

Bahasa Malaysian *translation of headnotes*

Syarikat Teratai KG Sdn Bhd ('STKG') dan responden dalam kes ini mempunyai pemegang saham dan pengarah-pengarah yang sama iaitu Dato' Fawziah dan ibunya, Maimoon Bee. Pada tahun 1986, STKG memperoleh satu kontrak dari Dewan Bandaraya Kuala Lumpur ('DBKL') bagi membina beberapa jalanraya di Kuala Lumpur dan mengutip tol di situ selama 12 tahun ('konsesi'). STKG menandatangani dengan DBKL Perjanjian Konsesi Pertama di sini, dan di bawah itu suatu Perjanjian Pelesenan memberikan hak ekslusif kepada STKG untuk meletak iklan-iklan dan tanda-tanda jalan di kawasan dan dalam tempoh konsesi ('hak pengiklanan'). Bagi melaksanakan projek konsesi, STKG juga: (i) menandatangai suatu Perjanjian Penjualan Penstrukturan dengan responden sekaligus bersetuju untuk melesenkan hak pengiklanan kepada responden, dan kedua, melalui fasal 9 & 10 perjanjian, mengkontrakkan semua kontrak dan kontrak hadapan kepada responden ataupun sebaliknya memegang apa jua wang, keuntungan dan manfaat dari kontrak-kontrak tersebut sebagai amanah untuk manfaat responden; dan (ii) menarik pemegang-pemegang saham baru ke dalam syarikat, mendapat modal RM65 juta dari mereka dan membuat pinjaman bank berjumlah RM204 juta.

Pada tahun 1990 STKG menyiapkan konsesi di bahagian Cheras, namun dipaksa menangguhkan kutipan tol oleh DBKL disebabkan bantahan orang ramai terhadap kutipan tersebut. STKG cuba mendapatkan pampasan berjumlah RM764 juta dari DBKL, dan untuk itu telah berjumpa dengan Tun Daim Zainuddin, Menteri Kewangan ketika itu, namun usaha tersebut gagal. Apapun, pada 2 November 1990, seperti yang dijanjikan di dalam Perjanjian Penjualan Penstrukturan, STKG menandatangani suatu Perjanjian Pelesenan-Kecil Tandajalan dengan responden memberikan hak pengiklanan kepada responden dengan balasan fi RM1,000 setahun. Perjanjian ini juga memperuntukkan bahawa jika ianya ditamatkan, maka STKG akan membayar pampasan kepada responden atas kehilangan jangkaan hasil RM7,797,000 di bawahnya, iaitu berdasarkan kepada formula yang tertera di fasal 8.2 perjanjian ('formula fasal 8'), dan seterusnya mengakui akan kewujudan suatu hutang yang perlu dibayar kepada responden (fasal 8.3). Berikutnya, STKG mendapat dan menerima tawaran yang dibuat oleh satu UEM untuk membeli saham-sahamnya dengan harga RM97.5 juta. Bagaimanapun, sebelum perjanjian pengambil-alihan formal mengenainya dimeterai, STKG menandatangani suatu Perjanjian Pemindaan Pelesenan-Kecil Tandajalan dengan responden meminda pembingkas (triggering point) untuk membangkitkan tuntutan di bawah formula fasal 8 bagi memasukkan sama faktor penamatan bersama Perjanjian Konsesi Pertama atau penamatan Perjanjian Pelesenan-Kecil Tandajalan oleh STKG.

Pada 23 Januari 1991, perjanjian dimeterai mengenai penjualan saham-saham STKG kepada Metro Juara Sdn Bhd, nomini UEM yang dimiliki oleh seorang Anuar Othman dan Dato Halim Saad, dan berikutnya STKG menukar namanya kepada Metramac Corporation Sdn Bhd (perayu). Bagaimanapun, setelah mengambilalih perayu, pemilik-pemilik baru telah menamatkan Perjanjian Konsesi Pertama dan menggantikannya dengan Perjanjian Penggantian Konsesi, membatalkan Perjanjian Pelesenan-Kecil Tandajalan dan Perjanjian Pemindaan Pelesenan-Kecil Tandajalan serta memberikan hak pengiklanan kepada pihak ketiga. Juga jelas bahawa, beberapa bulan kemudian, berasaskan kepada penamatan Perjanjian Konsesi Pertama, sejumlah RM405 juta (akhirnya RM756.7 juta) telah dibayar oleh DBKL kepada perayu. Responden mengatakan bahawa perbuatan-perbuatan pemilik baru perayu di atas merupakan suatu kemungkiran kontrak dan amanah, dan dengan itu telah memfail tuntutan di Mahkamah Tinggi antara lain untuk perintah-perintah berikut: (i) gantirugi kerana kemungkiran hak pengiklanan, atau secara alternatifnya gantirugi untuk jumlah RM65,182,920 kerana kemungkiran Perjanjian Pelesenan-Kecil Tandajalan; dan (ii) deklarasi bahawa perayu memegang RM405 juta di atas serta lain-lain imbuhan yang diterima dari DBKL sebagai amanah untuk responden berdasarkan Perjanjian Penjualan Penstrukturan. Perayu menolak alegasi dan apapun telah memplid tuntutan balas bahawa perjanjian-perjanjian adalah batal dan tidak sah dan tidak mempunyai kesan. Yang arif hakim memutuskan bahawa: (i) perayu bertanggungan kerana memungkiri kontrak hak pengiklanan; (ii) jumlah RM65,182,920 yang diasas kepada formula fasal 8 adalah suatu penalti yang menyanggahi s. 75 Akta Kontrak 1950 ('Akta Kontrak'), berakibat responden hanya berhak kepada gantirugi ditaksir; (iii) tuntutan kehilangan keuntungan, pendapatan atau manfaat-manfaat lain yang berbangkit dari "kontrak hadapan" di bawah fasal-fasal 9 & 10 Perjanjian Penjualan Penstrukturan adalah batal di bawah s. 30 Akta Kontrak kerana kekaburan dan kerana ketiadaan balasan, berakibat tiada persoalan mengenai akaun amanah di bawah perjanjian tersebut boleh berbangkit; dan (iv) tuntutan balas perayu adalah ditolak. Merasa tidak puashati, kedua-dua pihak telah merayu.

Mahkamah Rayuan, melalui penghakiman-penghakiman yang arif Gopal Sri Ram HMR, dengan mana yang arif Hashim Yusoff HMR telah bersetuju ('penghakiman utama'), dan

penghakiman yang arif Zulkefli Makinudin HMR ('penghakiman tambahan'), memutuskan bahawa s. 75 Akta Kontrak adalah tidak terpakai oleh kerana formula fasal 8 bukan merupakan suatu penalti, bahawa seksyen tersebut tidak terpakai kepada tindakan untuk suatu hutang biasa seperti kes responden, bahawa fasal 9.5 Perjanjian Penjualan Penstrukturan telah mencetuskan suatu amanah expres di sisi undang-undang dan bahawa s. 30 Akta Kontrak tidak terpakai kepada fakta dan halkeadaan kes ini. Mahkamah Rayuan peringkat pertengahan dengan itu menolak rayuan perayu, mengesahkan dapatan liabiliti Mahkamah Tinggi mengenai tuntutan hak pengiklanan dan membenarkan tuntutan responden untuk jumlah RM65,182,920 atas dasar ianya merupakan kehilangan keuntungan dari kontrak hadapan. Fakta bagaimanapun menunjukkan bahawa, berdasarkan keterangan di hadapannya, Mahkamah Rayuan merasakan wajar untuk menempelak beberapa personaliti yang bukan merupakan pihak kepada guaman, termasuklah Tun Daim Zainuddin dan Dato Halim Saad, pencelah-pencelah di sini. Antara lain penghakiman utama menyatakan: (i) "oleh itu kenapa membayar RM97.5 juta untuk saham-saham syarikat sedemikian? Jawapannya mudah. Anuar Othman dan Dato Halim Saad mempunyai sesuatu yang tidak dimiliki oleh plaintif. Sesuatu itu adalah naungan Menteri Kewangan ketika itu, Tun Daim Zainuddin"; (ii) "saya fikir adalah satu soalan yang adil untuk bertanya kenapa wang pembayar cukai telah disalurkan kepada dua orang individu - bagi kemanfaatan mereka - dan tidak secara lebih meluas kepada masyarakat awam. Tidak jelas mengapa Menteri Kewangan telah menggunakan kuasanya untuk manfaat Anuar Othman dan Dato Halim Saad"; (iii) "untuk melengkapkan, harus dinyatakan bahawa jumlah RM32.5 yang disebut sebelum ini telah dikeluarkan dari akaun defendan oleh Anuar Othman dan Dato Halim Saad"; (iv) "dalam konteks ini, adalah silap untuk melayan sebuah syarikat sendirian berhad yang mempunyai dua orang pemegang saham berbeza dari syarikat-syarikat lain. Perbuatan melesapkan dengan niat sebarang harta syarikat sedemikian, sama ada harta alih atau tak alih, adalah satu pecah amanah jenayah di bawah s. 405 Kanun Kesiksaan dan, jika pelesapan dilakukan oleh pengarah-pengarah, seperti halnya di sini, maka ia berbentuk pecah amanah jenayah yang lebih berat di bawah s. 409"; (v) "merekalah orangnya yang, dengan sokongan Tun Daim Zainuddin, menindas pemegang-pemegang saham terdahulu untuk melupuskan saham-saham mereka. Merekalah orangnya yang mengambil peluang atas idea-idea Dato' Fawziah dan menggunakannya untuk manfaat mereka dan memperoleh pembayaran besar dari DBKL dan Kerajaan Persekutuan".

Terkilan, perayu memohon dan memperoleh kebenaran untuk merayu atas persoalan-persoalan berikut, iaitu: (i) sama ada pembentukan suatu amanah oleh sebuah syarikat telah mengurangkan modalnya dengan secara tidak sah; (ii) sama ada ujian yang digunapakai Mahkamah Rayuan dalam menentukan sama ada fasal 8 Perjanjian Tandajalan merupakan suatu peruntukan penalti dan/atau suatu jumlah yang dinyatakan di dalam kontrak bagi maksud s. 75 Akta Kontrak adalah ujian yang betul dan/atau lengkap; dan (iii) sama ada ucapan/dapatan kurang baik oleh Mahkamah Rayuan dalam halkeadaan kes di sini, dilihat secara objektif, menunjukkan bahaya sebenar bias Mahkamah Rayuan dalam penghakimannya yang tidak memihak kepada perayu. Pencelah-pencelah juga telah diberi izin untuk memohon membuang kenyataan kurang baik Mahkamah Rayuan di atas, walaupun melalui dua permohonan yang berasingan, dan oleh itu, persoalan juga berbangkit sama ada ucapan bersifat menyerang, tidak adil dan tidak wajar dan harus dibuang dari rekod.

Oleh Abdul Hamid Mohamad HMP (menyampaikan penghakiman mahkamah berkaitan permohonan pencelah-pencelah):

> **(1)** Pendekatan munasabah yang harus diambil oleh mahkamah ini adalah dengan terlebih dahulu menimbang sama ada ucapan-ucapan pada

permukaannya adalah bersifat serangan, mencela, menghina, tidak adil, tidak berjustifikasi dan sebagainya, dan jika begitu, menimbang: (i) sama ada pihak yang kelakuannya dipersoalkan berada di hadapan mahkamah atau mempunyai peluang untuk memberi penjelasan ataupun mempertahankan diri; (ii) sama ada terdapat keterangan pada rekod mengenai kelakuan tersebut sekaligus menjustifikasikan ucapan; dan (iii) sama ada adalah perlu untuk keputusan kes, sebagai satu bahagiannya yang penting, bahawa ucapan tersebut dimuat ke dalam penghakiman. (*State of Uttar Pradesh v. Mohd Naim*).

(2) Yang ada di hadapan kami adalah suatu kes di mana ucapan-ucapan tidak wajar dan menghina telah dibuat oleh yang arif hakim dalam keputusannya di mana Tun Daim bukan merupakan suatu pihak atau seorang saksi; di mana beliau langsung tidak mempunyai peluang untuk membuat penjelasan ataupun membela dirinya; di mana tiada keterangan kukuh untuk menyokong ucapan-ucapan sedemikian; di mana nama beliau tidak disebut di dalam pliding atau oleh hakim bicara; di mana di dalam nota keterangan hakim bicara, walaupun namanya disebut, ia tidak membangkitkan apa-apa konsekuen dan di mana komen-komen berkenaan adalah tidak penting untuk yang arif hakim membuat keputusan mahupun mencapai konklusi-konklusi yang dibuatnya. Membaca bahagian penghakiman yang dibantah, tidak ada keraguan bahawa sekurang-kurang sebahagian darinya adalah tidak wajar dan bersifat menghina dan ini terpakai sama kepada permohonan Tan Sri Halim Saad. Oleh yang demikian, ucapan-ucapan menghina yang menjadi sebahagian dari penghakiman utama dan yang terangkum ke dalam perenggan-peranggan 13, 16, 17, 18 dan 34 penghakiman utama hendaklah dibuang dari rekod. Selain dari itu, tiada bahagian dari penghakiman tambahan perlu dibuang.

(3) Apa yang berlaku di sini adalah bahawa yang arif hakim membuat kenyataan yang menghina atas kesukaannya sendiri, bahawa pencelah-pencelah terpaksa mencelah dan menanggung perbelanjaan walaupun mereka tidak melakukan apa-apa kesalahan, dan bahawa Fawziah Holdings perlu membuat bantahan kepada permohonan untuk mencelah disebabkan ia dibuat terhadap suatu penghakiman yang menyebelahi mereka. Oleh itu, sementara ianya memang tidak adil kepada pencelah-pencelah bahawa mereka perlu memikul sendiri kos permohonan mereka, ianya juga adalah tidak adil bahawa Fawziah Holdings harus menanggung kos untuk mempertahankan penghakiman, dan lebih tidak adil untuk meminta mereka menanggung kos pihak pencelah-pencelah. Dalam halkeadaan sedemikian, mahkamah membenarkan permohonan tetapi tidak akan membuat sebarang perintah mengenai kos.

Case(s) referred to:

Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application [2004] 4 CLJ 350 FC ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2002] 4 CLJ

268 CA ***(refd)***

AM Mathur v. Pramod Kumar Gupta & Ors [1990] 2 SCC 533 ***(refd)***

Bahai v. Rashidian & Anor [1985] 3 All ER 385 ***(refd)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor [2006] 1 CLJ 577 FC ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd [1914-15] All ER Rep 739 ***(refd)***

Franklin v. Minister of Town & Country Planning [1948] AC 87 ***(refd)***

Inner West London Coroner, ex parte Dallaglio [1994] 4 All ER 139 ***(refd)***

Insas Bhd & Anor v. Ayer Molek Rubber Co Bhd & Ors [1995] 3 CLJ 328 FC ***(refd)***

K: a Judicial Officer AIR [2001] SC 972 ***(refd)***

Law v. Redditch Local Board [1982] 1 QB 127 ***(refd)***

Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66; [1972] 1 MLJ 89 ***(refd)***

Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor [2000] 1 All ER 65 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 CLJ 65 FC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

MGG Pillai v. Tan Chee Yionn [2002] 3 CLJ 577 FC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 CLJ 833 FC ***(refd)***

Phileo Promenade Sdn Bhd & Anor v. Premier Modal (M) Sdn Bhd [2003] 1 CLJ 854 CA ***(refd)***

PK Achuthan v. State Bank of Travancore, Calicut AIR [1975] Ker 47 ***(refd)***

R v. Gough [1993] AC 646 ***(refd)***

R v. Valente [1985] 19 CRR 354 ***(refd)***

R Rama Chandran v. The Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

RDS v. The Queen 151 DLR (4th) 193 ***(refd)***

Reg v. Bow Street Magistrate, Ex p Pinochet (No 2) (HL (E)) [2000] 1 AC 119 ***(refd)***

Robophone Facilities Ltd v. Blank [1966] 1 WLR 1428 ***(refd)***

Scott v. Scott [1913] AC 417 ***(refd)***

SS Maniam v. The State Of Perak [1956] 1 LNS 112; [1957] MLJ 75 ***(refd)***

State of Madhya Pradesh & Ors v. Nandlal Jaiswal & Ors [1987] 1 SCR1 ***(refd)***

State of Uttar Pradesh v. Mohd Naim [1964] AIR SC 703 ***(refd)***

State of West Bengal v. Babu Chakraborty AIR [2004] SC 2324 ***(refd)***

Sundram v. Arujunan & Anor [1994] 4 CLJ 300 SC ***(refd)***

T v. Secretary of State for the Home Department [1995] 1 WLR 545 ***(refd)***

V Sujatha v. State of Kerala & Ors [1994] Supp (3) SCC 436 ***(refd)***

Valente v. Her Majesty the Queen [1985] 2 SCR 673 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 64, 365(1)

Contracts Act 1950, ss. 30, 75

Counsel:

For the appellant - Dato' Muhammed Shafee Abdullah (S Sivaneindiren, Teh Eng Lay & Kaushalya Rajathurai with him); M/s Cheah Teh & Su

For the respondent - Dato' Dr Cyrus Das (Benjamin Dawson, Steven Thiru, Alvin Tang, Koh San Tee, David Mathew & Nor Aisyah Abu Bakar with him); M/s Noraisyah & Co

For the intervener (Tun Daim Zainuddin) - Dato' Cecil Abraham (Sunil Abraham with him); M/s Shearn Delamore & Co

For the intervener (Tan Sri Halim Saad) - Tommy Thomas (Alan Gomez (Jason Wee with him); M/s Tommy Thomas

Reported by WA Sharif

Case History:

Federal Court : [2006] 3 CLJ 177
Court Of Appeal : [2006] 1 CLJ 197
Court Of Appeal : [2006] 1 CLJ 996

JUDGMENT

Abdul Hamid Mohamad FCJ:

[149] It started with Fawziah Holdings Sdn. Bhd. ("Fawziah Holdings") suing Metramac Corporation Sdn. Bhd. ("Metramac Corporation") principally for damages for breach of contract in the High Court of Kuala Lumpur (Commercial Division) in Civil Suit no. D5-22-110-1995. The High Court allowed part of the claim of Fawziah Holdings and dismissed the others. Both Fawziah Holdings and Metramac Corporation appealed against the High Court judgment to the Court of Appeal. Fawziah Holdings' appeal was registered as Civil Appeal No. W-02-1009-2003. Metramac Corporation's appeal was registered as Civil Appeal No. W-02-1013-2003.

[150] The Court of Appeal allowed Fawziah Holdings' appeal but dismissed Metramac Corporation's appeal. Metramac Corporation applied for leave to appeal to this Court against both the judgments. The application arising from W-02-1009-2003 was registered as 08-8-2006(W) while the application arising from W-02-1013-2003 was registered as 08-9-2006(W). Leaves to appeal were granted. Metramac Corporation then filed the notices of appeal which were registered as 02-19-2006(W) and 02-20-2006(W) respectively.

[151] The judgment of the Court of Appeal ([2006]1 MLJ 505; *[2006] 1 CLJ 996*; [2006] 2 AMR 1), in particular, the judgment of Gopal Sri Ram JCA contained statements against Tun Daim and Tan Sri Halim Saad which they found to be objectionable. Tun Daim and Tan Sri Halim Saad were neither parties nor witnesses in the suit in the High Court or in the appeals in the Court of Appeal. They each filed an application to intervene in Metramac Corporation's applications for leave to appeal (08-8-2006(W) and 08-9-2006(W)) and to have the offensive statements expunged. Tun Daim's application in 08-8-2006(W) is in encl. 9(a) while his application in 08-9-2006(W) is in encl. 7(a). Both are the same.

[152] Tan Sri Halim Saad made a similar application in 08-8-2006(W), in encl. 13(a).

[153] This court on 7 March 2006 granted both Tun Daim and Tan Sri Halim Saad leave to intervene in the appeals for the purpose of expunging the alleged offensive statements. The main prayers in their applications, ie, to expunge the allegedly offensive statements were fixed for hearing together with the hearing of the appeals by Metramac Corporation (02-19-2006(W) and 02-20-2006(W)).

[154] In the mean time, Tun Daim applied to have encls. 7(a) amended and to have some documents exhibited in Fawziah Holdings' affidavits expunged - encl. 30(a). Similar

application was made by him in respect of encl. 9(a) - encl. 55(a). Tan Sri Halim Saad also made an application to expunge the same documents. His application is in encl. 81(a).

[155] As we had sorted out the side issues without having to make decisions and orders, I do not think that it is necessary to say anything about them. I shall go straight to the main issue ie, that of expunging the allegedly offensive statements.

Jurisdiction Of The Court

[156] Actually, jurisdiction of this court to make an order to expunge offensive statements is not an issue before us. First, this court in allowing Tun Daim and Tan Sri Halim Saad ("the interveners") to intervene in these appeals for that purpose, was already satisfied that this court had the threshold jurisdiction to make such an order.

[157] Secondly, this court has repeatedly held that it has the inherent jurisdiction "to make any order that may be necessary to prevent injustice or to prevent any abuse of the process of the court" - see *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61*; *Megat Najmuddin bin Dato' Seri (Dr.) Megat Khas v. Bank Bumiputra (M) Bhd. [2002] 1 CLJ 645*; *MGG Pillai v. Tan Chee Yionn [2002] 3 CLJ 577* and *Allied Capital Sdn. Bhd. v. Mohd. Latiff bin Shah Mohd. & Another Application [2004] 4 CLJ 350*.

[158] Thirdly, at least on two occasions, courts in this country had expunged remarks made in a judgment. The first is *Insas Bhd. & Anor v. Ayer Molek Rubber Co. Bhd. & Ors. [1995] 3 CLJ 328 (FC)*. The other case is *Phileo Promenade Sdn. Bhd. & Anor v. Premier Modal (M) Sdn. Bhd. [2003] 1 CLJ 854 (CA)*.

[159] In *Insas Berhad* or better known as the "Ayer Molek Case" the Federal Court expunged offensive remarks made by the Court of Appeal in its judgment against the High Court, the applicants and their counsel. Jurisdiction was not an issue in that case and the Federal Court did not even make any mention of it.

[160] In *Phileo Promenade (supra)*, the Court of Appeal expunged three paragraphs from the judgment of the High Court. In that case too, jurisdiction of the court, ie, the Court of Appeal, was not an issue and no mention was made in the judgment of the Court of Appeal on the question of jurisdiction. It was accepted by all that the court had the jurisdiction to do so.

[161] Fourthly, in this case too, learned counsel for Fawziah Holdings (the respondent) did not raise any objection to the application on ground of want of jurisdiction. It was only the learned counsel for the interveners who, out of caution, submitted on the question of jurisdiction of this court to make the expunging order.

[162] The Supreme Court of India too has on occasion exercised its inherent jurisdiction to expunge comments of the lower courts. An example is the case of *State of Uttar Pradesh v. Mohd. Naim* [1964] AIR SC 703. That case was also cited in *Insas Bhd. (supra)* and *Phileo Promenade (supra).*

[163] In the circumstances, I do not think it is necessary to dwell at length on the issue of jurisdiction of this court to make the expunging order. Suffice to say that this court has the jurisdiction to do so, if circumstances warrant it to do so.

The Test

[164] A number of judgments of the Supreme Court of India were referred to us. They are *State of Uttar Pradesh v. Mohd. Naim (supra), A.M. Mathur v. Pramod Kumar Gupta & Ors* [1990] 2 SCC 533; *State of Madhya Pradesh & Ors. v. Nandlal Jaiswal & Ors* [1987] 1 SCR 1; *V. Sujatha v. State of Kerala & Ors.* [1994] Supp (3) SCC 436. In fact passages from the same cases have been reproduced in the judgments of this court in *Insas Berhad (supra)* and in the judgment of the Court of Appeal in *PhileoPromenade (supra).* I do not think it is necessary to reproduce them again. These cases talk about the need for judicial restraint, remind judges not to misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties and witnesses, advise judges "not to use strong and carping language while criticising the conduct of parties and witnesses. They (judges - added) must have the humility to recognise that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and resulting in injustice" - per B.N. Bhagwati CJ.

[165] In *State of Uttar Pradesh v. Mohd. Naim (supra)* S.K. Das J, delivering the judgment of the court said that in such cases "it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct".

[166] I agree that the sensible approach for this court to take is first to consider whether the statements, on the face of it, are offensive, objectionable, disparaging, unjust, unjustified and so on. If so, then the court should consider the three points mentioned above. However, there may be other factors arising from the circumstances of the case that may be relevant.

[167] So, we have to look at the statements that have become the subject matter of this application. Both Tun Daim and Tan Sri Abdul Halim Saad have reproduced the parts of the judgments objected to by them in their affidavits in support of their respective application. They are too long to be reproduced. Suffice for me to identify them by their paragraph numbers. They are paras 11, 13, 16 and 34 of the judgment of Gopal Sri Ram JCA and para 35 of the judgment of Zulkefli Ahmad Makinudin JCA.

[168] Tan Sri Halim Saad objected to paragraphs (at times part of) 10, 11, 12, 13, 15, 16, 17, 18 and 34 of the judgment of Gopal Sri Ram JCA and part of para 32 of the judgment of Zulkifli Ahmad Makinudin JCA.

[169] We have before us a case where the unwarranted and disparaging statements were made by the learned judge in his judgment where Tun Daim was neither a party nor a witness; where he had no opportunity whatsoever to explain or defend himself; where there was no cogent evidence on record to support such statements; where he was neither referred to in the pleadings nor in the judgment of the trial judge; where in the notes of evidence of the trial judge even though his name was mentioned it was inconsequential and where such comments are altogether unnecessary for the learned judge to decide the case, even to arrive at the same conclusion that he did.

[170] Reading those parts of the judgment objected to I have no doubt that, at least some of

them are unwarranted and objectionable and should be expunged from the records.

[171] The same applies to Tan Sri Halim Saad's application.

[172] In my judgment, the following statements from the judgment of Gopal Sri Ram (JCA) should be expunged:

> **Para. 13**
>
> So why pay RM97.5 million for the shares of such a company? The answer is simple enough. Anuar Othman and Dato Halim Saad had something which the plaintiff did not. And that was the patronage of the then Minister of Finance, Tun Daim Zainuddin. The events leading to the takeover of the defendant company and subsequent thereto clearly bear this out. For example, look at the confident way in which Metro Juara behaved. Even before the restructure sale agreement was signed on 23 January 1991, Metro Juara wrote to DBKL on 14 January 1991 about recommencing toll collection and re-negotiating the first concession agreement. It would not have written such a letter unless everything had already been put in place.
>
> **Para. 16**
>
> You may well ask how all this could have happened without the direct involvement of Tun Daim. It is also incomprehensible why the defendant as it was constituted immediately before the takeover by Metro Juara was not given this same financial support by the Federal Government. After all, at least two of the pre-takeover shareholders were either Government concerns or Government assisted concerns. And in the case of Tabung Haji, the ultimate beneficiaries would have been the poorer section of our society. I think that it is a fair question to ask why taxpayers' money was channelled into the hands of two private individuals - to profit them - instead of a wider section of the general public. It is not at all clear why the Minister for Finance used his power to favour Anuar Othman and Dato Halim Saad.
>
> **Para 17**
>
> 17. For the sake of completeness, it must be mentioned that the RM 32.5 million mentioned earlier was siphoned out of the defendant's account by Anuar Othman and Dato Halim Saad. I asked learned counsel for the defendant during argument how this ever could have happened. His reply was stupefying. He said that these two gentlemen had, as shareholders, paid this sum into the defendant's account and were now reimbursing themselves. This answer overlooks the most elementary principle of company law. It is this. The shareholders of a company have no interest, legal or equitable, in the assets of their company. See, *Law Kam Loy v. Boltex Sdn Bhd [2005] 3 CLJ 355*.
>
> **Para 18**
>
> 18. In this context, it is clearly wrong to treat even a private limited company

with only two shareholders any different from any other company. An intentional misappropriation of such a company's property, movable or immoveable is a criminal breach of trust within section 405 of the Penal Code and, if the misappropriation is done by directors, as was the case here, it is the aggravated form of criminal breach of trust under section 409. See, *Public Prosecutor v. Datuk Harun [1976] 1 LNS 96*; [1977] 1 MLJ 180. I need do no more than quote from the judgment of Chua J in *Tay Choo Wah v. Public Prosecutor [1976] 1 LNS 156*; [1976] 2 MLJ 95 where his lordship said:

The sooner directors realise that *the Companies Act applies to private companies whether family or not* the better it is. *A company is not a mere puppet of the directors and the people interested in the proper and lawful conduct of the company are not just the directors and the shareholders.* All sorts of people have a legitimate and proper interest in the well-being and preservation of the assets and properties of a company, like creditors and persons having dealings with the company. (emphasis added.)

I must therefore be forgiven if I were to look askance at learned counsel's rationale for what was done in this case.

Para. 34

They are the ones who, with the support of Tun Daim, oppressed the previous shareholders into parting with their shares. They are the ones who took advantage of all the ideas of Dato' Fawziah and used it for their benefit and obtained huge payments from DBKL and the Federal Government. It is now scarcely open to them to point fingers at the plaintiff.

[173] No part of the judgment of Zulkifli Ahmad Makinudin JCA needs be expunged.

Costs

[174] The question is, since I am allowing the application to expunge, whether Fawziah Holdings should be penalized with costs of the interveners who, through no fault of theirs, have to incur expenses to intervene in the appeals. On the face of it, it is only fair that they be given their costs. But, to order that Fawziah Holdings pay their costs, there must be some "fault" on the part of Fawziah Holdings. At the very least, it should be shown that Fawziah Holdings in prosecuting their appeal, had led the learned judge to make those objectionable statements that he had made. I do not think it is fair to penalize Fawziah Holdings with costs if the learned judge, on a frolic of his own, had made those objectionable statements. What part had Fawziah Holdings played in this episode?

[175] I have read the excerpts of Fawziah Holdings' Final Submission and reply in the Court of Appeal which the interveners rely as forming the basis for the learned judge to make the impunged statements. To me the mention of the interveners' names in the contexts are a matter of fact and inconsequential. In no way they can be said to have caused the learned judge to make such comments. What happened here was that the learned judge had gone on a frolic of his own to do so.

[176] It is true that Fawziah Holdings had objected to the applications of the interveners to

intervene and had argued against expunging. Their actions is understandable and quite reasonable because it is an attack on a judgment which was in their favour and that they feared of having "a cut-up" judgment to defend. In any event, even if Fawziah Holdings did not object to the applications, the interveners would have to engage solicitors and counsel and incur legal expenses all the same. It is unfair to the interveners that they have to bear their own costs of making these applications. It is also unfair that Fawziah Holdings have to bear their own costs of defending the judgment of the learned judge. It is even more unfair to make Fawziah Holdings bear the costs of the interveners. All these only reemphasize the serious consequences statements from the bench can have. That is a lesson that all judges should learn.

[177] In conclusion, I would allow these applications and expunge the parts of the judgment of Gopal Sri Ram JCA reproduced earlier. I would make no order as to costs and I would order that the deposits to be refunded to the interveners.

[178] The learned Chief Justice Malaysia, Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim, the learned Chief Judge (Sabah and Sarawak) Tan Sri Dato' Richard Malanjum, and my learned brothers Dato' Alauddin bin Dato' Mohd. Sheriff, FCJ and Dato' Nik Hashim bin Nik Ab.Rahman, FCJ have read this judgment and have agreed with it.