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MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK
AT KUCHING
SUIT NO.22-118-2002-I

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BETWEEN

ABDUL RAHMAN DAWI ... Plaintiff

AND

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PERMODALAN ASSAR SDN BHD	...	1 st Defendant
PASB LOGISTICS SDN BHD	...	2 nd Defendant
AHMAD TARMIZI BINSULAIMAN	...	3 rd Defendant
WAN SULEIMAN BIN WAN SADI	...	4 th Defendant
20 SHAMSUL ANUAR BIN AHAMAD IBRAHIM	...	5 th Defendant

BEFORE THE HONOURABLE JUSTICE
DATUK CLEMENT SKINNER

IN OPEN COURT

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JUDGMENT

This is the hearing of Abdul Rahman bin Dawi’s (“the plaintiff”) claim for various reliefs, including for declarations, general and aggravated/ exemplary damages arising from the termination of his employment with PASB Logistics Sdn. Bhd (“the 2nd defendant or PLSB”). The following other parties have also been cited as defendants in this action; they are:

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(i) Permodalan Assar Sdn Bhd (“the 1st defendant or PASB”)

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(ii) Ahmad Tarmizi Bin Sulaiman (DW5) (“the 3rd defendant”) who was at the material time a director of PASB and the 2nd defendant;

- 5 (iii) Wan Suleiman Bin Wan Sadi (DW1) (“the 4th defendant”) who was a director of the 2nd defendant;
- (iv) Shamsul Annuar Bin Ahmad Ibrahim (DW3) (“the 5th defendant”) who was a director of the 2nd defendant.

10 The plaintiff pleaded several causes of action against the defendants including wrongful, unlawful, mala fide and illegal termination of contract and its implied terms and conditions or to be inferred from the letter of offer made to the plaintiff. The plaintiff also pleaded that certain representations made by the 3rd defendant to him had induced him to

15 enter into a contract or collateral contract of employment with the 2nd defendant which subsequently turned out to be false, causing him loss and damage. The plaintiff also pleaded a cause of action in conspiracy against the 3rd, 4th and 5th defendants for acting unlawfully together to cause loss and damage to him by unlawful means. The plaintiff also

20 pleaded that the 3rd, 4th and 5th dependants procured a breach of his contract or collateral contract. Fraud is also alleged against the 3rd, 4th and 5th defendants in terminating his contract. The plaintiff has also prayed that the corporate veil of the 1st and 2nd defendant be lifted so that any damages to be paid will be paid by the 1st defendant. The

25 defendants have denied each and every of the plaintiff’s claims against them.

The parties did not agree on any issues to be tried, although the plaintiff tendered a “list of primary issues”. From the pleadings I find that

30 the issues to be tried may be stated as follows:

5 1.1 Whether the 3rd defendant had made the representations as alleged to the plaintiff and the plaintiff was induced thereby to enter into the contract of employment with the 1st and 2nd defendant relying on those representations which turned out to be false?

10 1.2 Whether the representations were incorporated into the contract or are implied terms of the contract or to be inferred from the terms and conditions of the contract?

15 1.3 Whether the representations made amount to a collateral warranty which the plaintiff accepted and exists side by side with the said contract?

20 2.1 Whether the 3rd, 4th and 5th defendants had conspired and or acted together unlawfully and or wrongfully interfered with and procured the breach of contract between the plaintiff and the 1st and 2nd defendant?

2.2 Whether the said termination constitutes a fraud on the plaintiff?

25 3. Whether in the circumstances, the corporate veil of the 1st and 2nd defendants ought to be pierced or lifted to impose liability on the 1st defendant?

4. Whether the plaintiff is entitled to damages and aggravated or exemplary damages?

30 Before addressing the issues for trial, it will be convenient to mention certain facts and a chronology of events relating to the matters in

5 dispute between the parties, which I have deduced from the documents and evidence placed before the court:

(1) The 1st defendant/PASB is an investment arm of the State Government of Sarawak.

10 (2) The 2nd defendant/PLSB was at all material times a wholly owned subsidiary of PASB.

(3) The 2nd defendant/PLSB at all material times owned the following three subsidiary companies, namely,

(i) Konnas Sarawak Sdn. Bhd (“KSSB”) primarily involved in freight forwarding business;

15 (ii) Borneo Warehousing Sdn. Bhd (“BWSB”) primarily involved in integrated warehousing projects;

(iii) Assar Chemicals Sdn. Bhd. (“ACSB/Assar Chemicals”) involved in an independent oil terminal project.

20 (4) In 1997 the plaintiff was employed by Malaysia LNG Sdn./ Bhd a subsidiary of PETRONAS, as Manager, Shipping Operations, Commercial Division; the plaintiff is a Corporate Member since 1986 of the Chartered Institute of Logistics and Transport, United Kingdom.

25 (5) In 1997 onwards the following events occurred:

(6) June 1997 - the plaintiff attended an interview with the 3rd defendant at the 3rd defendant’s office at Kuching.

30 (7) 09.08.1997- A letter of offer of employment enclosing the Terms and Conditions of Service was issued by

5 Assar Logistics Sdn Bhd (now known as PASB
Logistics Sdn Bhd i.e. the 2nd defendant or
PLSB). The plaintiff was to be responsible for
the overall performance of PLSB and its
10 subsidiaries or Associated Companies and any
other responsibilities as and when instructed by
the Board of Permodalan Assar Sdn Bhd i.e. 1st
defendant. At the material time the subsidiaries
of PLSB were BWSB, KSSB and ACSB/Assar
Chemicals.

15 (8) 29.08.1997- The plaintiff accepted the said offer of
employment and informed the 2nd defendant that
he will report for duty on best endeavour basis.

(9) 01.10.1997- The plaintiff tendered his resignation letter dated
1.10.1997 to Malaysia LNG Sdn Bhd and giving
20 3 months notice commencing 1.10.1997.

(10) 02.01.1998- the plaintiff reported for duty as Executive
Director of 2nd defendant PLSB.

(11) 16.04.1998- Board of Directors of Konnas Sarawak Sdn. Bhd
resolved that the plaintiff be appointed as
25 Executive Director of KSSB with effect from
02.01.1998.

(12) 02.07.1999- Board of Directors of Borneo Warehousing Sdn.
Bhd resolved to appoint the plaintiff as Director of
BWSB.

30 (13) 10.12.1999- the shares held by 2nd defendant/PLSB in Assar
Chemicals/ACSB were transferred to Assar

5 Industri Sdn Bhd a subsidiary of 1st defendant/PASB.

(14) 20.07.2001- The plans for the independent oil terminal project were approved by the State Planning Authority.

10 (15) 29.08.2001- The Board of Directors of Assar Chemicals Sdn. Bhd held a meeting at which the Board resolved that a technical person with the relevant engineering background be shortlisted as full time MD/GM of Assar Chemicals Sdn Bhd and that the plaintiff be asked to assist the company in the preparation works for the planning of the project for a 3 months period from September, 2001 – November 2001 on the oil terminal project.

15 (16) 26.09.2001- Board of Directors of 1st defendant i.e. Permodalan Assar Sdn Bhd/PASB held its 19th Board meeting at which the Board endorsed Assar Chemical Sdn Bhd's/ACSB's request that the plaintiff assist ACSB from Sept 2001 to Nov 2008 on the oil terminal project.

25 (17) 06.02.2002- 2nd Board of Directors meeting of Assar Chemicals Sdn Bhd was held when it was stated that the services of the plaintiff would no longer be required as of December 2001 in respect of the preparation works for the planning of the independent oil terminal project.

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- 5 (18) 12.03.2002- 20th Board of Directors Meeting of 1st defendant
i.e. Permodalan Assar Sdn Bhd/PASB at which
the Board resolved that the business of PASB
Logistics Sdn Bhd i.e. 2nd defendant be closed
down and to give notice of termination of service
10 to the plaintiff and that PASB Logistics Sdn Bhd
be wound-up or delisted subsequently.
- (19) 12.03.2002- Resolution of the Board of Directors of 2nd
defendant i.e. PASB Logistics Sdn Bhd to close
the business of PASB Logistics Sdn Bhd and
15 give notice to terminate the services of the
plaintiff.
- (20) 28.03.2002- Letter of termination of business and service
issued by 2nd defendant i.e. PASB Logistics Sdn
Bhd to the plaintiff.
- 20 (21) 16.04.2003- PASB Logistic Sdn Bhd i.e. 2nd defendant was
delisted by the Registrar of Companies under
section 308 Companies Act 1965.
- (22) 01.04.2004- Assar Senari Holdings Sdn Bhd was appointed
by Kuching Port Authority as the approved port
25 operator for the independent oil terminal project.
- (23) Dec. 2006- Construction of the independent oil terminal was
completed and operational under Assar Senari
Holdings Sdn Bhd and Assar Chemicals Sdn
Bhd.

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With that I now turn to consider the issues for trial.

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Issues 1.1, 1.2 and 1.3

These Issues are dealt with together as they overlap.

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It is the plaintiff's case that during the interview with the 3rd defendant in June 2007, the latter had made certain oral representations to him which induced him to join the 1st and 2nd defendants employment. It was the plaintiff's testimony that the 3rd defendant had introduced himself as the Managing Director of the 1st defendant i.e. PASB which was an investment arm of the Sarawak Government, and informed the plaintiff that he (3rd defendant) needed a competent professional and experienced person like the plaintiff to develop, manage and head the business of freight forwarding, integrated warehousing and primary bulk oil terminalling under the 1st defendant and its subsidiaries. According to the plaintiff the 3rd defendant represented to him that the 1st defendant was concerned mainly with developing an oil terminal at Kuching and required people with his experience to help achieve their aim. The plaintiff went on to testify that the 3rd defendant "very firmly represented to me that if I joined the 1st defendant, **I would be given a permanent position** to lead, head, manage independently and professionally, to develop and be wholly responsible for the business and operations of the said subsidiaries, in particular for the development and operations of an oil terminalling project in Kuching, where I was told that my experience was required most and I believed the 3rd defendant" (see para 10.4(c) of plaintiffs Witness Statement exh P 23).

5 According to the plaintiff, the 3rd defendant was fully aware of his professional and employment background when the 3rd defendant made those representations.

10 The evidence shows that on 09.08.1997 the plaintiff received an offer of employment from the 2nd defendant, which was signed by the 3rd defendant as Director and that letter reads:

15 **“We are pleased to offer you employment with Assar Logistics Sendirian Berhad as an Executive Director. We enclose herewith the Basic Terms and Conditions of Employment for your perusal.**

If you accept this offer, kindly sign and return the copy of this letter to us within 7 working days of the above date.”

20 The Terms and Conditions of service attached to the letter of offer contain some 17 clauses. It will only be necessary to mention a few of them which are relevant to the issues under consideration. They are:

- | | | |
|----|--------------------------------|---|
| 25 | Clause 3, Basic Salary: | Commencing Salary RM9,000.00 only |
| 30 | Clause 5, Probation: | You will be on probation for a period of six (6) months as from the date of commencement of employment. At any time during the probationary period, your service may be terminated by you or the company without any reason being given by either side for such termination. The company reserves the right to extend your probationary period for a further three (3) months as it deemed fit and appropriate in any circumstances. Upon completion of the extended three (3) months probationary period, the Company may consider terminating your service if your performance remains unsatisfactory. |
| 35 | | |
| 40 | | |

5 **Clause 14, Termination of Service:** Upon confirmation, we may terminate your service by giving three (3) months notice or in lieu of notice by paying an indemnity sum equivalent to one (1) month basic pay.

10 **Clause 17, Responsibilités:** Responsible for the overall performance of the company and any Subsidiaries or Associated Companies under ASSAR Logistics Sdn Bhd.

15 **Clause 17, Other Responsibilities:** Any other responsibilities as and when instructed by the Board of Permodalan ASSAR Sdn Bhd.

20 On 29.08.1997 the plaintiff accepted the offer of employment and on 01.10.1997 he tendered his 3 months assignment to Petronas MLNG, and reported for duty on 2.1.1997.

The plaintiff testified at paragraph 12.5 of his witness statement that:

25 **“Acting and relying on the representations made by the 3rd defendant and his subsequent conduct in issuing the said Offer, I decided to join the 1st and 2nd defendants and had signed and returned the said offer on 29th August 1997. On 1st October 1997, I tendered my resignation with**
30 **Petronas MLNG.”**

The plaintiff emphasized in his evidence that unless induced by the representations of the 3rd defendant, he would not have left a secure job with Petronas MNLG to join the 1st and 2nd defendant to do freight forwarding and industrial warehousing business alone.

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The 3rd defendant in his testimony denied making any representation to the plaintiff that he would be given a permanent position as alleged by the plaintiff. The 3rd defendant in his cross-

5 examination admitted only to discussing the oil terminal project with the plaintiff at the interview and to informing him that the 3rd defendant wanted someone professional, competent and with technical background to lead the project. The 3rd defendant (DW5) was asked (at pg 544 notes of proceedings):

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Q: At the interview you had discussed with the plaintiff about oil terminalling project undertaken by the 1st defendant?

A: It was one of the businesses discussed.

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Q: Besides the other businesses discussed, regarding this oil terminalling project, you did tell the plaintiff that you wanted someone professional, competent to lead and manage the project?

A: Yes, and with technical background also.

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Looking at the plaintiff's assertions and the 3rd defendant's denials about a permanent position, it is evident to me that what the plaintiff wishes the court to believe is that he would never have left a secure job with Petronas MLNG unless he had been offered at the interview with the 3rd defendant, a permanent position with the 1st and 2nd defendant to do what the 3rd defendant had discussed with him, especially in respect of the oil terminal project. In view of the divergence in the evidence of the plaintiff and 3rd defendant on this point, it is clear to me that both the plaintiff and the 3rd defendant are each interested witnesses with a purpose to serve in what they said. To decide the critical issue of whether an oral representation of a permanent position had been made to the plaintiff at the interview, I adopt the approach recommended by Chang Min Tat FJ in *Tindok Besar Estates Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at pg 234, namely, that the oral evidence should be critically tested against the whole of the other evidence and circumstances of the

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5 case including documentary evidence and the acts and deeds of the witness, whereafter the reasonable inferences may be drawn from them.

As far as the documentary evidence is concerned, when the letter of offer of employment dated 9.8.1997 which I regard as an undisputed
10 contemporaneous document, is examined, I find that it clearly contradicts the assertions of the plaintiff as far as this part of the case is concerned. The plaintiff said in evidence that he did not find anything inconsistent between what had been orally represented to him by the 3rd defendant and what was stated in the letter of offer in regard to the issue
15 at hand. I do not agree. The plaintiff was not offered a “permanent position” in the 1st or 2nd defendant as alleged. Instead he was to be on probation after which his services may be terminated by three months notice or payment of 1 month’s basic salary in lieu of notice. Further, the plaintiff was not offered “to lead, head, manage independently and
20 professionally, to develop and be wholly responsible for the business and operations of the 1st defendant’s subsidiaries, in particular for the development and operations of an oil terminalling project in Kuching,” as alleged. Instead the plaintiff was to be responsible for the overall performance of the Company i.e. 2nd defendant and any subsidiaries or
25 Associate Companies under the 2nd defendant, and was required to perform any other responsibilities as and when instructed by the Board of the 1st defendant.

During his cross-examination the 3rd defendant (DW5) was asked
30 (at pg 571 notes of proceedings):

5 Q. I refer you to para 10.4(c) of the plaintiff's witness statement. Would you agree that the position to lead and manage the oil terminal project is a permanent job that requires full time dedication?

A. Yes, but that person has to have a technical background.

10 Therefore, the plaintiff contended that this was an admission by the 3rd defendant that a representation had been made by the 3rd defendant to the plaintiff at the interview that he would be given a "permanent position" to lead, head etc. I do not agree. While the 3rd defendant may have agreed that to lead and manage the oil terminal project is a permanent job that requires full time dedication by a person
15 who has a technical background, the 3rd defendant was never asked, nor was it put to him, that he had actually represented to the plaintiff at the interview that the plaintiff would be given a permanent position to lead, head etc.

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In fact, I find that there is other evidence from which it may be reasonably inferred that it is most unlikely and improbable that the 3rd defendant had made the alleged representation at the interview which induced the plaintiff to accept the job offer. The evidence I refer to is:

25 (1) After receiving the letter of offer of employment dated 9.8.1997, the plaintiff noticed that the offer of employment came from the 2nd defendant and not the 1st defendant, so he phoned the 3rd defendant about it. Given the fact that the letter of offer mentions nothing about the plaintiff being given a permanent
30 position to lead, head etc the oil terminal project but instead a position that was terminable by 3 months notice and in the light of the plaintiff's own evidence that he would not leave a secure job with Petronas MNLG to merely do freight forwarding and

5 industrial warehousing business alone, it would be reasonable
to expect that the plaintiff would have raised such an important
and fundamental matter with the 3rd defendant when he spoke
to the 3rd defendant after receiving the letter of offer of
employment. However, there is no evidence that the plaintiff
10 did so at any time.

(2) There was only one meeting between the 3rd defendant and the
plaintiff at which the representations were allegedly made by
the 3rd defendant which induced the plaintiff into accepting the
job. However there is no evidence that salary or benefits were
15 discussed at this meeting. In my view no matter how
“permanent” or attractive a job offer may be, I do not think it is
probable that a person would be “induced” into accepting a job
offer without at least knowing what salary he would be paid,
especially so if he was already holding a good job. The offer of
20 salary to the plaintiff only came with the letter of offer of
employment which also set out the other terms and conditions
of employment including on termination and what the plaintiff’s
job responsibilities were, which again shows that it is unlikely
that the alleged representation had been made and the plaintiff
25 was “induced” by what was allegedly said to him at the
interview. In his cross-examination the plaintiff explained that
salary was not a major consideration to him as it was the offer
of a permanent job to lead, head and manage the business of
the 1st defendant and its subsidiaries where the main attraction
30 was the oil terminal project which attracted him the most since
he had 17 years experience in the downstream activities of oil

5 and gas. I find the plaintiff's explanation self serving and made
with the benefit of hindsight after the event. It deserves no or
very little weight. The relevant point in time which the court
needs to consider is when the representation was allegedly
made to the plaintiff at the interview, which had allegedly
10 "induced" him into accepting the offer. But as I said, it is
unlikely that the plaintiff was "induced" when he did not even
know what his salary would be.

(3) I have also taken into account the fact that the plaintiff had
adduced evidence though the other witnesses called by him,
15 such as PW1 Madam Lai Moi Fong the General Manager of
Kuching Port Authority, PW2 Encik Rosli Saup the Deputy
General Manager of Kuching Port Authority, PW3 Dr. Lee Hock
Seng who initially acted as consultant to the oil terminal project,
all of whom testified in their evidence that they dealt with the
20 plaintiff in respect of the oil terminal project. Therefore, the
plaintiff contended that their evidence is consistent with his
allegation of having been offered a job to head and lead the oil
terminal project, especially so when even the 3rd, 4th and 5th
defendants as well as DW2 Encik Syed Mohd Hussein had
25 agreed in their cross-examination that the plaintiff was leading
the oil terminal project. I do not agree with this contention.
Whilst the defendants do not deny that the plaintiff was actively
involved in the oil terminal project or even that he was jointly in
charge of the project with others, it must not be overlooked that
30 it is the plaintiff's case that he was offered a permanent position

5 to lead, head etc the project, which I find for the reasons I have given is not supported by the evidence.

For all the above reasons I find that Issue 1.1 must be answered in the negative.

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With regard to whether the alleged representations were incorporated into the contract as the plaintiff claims, I find that on a plain reading of the contract that was entered into, they were not. As to whether the alleged representations are implied terms of the contract or
15 are to be inferred from the terms and conditions of the contract, I find that that are not. The terms and conditions of employment which the plaintiff had accepted very clearly deal with the question of termination of such contract and the job responsibilities of the plaintiff. The letter of offer of employment dated 9.8.1997 as well as the terms and conditions
20 of employment do not make any reference to the interview between the plaintiff and 3rd defendant or any reference to what was discussed there. Further the plaintiff's letter dated 29.8.1997 accepting the offer of employment does not mention anything about the interview or what was discussed there. There is no evidential basis to imply or infer the
25 matters which, the plaintiff wishes the court to. Accordingly Issue 1.2 must be answered in the negative.

With regard to whether the alleged representations amount to a collateral warranty which the plaintiff accepted and which exists side by
30 side with the said contract of employment, it must follow from my

5 findings on Issue 1.1 and 1.2 that there was no such collateral warranty nor does such contract exist side by side with the employment contract.

The plaintiff has relied on the cases of *Tan Chong & Sons Motor Company Sdn Bhd v Alan McKnight* [1983] 2 MLJ 220 (FC) and
10 *Tan Swee Hoe Co. Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 (FC) in support of this part of his case, but I find those cases of no assistance to the plaintiff here as each case must be decided on its own facts. In those two cases there were findings made that oral representations had been made at the time of contracting which were in conflict with the
15 written contract. In this case I have not found that the 3rd defendant had made the alleged representations to the plaintiff so as to induce him as alleged.

In arriving at the above conclusion I have not overlooked the
20 fact that in support of his case that he had been “induced” by the offer of a “permanent position” by the 3rd defendant which in turn constitutes a collateral warranty or contract between the parties, the plaintiff relies on the evidence given by Sayeed Mohd Hussein (DW2) the person from Petronas who was offered a job by ACSB in respect of the oil terminal
25 project. DW2 had stated in cross-examination that the 3rd defendant had offered him a permanent job with ACSB. So the plaintiff contended that there must be truth in what he said about the 3rd defendant offering him a ‘permanent position’ too.

30 I do not agree. It does not follow as a matter of course that just because the 3rd defendant had made such an offer to DW2 who was

5 working in Petronas Holding Berhad and who held a different
qualification and work experience from the plaintiff and was formerly the
Project Engineer for the Petronas Pending Oil Terminal Project in 1993
and in charge of the Oil Terminal Project in Sudan, the same offer was
made to the plaintiff. As indicated earlier, what the plaintiff asserts about
10 the matter must be tested against the other contemporaneous
documents, evidence and facts I have referred to which militate against
such an offer having been made to the plaintiff. Further in relation to his
contention that the alleged representation made to him constituted a
collateral warranty or collateral contract, I find the plaintiff's conduct is
15 inconsistent with the existence of such collateral contract. When the
plaintiff received the letter dated 28.3.2002 terminating his employment
which was signed by the 5th defendant, the plaintiff wrote back to the 5th
defendant on 5.4.2002 in which he congratulated the 5th defendant on
his appointment as a Director of PLSB and accepting the 3 months
20 salary paid to him in lieu of 3 months notice. To my mind, if the plaintiff
had regarded what the 3rd defendant had represented to him at the
interview as a collateral warranty or that it constituted a collateral
contract which existed side by side with his contract which had just been
terminated, surely the plaintiff would have reacted differently and
25 informed the 5th defendant, or even the 3rd defendant or the 1st or 2nd
defendant that he did not regard his contract as having been terminated
for the reason just given.

I accordingly find Issue 1.3 must also be answered in the negative.

5 **Issue 2.1: Whether the termination of the contract was lawful?**

When the plaintiff's employment with the 2nd defendant was terminated by the letter of 28.03.2002, two alternative courses lay before him. He could seek redress in the Industrial Court under the provisions of the Industrial Relations Act 1967, or he could file an action in the High Court for damages at common law for wrongful dismissal. The difference in law between the two types of action is well explained in case law on the point which show that in respect of a claim filed at the High Court for wrongful dismissal, the court treats the relationship between employer and employee as strictly contractual and if successful, the employee's remedy is an award in damages for breach of contract which is limited to the pay the employee would be entitled to receive during the notice period. In *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiew & Anor* [1981] 1 MLJ 238 the Federal Court said:

25 ***"In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, e.g. a summary dismissal where the workman has not committed misconduct. The rewards however, are rather meager because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain a similar job immediately or during the notice period with some other employer. He cannot sue for wounded feelings or loss of reputation cause by a summary dismissal, where for instance he was dismissed on a***

30 ***groundless charge of dishonesty. At common law it is not possible for***

5 ***a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, viz. an award of damages.***”

10 In *Aetna Universal Insurance Sdn Bhd v Ooi Meng Sua* [2001] 3 MLJ 502 the Court of Appeal held that where an employee sues at common law for wrongful summary dismissal and the employer fails to justify the dismissal, then he must pay the employee such damages as are just in lieu of proper notice.

15 In *Quek Chek Yen v Majlis Daerah Kulai* [1986] 2 MLJ 290 the Supreme Court held, in that case in which the relationship between the appellant and the Kulai Local Council was solely contractual, that an employee is not entitled to question the motives of his employer if the employer has the right to dispense with the services of the employee at
20 any time.

25 In *Zakia Bte Ishak v Majlis Daerah Hulu Selangor Darul Ehsan* [2005] 6 MLJ 517, the Court of Appeal held, in a case where the appellant was employed on a one year contract subject to the right of either party to terminate the contract by one month’s notice or payment of one month’s salary in lieu of such notice, that it was not open to the
30 appellant there to question the motive of the respondent.

30 Reverting to the facts of our case I find that since the plaintiff has chosen to seek his remedy at the High Court, his claim is strictly contractual. I find that under the contract entered into the 2nd defendant was entitled to terminate the services of the plaintiff by giving him 3

5 month's notice, which right the 2nd defendant exercised by paying the plaintiff money in lieu of such notice. I accordingly find the plaintiff's employment had been lawfully terminated.

10 Notwithstanding the clear law on this point the plaintiff contended that the termination of his employment was unlaw for the following reasons.

No opportunity to show cause

15 According to the plaintiff, the reason given for the termination of his service was that the 2nd defendant and its subsidiaries KSSB and BWSB were losing money and as such a decision had been made to close down the business of the companies. The plaintiff contends that he should have been given an opportunity to explain if there was any
20 truth in the assertions made in his letter of termination. I find no merit in this contention. In *American International Assurance Co. Ltd v Koh Yeng Bee* [2001] CLJ 49, the Court of Appeal held that no such right arises in cases where termination of service was pursuant to a contractual right.

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The right to employment is a fundamental right.

According to the plaintiff the Courts have moved away from the 'old approach' with regard to employer/employee or master/servant
30 relationship at common law and now regard the right to employment as a fundamental right. Accordingly, the plaintiff contends the termination

5 of his service was unlawful as it infringed a fundamental right of his. I do
not agree. In the context of the plaintiff having instituted a contractual
claim for damages at common law, the plaintiff has not referred me to
any authority to show that what was decided in *Fung Keong Rubber*
(supra), *Aetna Universal Insurance* (supra) *Quek Chek Yen* (supra) and
10 *Zakiah Bte Ishak* (supra) have been overruled or declared bad law.

*The 3rd 4th and 5th defendants had conspired and or acted together
unlawfully to cause loss and damage to the plaintiff by unlawful means
or to procure the breach of the plaintiff's contract of service or collateral
15 contract.*

It is alleged by the plaintiff that the 3rd 4th and 5th defendants had
acted in concert to do the following things:

(a) the plaintiff was barred by the 3rd defendant from attending a
20 Board meeting of ACSB on 29.8.2001 even though he (the
plaintiff) had contributed to one item on the agenda. I find no
merit in this complaint. The plaintiff was not a Director of ACSB
and had no right to be present at its Board meetings unless
requested to do so. I do not see how this can be said to have
25 interfered with the plaintiff's work as he alleges.

(b) the plaintiff was barred by the 4th defendant on the instructions
of the 3rd defendant from attending a meeting between the oil
companies, the State Government representatives, the 1st
defendant and Kuching Port Authority on the same day i.e.
30 29.8.2001. I find no merit in this allegation. The plaintiff was not
a director of the 1st defendant. When cross-examined on this (at

5 page 583 Notes of Proceedings) the 3rd defendant denied doing so, saying it was the decision of the Board to bar the plaintiff from the meeting with the oil companies. I find nothing wrong in the 1st defendant selecting who can attend its meeting.

10 (c) The 3rd defendant had stopped the plaintiff from bringing one Dr. Lee Hock Seng a Consultant to attend a meeting held on 25.2.2000 with Petronas Dagangan Berhad, because Encik Zainal Abidin Ahmad the Managing Director of Zecon Bhd had instructed so. I find no merit in this allegation. DW3 had explained in his evidence (at pg 624 Notes of Proceedings) that
15 that meeting was in fact initiated by Encik Zainal Abidin. Accordingly the plaintiff can have no complaint about what Encik Zainal Abidin is alleged to have done.

20 (d) the plaintiff alleged that sometime between the 3rd quarter of 1999 to the 1st quarter of 2000 the 3rd defendant had suggested to him i.e. the plaintiff that he should engage in improper conduct and give in to nepotism in that (i) he and the 3rd defendant should set up a management company to take over the project, (ii) when the plaintiff refused to do so the plaintiff criticized him for not acting like a named friend of the plaintiff
25 who had allegedly got rich by acting as a nominee for certain highly placed politicians in Sarawak, which suggestion offended and humiliated the plaintiff greatly, (iii) that the plaintiff should allow a company called Assar-PPL Sdn Bhd to take over the oil terminal project which the plaintiff refused to agree to despite
30 being told by the 4th defendant that the company belonged to a certain Datuk Wan Ali, the then Chairman of the 1st defendant,

5 (iv) the 3rd defendant had tried to get a company called
Technology Establishment Sdn Bhd, a company controlled by
Zecon Sdn Bhd which in turn is controlled by Encik Zainal Abidin
Ahmad to take over the project, but when the plaintiff objected
10 the 3rd defendant angrily told him that Encik Zainal Abidin was
the nephew of a highly placed Tan Sri in Sarawak. According to
the plaintiff when he did not agree to these unprofessional acts
of mismanagement and nepotism, the 3rd, 4th and 5th defendants
acted together to exclude him from Board meetings and the oil
terminal project, and without consulting the plaintiff transferred
15 the oil terminal project to the 1st defendant and its subsidiary
Assar Industri Sdn Bhd, transferred his staff out, and falsely
blamed the plaintiff for the losses of KSSB and BWSB even
though they knew that the subsidiaries were already incurring
losses before he joined the 2nd defendant and that he had in fact
20 brought in business worth RM10 million for KSSB from the
MLNG – 3 Project Cargo, while the State Government had
directed that KSSB was not to undertake freight business worth
less than RM 2 million in value so as not to compete with local
bumiputra businessman.

25

I find no merit in the above allegations. The plaintiff
overlooks the fact that at that material time he was a director of
only the 2nd defendant, KSSB and BWSB whereas the oil
terminal project was under Assar Chemicals Sdn Bhd of which
30 he was never a director. Further he was also never a director of
the 1st defendant/PASB which ultimately controlled the 2nd

5 defendant and its subsidiaries. Therefore if the 3rd defendant
had wanted to do what he is alleged of, he need not get the prior
consent or agreement of the plaintiff since it is alleged that he
was a leading figure in the 1st defendant. The plaintiff also
overlooks the fact that by 10.12.1999 the shares held by the 2nd
10 defendant in Assar Chemicals Sdn Bhd had been transferred to
Assar Industri Sdn Bhd which is a date before the matters
complained in (ii)(iii) and (iv) above are alleged to have
occurred. The plaintiff himself signed the share transfer form
and it is strange that he did so if he knew what the 3rd, 4th and 5th
15 defendants were alleged up to. Even furtherer still the plaintiff
seems to have overlooked the fact that the State Government
had a keen interest in the oil terminal project and the State
Secretary Tan Sri Datuk Amar Haji Abdul Aziz (DW4) as well as
other persons other than the 3rd, 4th and 5th defendants sat on
20 the Board of the 1st defendant which had been monitoring the oil
terminal project and so was the Board of Assar Chemicals Sdn
Bhd at its meetings. Further, Tan Sri Aziz as well as persons
other than the 3rd, 4th and 5th defendants also sat on the Board
of Directors of Assar Chemicals Sdn Bhd. Accordingly, (to
25 borrow the words of the plaintiff himself) any attempt by the 3rd
defendant “to siphon out” the oil terminal project to a company in
which the 3rd defendant had an interest in as alleged by the
plaintiff would have to overcome the attention of the Board of
both the 1st defendant and Assar Chemicals Sdn Bhd and there
30 is no evidence to suggest that Tan Sri Aziz and other members

5 of the Board of both these companies were under the control or influence of the 3rd or the 4th and 5th defendants.

(e) It was contended by the plaintiff that the 5th defendant (DW3) had admitted in his cross-examination that he and the 3rd and 4th defendants had caused the termination of the plaintiff's employment. I do not find this to be so on a proper reading of his evidence. The 5th defendant was asked in cross-examination at page 117 Notes of Proceedings:

15 **Put: You together with the 3rd and 4th defendants had caused the termination by issuing the letter of termination to the plaintiff.**
A: I agree by issuing the letter.

20 So what the 5th defendant had really agreed to was that by issuing the letter of termination the termination of the plaintiff's services was affected, and not as suggested by the plaintiff in his contention.

(f) The plaintiff also contended that the letter of termination dated 28.3.2002 was unauthorized and unlawful. I find no merit in this contention. The evidence shows that on 12.03.2002 at the 20th Board of Directors meeting of the 1st defendant (exh D24 (1-14) the Board resolved that the business of the 2nd defendant i.e. PLSB be closed down and that notice of termination of service be given to the plaintiff. The Board also decided that the 2nd defendant /PLSB be wound up or delisted subsequently.

30 On the same day i.e. 12.03.2002, the Board of the 2nd defendant i.e. PLSB resolved to close the business of the

5 company and to give notice to terminate the service of the plaintiff
and that any Director is authorized to sign the letter of termination.
See exh D25 (1-2). Accordingly, there is no basis for the plaintiff
to say that the letter of termination was unauthorized or unlawful.

10 *The resolutions to wind up the 2nd defendant were all “cooked-up”.*

 The plaintiff contended that the resolutions to wind up the 2nd
defendant were all “cooked up” because, according to the plaintiff, the
3rd, 4th and 5th defendants only moved to wind-up the 2nd defendant and
15 businesses of the subsidiaries well after the letter of termination dated
28.3.2002 had been issued to him. It is the plaintiff’s case that it was
only after his solicitors had written to the defendants on 19.8.2002
threatening to commence legal action that the 3rd, 4th and 5th defendants
moved to cook-up the resolutions to wind up the 2nd defendant and its
20 subsidiaries.

The plaintiff relies on the following matters in support of his contention:

- (a) Under s 147(7) and s 254(2) of the Companies Act 1965, after
certain resolutions including to voluntarily wind up the business
25 of a Company are passed, a printed copy of the resolution must
be filed with the Companies Commission within one month or 7
days thereof respectively, which was not done in this case;
- (b) There are other documents that do not tally with the letter of
termination dated 28.3.2002, namely (i) an undated
30 “Resolution/Confirmation”, found at pages 255-256 of the
Defendant’s Disputed Bundle (DDB) which was made pursuant to

5 s 147(6) Companies Act 1965 and signed by the 3rd defendant as
a representative of PASB, the company beneficially entitled to the
whole of the issued share capital in PLSB, stating that at an EGM
of PLSB which was deemed held on 24.6.2002 it was resolved,
inter alia, to close down the operations of PLSB. The plaintiff says
10 that the date '24.6.2002' is well after the date of the letter of
termination; (ii) the Extract of Minutes dated 2.9.2002 i.e. exh D28,
in respect of the 20th PASB Board of Directors Meeting held on
12.3.2002, which is found at page 259 of DDB. The plaintiff says
the date "2.9. 2002" shows the resolution was "cooked-up" since it
15 is after the date of the letter of termination; (iii) the letter at page
260 of DDB dated 2.9.2002 i.e. exh P24, written by the 1st
defendant/PASB to the 2nd defendant/PLSB informing the latter
that PASB would waive the amount of RM282,721.04 owed to
PASB. According to the plaintiff the date "2.9.2002" is also well
20 after the letter of termination and shows that the meeting of the
Board of the 1st defendant/PASB on 12.3.2002 did not take place;
(iv) that the two Statutory Declarations found at pages 261 and
262 of DDB i.e. exh P25 and exh P26 dated 10.9.2002 and signed
by the 5th defendant and 4th defendant respectively were false
25 declarations because they had each as Directors of the 2nd
defendant/PLSB not revealed that the company faced potential
liability as the plaintiff's solicitors had already written a letter of
demand against the company on 19.8.2002 and further, in
paragraphs (h) of the statutory declaration they had stated that
30 "syarikat ini bukan anak syarikat kepada syarikat lain", which the
plaintiff says is not true; (v) the letter at page 263 DDB i.e. exh

5 D27 which is a letter dated 13.9.2002 from the 2nd defendant/PLSB
to the Companies Commission requesting for the Company to be
delisted. According to the plaintiff this letter shows that there was
never any resolution of 12.3.2002 passed by either the 1st or 2nd
defendant's board; and (vi) the shares of KSSB and BWSB were
10 transferred by the 4th and 5th defendants to other subsidiaries of
the 5th defendant which was a matter never disclosed in his letter
of termination.

I find no merit or substance in any of the above allegations and
15 contentions of the plaintiff for the following reasons.

The decision to close down the 2nd defendant PLSB was made by
its holding company, the 1st defendant/PASB at its Board Meeting of
12.3.2002 marked as exh D24(1) to (14) and is found at pages 29-42 of
20 the Defendant's Supplementary Bundle of Documents. A perusal of the
minutes of that meeting shows that as of 31.12.2001 the 2nd
defendant/PLSB which was 100% owned by PASB had incurred
substantial accumulated losses of RM348,174.40. Further the
subsidiaries of the 2nd defendant, namely KSSB and BWSB had incurred
25 accumulated losses of RM156,240 and RM23,884.00 respectfully as of
31.12.2001. Therefore the Board of PASB decided to close down the
operations of PLSB which should be wound up or delisted, and that the
services of the plaintiff be terminated whilst a sum of RM282,721.04
which was owned to PASB by PLSB should be waived.

30

5 The 4th defendant (DW1) testified that following the decision made
by the Board of the 1st defendant/PLSB at its meeting of 12.3.2002, the
Board of the 2nd defendant/PCSB held a meeting at which the Board
resolved that it could no longer bear its losses, that the company should
be closed down and delisted and that the services of the plaintiff be
10 terminated. This Resolution was marked as exh D25(1) and (2) and is
found at pg 238 of DDB.

Learned Counsel for the plaintiff had cross-examined DW4 Tan Sri
Datuk Amar Haji Abdul Aziz the Chairman of the 1st defendant/PASB
15 about the board Meeting held on 12.3.2002 and suggested to him that
the minutes of meeting and resolution of the 1st defendant's Board on
12.3.2002 were cooked-up only after the services of the plaintiff was
terminated, but DW4 firmly denied this. DW4 confirmed that he chaired
the meeting and also confirmed that the minutes of that meeting were
20 correct. The plaintiff also said there is no evidence of who took the
minutes of the 1st defendants Board meeting of 12.3.2002 but the 4th
defendant (DW1) confirmed in evidence that he recorded the minutes. I
accept the evidence of DW4 and DW1 on the matter. The minutes of
meeting show that apart from the matters regarding PLSB and its
25 subsidiaries, many other matters and business not relating to PLSB
were also discussed at the Board meeting of 12.3.2002. I do not think
this was a fictitious meeting as alleged. I find the resolutions passed at
that meeting were not "cooked-up" as alleged. I find that the decision of
the 1st defendant was a commercial decision which its Board was fully
30 entitled to make. The same applies to the decision of the Board of the
2nd defendant.

5

The plaintiff complained that his letter of termination did not mention the resolutions passed on 12.3.2002. I do not see any reason why it should, or how such omission would affect the validity of the letter. However, contrary to the plaintiff's allegation that the resolutions of 12.3.2002 were cooked-up only after his lawyer's letter of 19.8.2002, there is evidence given by the 5th defendant (at page 501 Notes of Proceedings) to show that 2 days after the 1st defendant's Board meeting the plaintiff was informed over the phone by the 5th defendant (DW3) of the Board's decision which caused for plaintiff to hang up the phone on the 5th defendant. What the 5th defendant testified to is supported by the fact that a reading of the opening paragraph of the letter of termination dated 28.3.2002 signed by the 5th defendant shows that it states "our telephone conversation on 14th March 2002 is hereby referred". Further on 5.4.2002 when the plaintiff wrote back to the 2nd defendant accepting the 3 months salary in lieu of notice, the 5th defendant had made a handwritten note on the plaintiff's letter, addressed to the 4th defendant which reads as follows:

25 **'Sulai,**
 For your info + filing and pls ensure that B.O.D. decision is
 carried out fully.
 Sgd: 5.4.2002"

This note which is found at page 35 of the Defendant's Agreed Documents (DAD), the authenticity of which is not in dispute. This note which refers to the Board decision shows it was written long before the plaintiff's solicitors letter dated 19.8.2002.

5 With regard to the plaintiffs allegation that the undated
“Resolution/Confirmation” found at page 255-256 DDB was passed only
after his solicitor’s letter of demand, I find the defendants have given a
perfectly acceptable explanation for it which shows that it was not
cooked-up as alleged. It will be recalled that at the 1st defendant’s
10 Board meeting of 12.3.2002 it was resolved that the 2nd defendant could
either be wound up or delisted. The 5th defendant (DW3) explained that
the document at page 255-256 DDB was prepared as part of the steps
taken to implement the decision of the 1st defendant’s Board made on
12.3.2002 but a winding up was not pursued after advice from the
15 Companies Commission that delisting was simpler than a winding up.
At page 497 Notes of Proceedings, the 5th defendant testified:

20 Q: You were examined about the Resolution deemed to be passed on
24.6.2002 to wind-up PASB Logistic Sdn Bhd which Resolution is found
at page 255 of DDB. Can you clarify what this Resolution is for?

A: The Board of the Shareholders i.e. Permodalan Assar Sdn Bhd (1st
defendant) had resolved on 12.3.2002 to terminate the operations of
PASB Logistics Sdn Bhd. After liaising with the Companies
25 Commission we were advised to have a shareholders Resolution on the
cessation of business. So this is the resolution of the EGM of PASB
Logistics Sdn Bhd to wind up the company and close down operations.

Q: Was this Resolution a step to implement the decision of Board of
Director of the Shareholders i.e. Permodalan Assar Sdn Bhd made on
12.3.2002 to terminate the business of PASB Logistics Sdn Bhd.?

30 A: Yes

Q: This step was taken after 12.3.2002 after liaising with the ROC?

A: Yes.

Q: After this Resolution was deemed passed, were any step taken to wind
up or delist the 2nd defendant?

35 A: Yes the Company Secretary pursued the matter.

Q: I refer you to page 85-87 of DAD. These documents show that the 2nd
defendant was delisted and not wound up. Can you explain why?

A: This was on the advice of the Companies commission that the 2nd
defendant be delisted under s 308 Companies Act instead of winding
40 up.

Q: did the Companies Commission tell you why they recommended
delisting?

5 **A: They said it was a simpler process and it did not involve the court since the 2nd defendant was a 100% owned subsidiaries of the 1st defendant.**

Q: Can you explain why the 4th defendant and you were not terminated whereas the plaintiff was terminated?

10 **A: Until the 2nd defendant was delisted, the company required 2 directors. And the 4th defendant and I were not paid directors. Subsequently upon delisting, we ceased to be Directors of the 2nd defendant at no cost to the shareholders.**

15 With regard to the plaintiff's allegation about exh D28 i.e. the "Extract of Minutes" dated 2.9.2002 found at page 259 of DDB, I find absolutely nothing in the point taken by the plaintiff because there is nothing wrong in dating the document "2.9.2002" as it is meant to be an "Extract of the Minutes of the 20th PASB Board of Directors Meeting held on 12.3.2002." This "extract" was one of the documents supplied to the
20 Companies Commission by PLSB's letter dated 13.9.2002 (exh D27) so as to enable PLSB to be delisted under s 308 Companies Act 1965. The date "2.9.2002" clearly refers to the date of the "Extract". It certainly does not show that the actual resolution of 12.3.2002 was cooked up as alleged.

25

With regard to the allegation that the two Statutory Declarations were false declarations, I find no substance in this allegation as the 5th defendant (DW1) explained that the Statutory Declaration used was a standard form of document and paragraph (h) was meant to be
30 cancelled but the deponents forgot to do so. I accept this explanation as these statutory declarations were not stand alone documents but, meant to be used together with other documents mentioned in the 2nd defendant's application to be delisted by the Companies Commission. It is clear from exh D27 i.e. the letter dated 13.9.2002 written by the 5th
35 defendant on behalf of PLSB to the Companies Commission, applying

5 for delisting under s 308 Companies Act 1965, that the 5th defendant
also supplied other documents in that letter such as the extract of the
Minutes of the 20th Board of Directors meeting of PASB dated 12.3.2002
a reading of which clearly discloses that the 2nd defendant is a 100%
subsidiary of PASB. I therefore accept that the failure of the 4th and 5th
10 defendant to delete paragraph (h) of their standard form statutory
declarations was an oversight on their part. There was no intention to
make a false statement as alleged or mislead anyone as the “extract” of
the board meeting already discloses that PLSB is a 100% subsidiary of
PASB. It does not show the resolutions passed on 12.3.2002 were
15 cooked-up as alleged.

With regard to the plaintiff’s complaint that the Statutory
Declarations had not disclosed the 2nd defendant’s potential liability to
the plaintiff, I see nothing in the point taken. The plaintiff had merely
20 made a demand against the 2nd defendant through his solicitors, but
there was no way the 4th and 5th defendants could know on the date they
signed their statutory declarations whether the plaintiff would decide to
proceed to file a suit or drop the matter.

25 With regard to the complaint that the 4th and 5th defendants had
transferred the shares of KSSB and BWSB to other subsidiaries of the
1st defendant, I find nothing in the point taken as such fact does not
show in anyway that the resolutions passed on 12.3.2002 were cooked-
up as alleged. Further, it does not detract from the fact that KSSB and
30 BWSB have been wound up and dissolved in accordance with the
resolutions passed on 12.3.2002.

5

The plaintiff had also referred to the fact that during the cross-examination of the 5th defendant he had admitted that when the letter of termination was issued to the plaintiff on 28.3.2002, there was no decision yet by any of the defendants to terminate the services of the plaintiff. However I find that the 5th defendant has successfully clarified in his re-examination that when he was being cross-examined he had forgotten about the resolutions passed on 12.3.2002. I accept this explanation, especially as there is other credible evidence I have referred to above which show that the resolutions of 12.3.2002 were not cooked-up as alleged.

Accordingly I find that even though the 2nd defendant did not file at the Companies Commission a copy of the resolutions regarding its voluntary winding up within the time frame required by ss 147(1) and 254(2) Companies Act 1965, this does not mean that the resolutions of 12.3.2002 were cooked-up as alleged because the Board of the 1st defendant decided that the 2nd defendant could either be wound up or delisted and the 2nd defendant chose delisting.

25 *Non-compliance with s 128(2) Companies Act 1965*

One of the reasons given by the plaintiff for saying the letter of termination was unlawful was because he was also an Executive Director of the 2nd defendant/PLSB, but he had never been served with a notice in accordance with s 128(2) Companies Act which states that a special notice is required of any resolution to remove a director and the

30

5 director concerned shall be entitled to be heard on the resolution at the meeting. According to the plaintiff, s 128(2) applies to the 2nd defendant as the company had adopted Article 69 of Table A of the Companies Act which incorporates s 128.

10 I find no merit in this contention. Section 128(2) of the Companies Act is a provision which applies to directors of public companies, but it may be adopted in private companies as well. However, the point of importance to note is that the plaintiff was engaged as an employee of the 2nd defendant on the terms stated in his contract of employment and
15 his employment was terminable by 3 months notice. In the context of what occurred on 12.3.2002, the resolutions passed by the 1st and 2nd defendant was for the purpose of closing down the business of the 2nd defendant company and also terminate the plaintiff's services as employee. The board meeting of 12.3.2001 was not called for the
20 purpose of removing the plaintiff as an executive director and the the resolutions were not directed at removing the plaintiff as a director of the 2nd defendant under s 128 Companies Act. Accordingly it is my view that s 128(2) does not apply to the facts here. For the same reasons the case of *Solaiappan & Ors v Lim Yoke Fan & Ors* [1968] 2 MLJ 21 and
25 *Tien IK Sdn Bhd & Ors v Kwok Khoon Hwong* [1993] 1 CLJ 9 are distinguishable on their facts from this case. I also agree with the views expressed by the learned Author in *Corporate Powers Accountability* (2nd Edition) by Loh Siew Cheang at page 92 where it is stated that the amendment made to s 128(2) after *Solaiappan & Ors v Lim Yoke Fan &*
30 *Ors*, was not intended to make the requirement applicable to directors of private companies.

5

For all the reasons given above I find that Issue 2.1 must be answered in the negative.

Issue 2.2 Whether the said termination constitutes a fraud on the plaintiff?

10

It is the plaintiff's case that the termination of his services constituted a fraud on him because there was never any intention to allow him to head, lead and manage the oil terminal project independently contrary to the representations made to him by the 3rd defendant which the 3rd defendant never intended to honour. The plaintiff says that when he would not toe the 3rd defendant's line of "mismanagement" and he would not give in to the 'dictates' of the 3rd defendant, the 3rd, 4th and 5th defendants conspired to get rid of him by the wrongful means earlier described. Having reviewed all the evidence and the submissions of the plaintiff on the matters he had earlier complained of it must follow from my earlier findings regarding the complaints of the plaintiff that I find, that the plaintiff has not proved beyond a reasonable doubt the termination was a fraud on the plaintiff as alleged. I have used the above standard of proof as the acts which the 3rd, 4th and 5th defendants were alleged to have committed, such as cooking up the resolutions of 12.3.2002 are accusations of a criminal nature.

15

20

25

30

Incoming to the above finding I have not overlooked the accusation of the plaintiff that the defendants had 'withheld' or prevented

5 one Encik Abdillah Bin Azahari (DW6) who was in 2001 and 2002 an
Assistant Manager of the Projects Department of the 1st defendant and
who is still in the Assar Senari Group of Companies, from giving
evidence for the plaintiff. This witness had been subpoenaed to testify
on behalf of the plaintiff but he did not appear until after the plaintiff had
10 closed his case. He was then called by the defendants to testify.

No evidence was placed before the court to support the plaintiff's
allegation that the defendants had prevented DW6 from giving evidence
as the plaintiff's witness. There is no propriety in a witness. There was
15 nothing to prevent the defendants from calling him as a witness. The
plaintiff had alleged in paragraph 38.3 of his witness statement that DW6
had handed him a document from which the plaintiff deduced that the
3rd, 4th and 5th defendants had allegedly manipulated or altered item
6.1.2001 of the draft Minutes of Meeting of the Board of Assar
20 Chemicals Sdn Bhd/ACSB held on 29.8.2001. Those minutes are found
at page 382 and page 386 of the Plaintiffs Disputed Documents (PDD2)
and which was marked as exh D21 and D22 respectively. Exhibit D21
relates to Item 2.5 of the Minutes of 29.8.2001 relating to the
appointment of various consultants for the oil terminal project. The
25 minute reads that it was "Noted" that the consultants/specialists who
were working on the project but yet to be formally appointed were Aki-
Media as architects, Tech Centre Engineering Sdn Bhd for M & E
Works and Jutera Jasa (Sarawak) Sdn Bhd to assist Tech Centre
Engineering. At the side margin of Item 2.5 appears handwritten words
30 which read "changed fr original. Originally agreed to appoint". These
words were allegedly written by DW6. Exhibit D22 relates to Item

5 6.1.2001 of the same minutes which deal with “Appointment of
Managing Director/General Manager” and it records that it was Resolved
(i) that a technical person with the relevant engineering background and
experience be shortlisted for appointment as a full time Managing
Director/General Manager of the Company, and (ii) the Board has
10 decided that in the meantime, Encik Abdul Rahman Dawi from PASB
Logistics Sdn Bhd be requested to assist the Company in the
preparation works for the planning of the project for a 3-month period
from September 2001 to November 2001; and that the Company would
undertake to cover the plaintiff’s salary and related expenses incurred
15 during this period while waiting for the appointment of a full-time
Managing director/General Manager. At the side margin of Resolution
(ii) abovementioned, there appear handwritten words which read “Last
minute addition”. These words were allegedly written by DW6.
According to the plaintiff he was never only “assisting” in the oil terminal
20 project as recorded in the above minutes but had played a leading role.
The plaintiff further alleged in his witness statement that from another
document handed to him by DW6 which were DW6’s own handwritten
notes taken at a meeting of the Board of Directors of ACSB held on
6.2.2002 (exh D20) found at pages 388 of PDD2, the 3rd defendant had
25 untruthfully announced in the presence of the 4th and 5th defendants at
that meeting that the plaintiff was no longer in the 1st and 2nd defendants
employment when they knew that was not so.

I find no substance in the plaintiff’s allegations abovementioned.
30 When DW6 gave evidence, he said that during the Board of Directors
Meeting of ACSB on 29.8.2001, he had excused himself after the

5 presentation of the technical aspects of the oil terminal project and did
not see the minutes of the Board meeting being altered as alleged.
DW6 also testified that he did not see the minutes of the Board Meeting
of ACSB of 6.2.2002 being altered as alleged. According to DW6 in re-
examination, he had informed the plaintiff that the minutes were altered
10 as he felt that was what happened after he compared what was in the
minutes and what was in his notes, but DW6 said his notes only
reflected his own personal views. What DW6 said is to be contrasted
with the fact that the minutes of the Board meeting of ACSB held on
29.8.2001 and 6.2.2002 respectively were confirmed as correct by DW4
15 Tan Sri Datuk Amar Abdul Aziz who chaired the said meetings and
whose evidence I accept.

With regard to the accusation that the plaintiff was not merely
“assisting” as alleged, I find nothing in the point taken. I have already in
20 an earlier part of this judgment stated that the plaintiff was jointly with
others involved in the project. I do not think the word “assist” is a false
description as alleged.

For all the reasons above I find that Issue 2.2 must be answered in
25 the negative.

***Issue 3: Whether in the circumstances the corporate veil of the
1st and 2nd defendants ought to be lifted?***

30 It must follow from my earlier findings that I have not found that the
corporate personality of the 1st and 2nd defendants are a mere facade to

5 conceal the true facts of the unlawful acts of the 3rd defendant acting in
concert with the 4th and 5th defendants as alleged. I find that the plaintiff
has not discharged the burden of showing that special circumstances
exist in this case for lifting the corporate veil of the 1st and 2nd
10 defendants so as to impose liability on the 1st defendant as the plaintiff
wishes the court to (see *Perman Sdn Bhd v European Commodities
Sdn Bhd & Anor* [2006] 1 MLJ 97 (CA)).

***Issue 4: Whether the plaintiff is entitled to damages and
aggravated or exemplary damages.***

15

It must follow from my earlier findings that this Issue must be
answered in the negative.

20 In the result, for all the reasons given above, I find on a balance of
probabilities that the plaintiff has not proved his case against the
defendants. I therefore dismiss his claim with costs.

DATUK CLEMENT SKINNER
Judge

25

Date : 23rd March 2012

For Plaintiff:

Mr. Shankar R.P.Asnani
Messrs Thomas, Shankar Ram & co
Advocates & Solicitors
Kuching, SARAWAK

30

For Defendant :

Mr Leonard Shim
Messrs Reddi & Co
Advocates & Solicitors
Kuching, SARAWAK

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5 *Note:* *This Judgment is subject to typographical and editorial corrections.*