IN THE COURT OF APPEAL OF MALAYSIA

Coram: David Wong, JCA; Iskandar Hashim, JCA; Hasnah Hashim, JCA

Low Boon Eng and 2 Others v Teo Kiong Huat and 3 Others, and Another Appeal

Citation: [2018] MYCA 228 **Suit Number:** Rayuan Sivil Nos. J-02(NCVC)(W)-557-04/2016 & J-02(NCVC)(W)-1610-08/2016

Date of Judgment: 03 July 2018

Corporate law – Shareholding in a company – Purchase of shares – Intention of parties behind the purchase of shares

JUDGMENT

Introduction:

[1] There were two appeals heard before us and they were:

(i) RAYUAN SIVIL NO. J-02(NCVC)(W)-557-04/2016 (Appeal 557).

(ii) RAYUAN SIVIL NO. J-02(NCVC)(W)-1610-08/2016 (Appeal 1610).

[2] Appeal 557 and Appeal 1610 emanated from one case only. The former appeal related to the Respondents/ Plaintiffs' claim for a declaration that they hold fifty percent equity in the 3rd Appellant/ Defendant. While the latter appeal was an application by the Respondents in Appeal 557 to ask for consequential orders from the learned Judge in the High Court.

[3] The learned Judge sustained the Respondents' claim of fifty percent equity in the 3rd Appellant but however dismissed the application for consequential orders by the Respondents in Appeal 557.

[4] We heard the appeals together for obvious reasons. In this Judgment, parties individually will be referred to as they are referred in this appeal. However, when appropriate, the 1st and 2nd Appellants will be collectively referred to as the Low Group, while the Respondents will be collectively referred to as the Teo Group.

Background facts:

[5] The 3rd Appellant (Bell Pure) was formed by the 1st and 2nd Appellant with each holding one founding share at the time of incorporation. Bell Pure was incorporated for the sole purchase of a palm oil estate with an oil palm processing mill situated in Yong Peng, Johor, which land and oil mill are wholly owned by Syarikat Perusahaan Sawit Sdn Bhd (SPKS).

[6] The purchase of the shares in SPKS was completed in 1996 by the 1st and 2nd Appellants (Teo Group) and the Respondents in Appeal 557 (Low Group) in a joint venture exercise under the following conditions:

1. Each Group is to contribute equally financially in that the purchase price of RM16,000,000.00 is to be paid by cash of RM4,000,000.00 (each group contributing RM2,000,000.00) with the balance of RM12,000,000.00 to be sourced from loans by financial institutions. The RM12,000,000.00 loan was obtained from EON Bank Berhad and secured against the shares and assets of SPKS together with personal guarantees provided by the 1st and 2nd Appellants from the Low Group and 1st and 2nd Respondents from the Teo Group.

2. The purchase of the palm oil land and mill was structured in a way that Bell Pure will own 100% shareholding in SPKS.

3. As at 19 July 1996, the shareholdings in Bell Pure were as follows:

   a. The Low Group - 4,000,002 shares (including the 2 Founding shares)

   b. The Teo Group - 4,000,000 shares.

[7] What had given rise to the dispute between the two Groups was simply that the Low Group is now asserting that they are the majority shareholders in Bell Pure by virtue of the extra 2 Founding shares. It is the stand of the Teo Group that the 2 Founding shares were never intended to give the Low Group control of Bell Pure as the purchase of the shareholdings of oil palm land and mill via SPKS was premised on a mutual oral understanding that the joint venture between the groups was on the basis that each group holding fifty (50) percent equity in Bell Pure. This assertion of majority shareholding in Bell Pure happened in 2008 when the Low Group sought to appoint an additional director in the Board of Directors which would in effect make the Low Group controlling the Board of Directors. That assertion by the Low Group succeeded through the use of the two Founding shares in Bell Pure.

High Court:

[8] The learned Judge after a full trial sustained the claim of the Teo Group and her reasoning can be seen from the following paragraphs of her grounds:

"(b) Sama ada terdapat persetujuan Plaintif-Plaintif bahawa struktur pemegang saham Defendan ketiga dan pengawalan ekuiti Defendan Ketiga atas dua saham tersebut adalah

dipegang oleh Kumpulan Low.

1. Dari keterangan yang ada ternyata kedua-dua kumpulan tersebut telah menggunakan Defendan Ketiga sebagai "Corporate Vehicle". Mahkamah ini telah melihat kepada niat pihak-pihak ketika menggunakan Defendan Ketiga sebagai "Corporate Vehicle" adalah untuk membeli saham ekuiti atau kepentingan di dalam Syarikat Perusahaan Kelapa Sawit Sdn Bhd (SPKS). Pembelian tersebut oleh kedua-dua kumpulan adalah atas usahasama berdasarkan 50:50 bahagian.

2. Walaupun di dalam penyata akaun tahunan Defendan Ketiga dinyatakan dua saham tersebut bahawa nama penyumbangnya adalah Defendan Pertama dan Kedua, tetapi ianya adalah jelas kepunyaan kedua pihak. Ini memandangkan kedua pihak telah bersetuju menggunakan Defendan Ketiga sebagai "Corporate Vehicle" untuk membeli Syarikat Perusahaan Kelapa Sawit Sdn Bhd (SPKS) atas dasar 50:50 bahagian.

3. Mahkamah ini berpendapat berdasarkan 50:50 bahagian seperti yang telah dipersetujui dan telah menggunakan Defendan Ketiga sebagai "Corporate Vehicle", maka adalah tidak timbul isu bahawa dua saham tersebut adalah kepunyaan Defendan Pertama dan Defendan Kedua sahaja. Jika pernyataan Defendan Pertama dan Defendan Kedua tersebut adalah benar, maka persetujuan pegangan bahagian 50:50 di dalam Syarikat Perusahaan Kelapa Sawit Sdn Bhd (SPKS) juga adalah tidak benar. Keterangan telah menunjukkan sebaliknya di mana SD1 sendiri telah mengakui bahawa pegangan di dalam Syarikat Perusahaan Kelapa Sawit Sdn Bhd (SPKS) adalah atas dasar 50:50 ketika keputusan untuk membelinya telah dipersetujui oleh kedua-dua pihak."

Our grounds of decision:

[9] It was our considered view that the issue before us was simply this:

What were the intentions of the respective Group when they decided to purchase the shares in SPKS through Bell Pure?

Submission of the Low Group:

[10] As far as the Low Group was concerned, the mutual understanding with the Teo Group was that the two founding shares were to be held by them to exercise in the event of any deadlock in management of Bell Pure. To support this understanding, learned counsel relied on the conducts of the Teo Group prior and after the Extraordinary General Meeting of Bell Pure on 22.2.2008. Further it was submitted that the claims of Teo Group were barred by the **Limitation Act** and concept of laches.

[11] In regard to the conducts of the Teo Group, learned counsel for the Low group put it as follows:

12. The assertion that the 2 founding shares in Bell Pure Palm ought to have been neutralised is inconsistent with the conduct of the parties. Those shares were held by the 1st and 2nd Appellants

from 1994 and that position remains unchanged till today. No attempt whatsoever has been made by the Teo Group to assert their alleged right to neutralise the share until 2008, 12 years after the event, at an EGM. Apart from that attempt, no formal action has been taken until the filing of this action 17 years after the event.

13. We will deal with the EGM of 2008 shortly. However, we note that:

a. From 1996 till 2008, the audited accounts signed by directors representing both the Low and Teo Group disclose the 1st and 2nd Appellants' interest in the 2 founding shares;

b. That dividend distributions included a separate distribution for the 2 shares;

c. That the Respondents claim to have made oral requests for the neutralisation of the 2 shares from 1996 but made no attempt at asserting the same when they undertook an internal restructure within their group in 1997 and 2003;

d. Further still, notwithstanding the assertion that they made oral requests for the neutralisation of the 2 shares, the only time any attempt was made to assert the position formally was at the EGM in 2008.

14. The Appellants position on the 2 shares is that they were to be held by them so as to maintain a majority in the event of deadlock. They say that the financial and operational management of the mill was in their hands, hence the necessity to maintain control if necessary. For reasons outside of our knowledge, this issue does not seem to be canvassed extensively by either party at trial.

15. On 22.2.2008 the Appellants convened an EGM of Bell Pure Palm to appoint an additional director. The Respondents issued a letter proposing the transfer of the 2nd Appellant's founding share to the 1st Respondent, effectively neutralising the 2 founding shares. The Appellants' resolution was passed over the objections of the Respondents using the 2 founding shares. After it was passed, the Respondents asked for the meeting to be "cancelled" and when their request was rejected they withdrew from the meeting. Their resolution was therefore not tabled.

16. Notwithstanding the objections at the EGM, on 26.3.2008 at a Board of Directors' meeting of Bell Pure Palm, the 1st Respondent representing the Teo Group's interest supported and indeed seconded the 2nd Appellant's proposal for the appointment of the additional director, Mr. Yip Chye Kwong to the Board of SPKS. We respectfully interject the narrative to say that having seconded the appointment of Mr. Yip to the Board of SPKS, the Respondents now cannot be heard to complain about his appointment.

17. ***On 30.6.2008 at the AGM of Bell Pure Palm, the additional director was re-elected unopposed. The Teo Group was present at the meeting and from the minutes of the AGM did not oppose this.*** *We again respectfully interject in the narrative to say that having allowed the additional director to be re-appointed unopposed, it is no longer open for the Respondents to complain about the Appellants' use of the majority shareholding.*

18. It was only 2 years later by letters of 17.9.2010 and more specifically 8.10.2010 that the Respondents purported to challenge the validity of the EGM and we assume by inference the AGM, ratifying the appointment of the additional director. We again interject the narrative to say that this is clearly an afterthought to bolster a weak position and that the contemporary position taken as at 30.6.2008 did in fact reflect an acquiescence that the Appellants were entitled to use their majority shareholding.

19. Apart from an exchange of correspondence and litigation in 2011 for access to financial documents which was resolved in the Court of Appeal by consent on 28.2.2012, no material events occurred subsequently until the filing of this action on 16.10.2013.

[12] As for the contention that the claims of the Teo Group was barred by the Limitation Act, learned counsel put it in the following manner:

15. The action is time-barred as the cause of action is in reality, for specific performance of an alleged oral agreement struck in 1996:

15.1 The Respondents allege that in early 1996 they entered into a joint venture with the Appellants for equal participation in one Syarikat Perusahaan Kelapa Sawit Sdn Bhd ("SPKS");

15.2 The equity in SPKS was held entirely by the 3rd Appellant, Bell Pure Palm Sdn Bhd. Equity in Bell Pure Palm was held 49.99% by the Respondents and 50.01% by the 1st and 2nd Appellants;

15.3 The difference is in 2 founding shares held by the 1st and 2nd Appellants in Bell Pure Palm since 1.8.1994;

15.4 The cause of action, is for relief in relation to the 2 shares to bring the equity in line with the alleged oral agreement for equal equity participation in SPKS;

15.5 As the alleged oral agreement and the 2 founding shares which underpin the cause of action date back to "early" 1996 and the action was filed on 16.10.2013, the action is well outside the 6 year limitation imposed by s. 6(1)(a) of the Limitation Act 1953.

16. A recent decision of the Court of Appeal is directly on point and deals with a similar issue on limitation in similar circumstances: ***Tan Poh Yee v Tan Boon Thien and other appeals [2017] 3 MLJ 244*** *at 263-265.*

B: Laches and Acquiescence

17. The Respondents have acquiesced to the Appellants holding the 2 founding shares in the 3rd Appellant ("Bell Pure Palm") and are therefore barred by laches:

17.1 All audited accounts for Bell Pure Palm signed by the Respondents' group representative

as director, from 1996-2008 disclosing and acknowledging the 2 shares held by the 1st and 2nd Appellants;

17.2 Payment of dividends in 2006 and 2007 which provided for separate payments on the single shares held by the 1st and 2nd Appellants additional to the dividends paid to the shareholders;

17.3 The Respondents faction undertook a restructure on 17.3.1997 and 31.12.2003 when the original Teo shareholders, Teo Kiong Bin and Teo Tian Chai transferred their shareholdings to Lim Keng Huat, Teo Tian Chai Sdn Bhd and Teo Chuan Keng Sdn Bhd, respectively. If there was a genuine issue over the 2 founding shares, then the issue could have been dealt with on these 2 separate occasions;

17.4 The Respondents allege that they made numerous oral requests for the 2 founding shares to be dealt with in accordance with their alleged agreement. If this is true, then it shows that they were alive to the issue from inception but chose not to act on it until 17 years later when this action was brought;

17.5 We will deal with the events of the EGM on 22.2.2008 below in detail. The Appellants disclose that the alleged breach on which the Trial Judge founded her Judgment for the accrual of the cause of action was subsequently waived by the Respondents.

[13] We shall now evaluate the evidence in light of the submissions put in by respective counsel. In any analysis of evidence tendered in Court, one must look at the totality of evidence and evaluate them as such, before any conclusion can be made by the trial Court. And those conclusions must stand up to scrutiny in terms of reasonableness and most importantly the same must be supported by undisputed evidence.

[14] In the context of this case, we started our analysis of the evidence by looking at the time when Bell Pure was incorporated and the manner in which it was done. It was undisputed that the intentions of both groups of investors were to form a joint venture vehicle for the sole purpose of 100% of the shareholdings in SPKS and that joint venture vehicle came in the form of Bell Pure. It was also undisputed that the consideration for the shares in SPKS was the sum of RM12 million of which both Groups had paid a sum of RM2 million each for the purchase by injecting into Bell Pure. The balance of the purchase sum in the sum of RM12 million was financed with a loan from EON Bank Berhad premised on the security on the shares and assets of SPKS and personal joint and several guarantees provided by both Groups where the Teo Group were represented by the 1st Respondent and 2nd Respondent and the Low Group were represented by 1st Appellant and 2nd Appellant. We noted here that both groups' injection into the joint venture vehicle in the form of Bell Pure to be of the same proportion of RM2 million each. Further their potential liabilities under the RM12 million loan from EON Bank Bhd were also of the same proportion in that they were jointly and severally liable to the aforesaid bank through their personal guarantee if there were a default in the repayment of the loan.

[15] Between 1996 and the Extraordinary General Meeting dated 22.2.2008 (EGM), the relationship between the respective Groups was cordial and uneventful. However, at the EGM we observed two resolutions of immense relevance and they were resolutions 3 and 4 and for clarity they were recorded in the minutes as follows:

> ***ORDINARY RESOLUTION 3***
>
> ***APPOINTMENT OF DIRECTOR***
>
> *The Chairman proceeded with Ordinary Resolution 3 which was to appoint Yip Chye Kwong as a Director of the Company for voting by the shareholders.*
>
> *The motion was proposed by Datin Dr. Wong Kwi Lian and seconded by the Chairman.*
>
> *Mr Teo Chuan Keng strongly objected to the motion in respect of the appointment of Yip Chye Kwong as a Director of the Company.*
>
> *The Chairman put the motion to vote on a show of hands. 2 shareholders voted for the motion and 3 shareholders voted against the motion.*
>
> *Datin Dr. Wong Kwi Lian, the Corporate Representative of Bell Corporation Sdn. Bhd., the shareholder holding not less than one-tenth (1/10) of the total voting rights of all the members having the right to vote at the Meeting, demanded for a poll for the motion indicated as Ordinary Resolution 3 in the Notice convening the Meeting.*
>
> *The Chairman instructed the Company Secretaries to circulate the voting slips to all the shareholders present at the Meeting for the voting to be carried out by poll.*
>
> *The Meeting resumed a while after the voting slips had been completed by all the shareholder present.*
>
> *The Chairman notified the Meeting that the votes had been counted and he then requested the Company Secretary, Ms Mah Li Chen to announce the results of the polling to the floor.*
>
> *Ms Mah Li Chen read out the poling results as follows:*
>
> > *2,000,002 votes were casted in favour of Ordinary Resolution 3*
> >
> > *2,000,000 votes were casted against Ordinary Resolution 3*
>
> *The Chairman declared that the following Ordinary Resolution 3 was carried:*
>
> > *"THAT Yip Chye Kwong [NRIC No.: 590223-10-5655] having completed his Statutory Declaration as required under Section 123(4) of the Companies Act 1955 and having given his consent to act as a Director of the Company be and is appointed with immediate effect."*

ORDINARY RESOLUTION 5

TRANSFER OF ONE (1) ORDINARY SUBCRIBER'S SHARE IN THE COMPANY

The Chairman referred to the letter dated 5 February 2008 from the requisitionists, Mr. Teo Kiong Huat and Mr. Teo Tian Chai (for Teo Tian Chai Sdn. Bhd. And Teo Chuan Keng Sdn. Bhd.), requisitioned for an additional resolution as Ordinary Resolution 5 for tabling at the Meeting as follows:

> *"That Datin Dr. Wong Kwi Lian to transfer ONE (1) ordinary subscriber share in Bell Pure Palm Sdn. Bhd. To Mr. Teo Kiong Huat."*

The Chairman enquired whether Datin Dr. Wong Kwi Lian is requesting the Board for permission to transfer her one (1) subscriber's share to Mr. Teo Kiong Huat.

Datin Dr. Wong Kwi Lian confirmed that she is not seeking the permission of the Board of Directors to transfer her one (1) subscriber's share to Mr. Teo Kiong Huat.

Premised on the above confirmation of Datin Dr. Wong Kwi Lian, the motion was not tabled to the Meeting.

[16] The minutes were clear in showing that the Teo Group had objected to the use of the two founding shares by the Low Group to tilt the balance of power in their favour.

[17] Learned counsel for the Low Group then submitted that despite the objection to the Resolution 3 and the tabling of Resolution 5 of the EGM, the subsequent conducts of the Teo Group had showed that they had agreed to the stand of the Low Group in regard to the use of the two Founding Shares. Learned counsel referred us to the Board Meeting of Bell Pure on 26.3.2008 (Record of Appeal-jilid 2(5)(C) at page 1066) where the 1st Respondent representing the Teo Group supported and indeed seconded the 2nd Appellant's proposal for the appointment of the additional director, Mr Yip Chye Kwong to SPKS's Board. It was also pointed out to us at the Annual General Meeting of Bell Pure on 30.6.2008 (Record of Appeal-jilid 2(5)(C) at page 1071), Mr Yip Chye Kwong, the additional director was re-elected without any opposition from the Teo Group. From the conducts of these two meetings, learned counsel for the Low Group strenuously submitted that the Teo Group cannot now complain about the use of the 2 Founding Shares by the Low Group.

[18] The aforesaid contention was rebutted by learned counsel for the Teo Group in that the additional director was insignificant in the whole scheme of thing and had referred us to a letter dated 27.7.2011 from AmIslamic Bank (Ikatan Teras Bersama Tab 41) where the Bank had agreed to exclude the personal guarantee of Mr Yip Chye Kwong despite his directorship in Bell Pure. Taking into consideration of this letter in the context of other evidence, we agreed with the contention made by learned counsel. Mr Yip Chye Kwong had no equity interest in Bell Pure and in our view was made an additional director so that the Low Group could take control of the joint venture vehicle. The central issue in our view was what we had stated earlier and that was what were the intentions of the respective Group of investors.

[19] In our view the undisputed fact that both Groups injected similar amount in Bell Pure and undertook joint and several liability for the EON Bank Berhad tilted the scale in favour of the contention of the Teo Group. We said that for the simple reason that if the Low Group had in 1996 made it clear to the Teo Group that the two Founding Shares were to be held by them to break any deadlock in management of Bell Pure, we were quite sure that the Teo Group would have objected to it in view of the equal equity pumped in by respective Groups. It defied common sense that one Group would forgo its status of equality after having injected the same amount as to the other Group. Any reasonable businessman if he had wanted to use the two Founding Shares as leverage would have bedded down this arrangement in written form rather than let it remained in in a state of uncertainty.

[20] We come now to the issue of limitation pleaded by the Low Group. In rebuttal, learned counsel for the Teo Group submitted that the event of the EGM which for the first time infringed their rights of 50:50 equity in Bell Pure kicked in the cause of action in necessitating a declaration of a constructive trust. That EGM was in February 2008 and since this action was started in October 2013, learned counsel submitted that it was well within the six-year limitation period prescribed in section 6(1) of the **Limitation Act 1953**.

[21] The claim by the Teo Group was basically to neutralize the two Founding Shares by claiming back one of the Founding Shares premised on the concept of constructive trust as reflected in Resolution 5 of the EGM. At this juncture it would be appropriate to apprise ourselves of the nature of a constructive trust. We can do no better than quote the instructive commentary of Millett LJ in the **Paragon case [1999] 1 All ER 400, 408-409**:

> *"Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff."*
>
> *"A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust... In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it*

unconscionable for him thereafter to assert a beneficial interest in the property."

"The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief'."

[22] The first class and the second class of constructive trust as described by Millet LJ are also known as "institutional trust" and "remedial trust" respectively.

[23] In view of our finding that the intentions of both Groups were to be equal joint venture partners in purchasing the shares in SPKS and applying the principles expounded by Millet LJ, we found that one of the 2 Founding Shares was held by the Low Group as constructive trust in the nature of an institutional trust as described by Millet LJ in the **Paragon cases** (supra).

[24] The distinction of the two classes of constructive trust is highly relevant in the context of the Limitation Act 1953. Different time-lines exist for limitation purposes for different cause of action. In **Panchanath Ratnavale v Sandra Segara Mahalingam & Ors** [2012] 1 LNS 167, Harminder Singh JC (now JCA) said as follows:

The guiding principle behind section 22 of the Limitation Act is that the rules of limitation should not protect fraudulent breach of trust and the case where trustees have come into possession of trust property. In other words, and in each case, no limitation period applies. In the instant case, so far as the cause of action in fraud is concerned, the plaintiffs' claim is not defeated by limitation. However, the claim in breach of trust must be limited to trust property in the hands of the trustees namely D1 and D2. Any other situation will attract the limitation period of six years as provided in section 22(2) unless of course if it was an action for recovery of land where pursuant to section 9 of the Limitation Act, the action can be brought before the expiry of 12 years from the date on which the right of action accrues. Considering the time periods in the instant action as alluded to at the outset, the Plaintiffs are clearly out of time for any action relating to trust property where there is no fraud and where the trust property is not with the trustees Accordingly as well, D3 and D4 are exempted from liability under Section 22(2) of the Limitation Act as even conceded by the Plaintiffs' counsel.

[25] As the trust is one of an "institutional trust", section 22(1)(b) of the **Limitation Act 1953** comes into play and it reads as follows:

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action-

> *(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
>
> *(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.*

[26] The claim by the Teo Group was effectively to *"recover from the trustee trust property (one Founding Share) in the possession of the trustee"*. That being the case, no limitation applies. Accordingly, we rejected the contention that the Teo Group's claim was statute barred.

[27] As for laches and acquiescence, we also found no evidence of the same as we have pointed out between the period of 1996 to 2008, the relationship was cordial and uneventful. It was only at the EGM that the Low Group tried to take advantage of their legal ownership of the two Founding Shares to gain control of the Board of Bell Pure.

[28] Before we deal with Appeal No 1610, we wish to state that what we had done was also to apply the trite principle of appellate interference as elucidly stated by the Federal Court in **Dream Property Sdn Bhd v Atlas Housing Sdn Bhd** [2015] 2 CLJ 453, where Azahar Mohamed FCJ said at pg 458:

> *"It is trite that an appellate court would be slow to disturb a trial court's findings of facts in the absence of any perverse and unwarranted finding on the totality of the evidence before it. The cases of Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146; [1993] 1 MLJ 113; Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor [1987] CLJ Rep 579; [1987] 2 CLJ 145; [1989] 1 MLJ 35 and Lim Kim Chet & Anor v. Multar Masngud [1984] 2 CLJ 77; [1984] 1 CLJ Rep 23; [1984] 2 MLJ 165 are some of the authorities to support the cardinal principle that an appellate court should be slow in interfering with a finding of fact of the trial court which had observed the demeanour and heard the witnesses before coming to its conclusion."*.

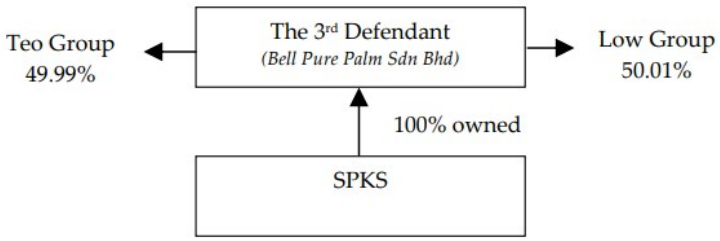
Appeal 1610

[29] We then dealt with the Appeal no 1610. To recapitulate, this related appeal by the Teo Group seeking the trial Judge some consequential orders (enclosure 84) arising from the learned Judge's order in declaring that the Teo Group owns the same number of shares as the Low Group in SPKS. The learned Judge refused to accede to the application in enclosure 84 on the ground that the same was in fact a variation of his orders and not a consequential relief.

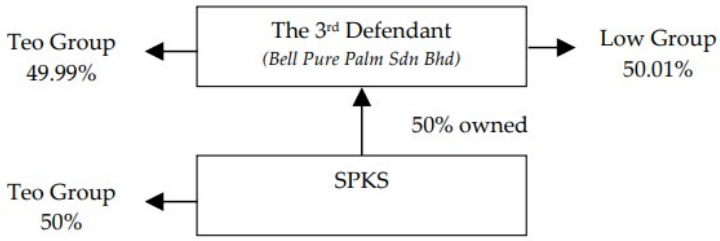
[30] With respect to the learned Judge, we were of the view that enclosure 84 was not a variation of his orders, though on the face of it, it appeared to be so. The orders of the learned Judge, in essence, were that the Teo Group and Low Group each holds 50% equity in SPKS. What that meant was simply to make the 1st, 3rd and 4th Respondents own 50% equity in SPKS. To put into effect, in view of the shareholding structure of Bell Pure and SPKS, the learned Judge should have and had to make consequential orders to reflect his orders. Without such consequential orders, his orders, if carried out

literally, would with respect make his orders non sensical as pointed out by the learned counsel for the Low Group where he submitted that the Teo Group would end up holding 75% of SPKS as illustrated in this diagram:

Shareholding prior to Judgment dated 24.2.2016



The Nett Effect of the Orders sought by the Appellants:



**Nett Shareholding of SPKS: Teo Group = 75%*

Low Group = 25%

[31] The 75% shareholding of SPKS by the Teo Group could not have been what the learned Judge had intended at all. In **Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd** (2017) 2 CLJ 32, the Federal Court at page 33 had held:

> *"(3) Ultimately whether an application for variation may be allowed under 'liberty to apply' depends very much on the purpose of the application, say, whether the application was necessary to obtain the decision of the Court to enforce the agreement without varying the essence of the order.."*

[32] With respect to the learned Judge, had she enquired as to what was the real or underlying purpose of enclosure 84, we would have no doubt that she would have looked at the application favourably. That being the case, we saw no merit in the submission of learned counsel for the Low Group that the learned Judge was bound by the principle of "functus officio".

Conclusion

[33] For reasons stated above, we dismissed Appeal 557 but allowed Appeal 1610 with a global cost of RM30,000.00 to the Respondents subject to payment of allocator fees. We also ordered the deposits of respective appeals to be refunded to the Appellants.

[34] In respect of Appeal 1610, we make the following orders:

1. That the 3rd Respondent/ Defendant, Bell Pure Palm SDN BHD (Company No. 310119-X) *("BPP")* within two (2) months from the date of this Order transfer 50% of the 100% shareholding in SYARIKAT PERUSAHAAN KELAPA SAWIT SDN BHD (Company No. 15929-U) *("SPKS")* in favour of the Appellants/ Plaintiffs as follows:-

Transferor *(of SPKS shares)*	**Transferee *(of SPKS shares)***	**No. of Issued Shared to be Transferred**	**Percentage of shareholding in SPKS**
BELL PURE PALM SDN BHD (Company No. 310119-X) (3rd Respondent/ Defendant)	TEO KIONG HUAT (NRIC NO. 580201-01-6505) (1st Appellant/ Plaintiff)	1,796,256 Shares	28%
BELL PURE PALM SDN BHD (Company No. 310119-X) (3rd Respondent/ Defendant)	TEO TIAN CHAI SDN BHD (Company No. 420051-M) (3rd Appellant/ Plaintiff)	633,501 shares	9.875%
BELL PURE PALM SDN BHD (Company No. 310119-X) (3rd Respondent/ Defendant)	TEO CHUAN KENG SDN BHD (Company No. 38036-M) (4th Appellant/ Plaintiff)	777,843 shares	12.125%
	TOTAL	**3,207,600 shares**	**50%**

2. That in the event such transfer by the 3rd Respondent/ Defendant, BPP, in favour of the Appellants/ Plaintiffs as set out in Order 1 above is not effected, IT IS HEREBY ORDERED that:-

a) the Deputy Registrar of the High Court, Muar be authorized to execute all necessary documents and instruments to enable and effect the transfer of 50% of the 100% shareholding in SPKS from the 3rd Respondent/ Defendant, *BPP* in favour of the Appellant/ Plaintiffs as set out in Order 1 above; and

b) the aforesaid documents and instruments executed by the Deputy Registrar of the High Court, Muar be given effect by all parties including the Companies Commission of Malaysia, Inland Revenue Board of Malaysia and the Registrar/ Secretary of the SPKS as if the same were executed by the 3rd Respondent/ Defendant, *BPP* in all respects.

3. The Appellants/ Plaintiffs undertake that simultaneously with the transfer of 50% of the 100% shareholding in SPKS by the 3rd Respondent/ Defendant, BPP to Appellants/ Plaintiffs as per Order 1 above, they shall similarly transfer all their shares in the 3rd Respondent/ Defendant, BPP

to the 1st Respondent/ Defendant, LOW BOON ENG (NRIC No. 500506-10-5653) and/or the 2nd Respondent/ Defendant, WONG KWI LIAN (NRIC No. 580203-10-5456) and/or their nominees.

4. The decision of the High Court Judge dated 2 August 2017 is set aside.

Dated: 3rd July 2018

Sgd

DAVID WONG DAK WAH
Judge
Court of Appeal Malaysia

COUNSEL

For the Appellant: Dato' M David Morais with him Vince Chong & Raul Lee Bhaskaran, Messrs. Nik Hussain & Partners

For the Respondent: Dato' Meyappan Pillai with him Alvin Teo Sze Pin, Messrs Mak Ng Shao & Kee

LEGISLATION REFERRED TO:

Companies Act 1955, Section 123(4)

Limitation Act 1953, Sections 6(1), 6(1)(a), 22(1)(b)

JUDGMENTS REFERRED TO:

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 CLJ 453

Panchanath Ratnavale v Sandra Segara Mahalingam & Ors [2012] 1 LNS 167

Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400,408–409

Tan Poh Yee v Tan Boon Thien and Other Appeals [2017] 3 MLJ 244

Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd (2017) 2 CLJ 32