

**IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR
(COMMERCIAL DIVISION)
CIVIL SUIT NO: WA-22IP-9-03/2016**

BETWEEN

1. **SYARIKAT FAIZA SDN BHD**
(COMPANY NO. 247191-D)
2. **FAIZA BAWUMI BINTI SAYED AHMAD**
(NRIC NO. 420309-71-5196) ... **PLAINTIFFS**

AND

1. **FAIZ SDN BHD**
(COMPANY NO. 1054580-U)
2. **FIKRI BIN ABU BAKAR**
(NRIC NO. 660307-01-5439) ... **DEFENDANTS**

*(Consolidated with Civil Suit No. WA-22IP-13-03/2016 pursuant to Order of Court dated 29.04.2016
by Judicial Commissioner Datuk Wong Kian Kheong)*

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JUDGMENT

(Court Enclosure No. 34)

A. Introduction

1. This judgment discusses the following questions, among others:

- (1) whether Order 18 rule 19(2) [**Paragraph (2)**] of the Rules of Court 2012 (**RC**) disallows the Court from considering affidavit evidence in an application to strike out a party in a suit under Order 18 rule 19(1)(a) RC [**Subparagraph (a)**] when the application is also made pursuant to Order 92 rule 4 RC and/or the Court's inherent jurisdiction;
- (2) whether a striking out application should be dismissed solely on the ground that the application has failed to specify which paragraph of Order 18 rule 19(1) RC is relied on by the application; and
- (3) whether the Court may order a defendant to cease to be a party under Order 15 rule 6(2)(a) RC [**Rule 6(2)(a)**] when –
 - (a) the plaintiff has pleaded a cause of action against the defendant;

(b) it is necessary to join the defendant in the suit so as to ensure that all matters in dispute “*may be effectually and completely determined and adjudicated upon*” under Order 15 rule 6(2)(b)(i) RC;

(c) there exists a question or issue “*arising out of or relating to or connected with any relief or remedy*” claimed by the plaintiff which would be just and convenient to determine as between the plaintiff and the defendant as provided in Order 15 rule 6(2)(b)(ii) RC; or

(d) the defendant “*will or may be affected*” by the judgment in the suit.

2. In Court enclosure no. 34 (**This Application**), the 2 defendants (**Defendants**) applied for the following orders, among others:

(1) the second defendant (**2nd Defendant**) ceases to be a party in these 2 consolidated suits (**These Suits**); and

(2) as an alternative, all references to the 2nd Defendant in the Statement of Claim (**SOC**) shall be struck out.

B. Parties

3. The first plaintiff company (**1st Plaintiff**) is in the business of manufacture, distribution and retail of rice under various brand names. The second plaintiff (**2nd Plaintiff**) is the founder and Managing Director (**MD**) of the 1st Plaintiff. The 1st and 2nd Plaintiffs shall be collectively referred in this judgment as the Plaintiffs.

4. The 2nd Defendant is the founder and MD of the first defendant company (**1st Defendant**). The Defendants have recently commenced business of manufacture, distribution and retail of rice under various brand names.

C. SOC

5. The Plaintiffs have pleaded as follows in the amended SOC (**ASOC**) of Civil Suit No. WA-22IP-9-03/2016 (**1st Suit**):

(1) the Plaintiffs have registered trade marks in the name of either the 1st or 2nd Plaintiff (**Plaintiffs' Registered Trade Marks**) [paragraphs 7-11 ASOC (1st Suit)];

(2) the Defendants have, jointly or severally, infringed the Plaintiffs' Registered Trade Marks [paragraphs 27-31 ASOC (1st Suit)];

- (3) the Plaintiffs have copyright in the Plaintiffs' rice packages (**Plaintiffs' Copyright**) – paragraphs 13-24 ASOC (1st Suit);
 - (4) the Defendants have, jointly or severally, infringed the Plaintiffs' Copyright [paragraphs 32-36 ASOC (1st Suit)];
 - (5) the Defendants have, jointly or severally, committed the tort of passing off in respect of the goods, trade and business of the Plaintiffs [paragraphs 37-41 ASOC (1st Suit)]; and
 - (6) the Defendants have, jointly or severally, committed the tort of unlawful interference with the Plaintiffs' trade, business and/or economic interests [paragraphs 42-45 ASOC (1st Suit)].
6. The SOC in the Civil Suit No. WA-22IP-13-03/2016 (**2nd Suit**) pleaded, among others, as follows:
- (1) after the filing of the 1st Suit, the 1st Plaintiff obtained the registration of a logo as a trade mark (trade mark registration no. 2015007357) (**Plaintiffs' Faiza Logo**) [paragraph 7 SOC (2nd Suit)];

- (2) the Defendants have, jointly or severally, infringed the Plaintiffs' Faiza Logo [paragraphs 10-13 SOC (2nd Suit)]; and
- (3) the Defendants have, jointly or severally, unlawfully interfered with the Plaintiffs' trade, business and/or economic interests by infringing the Plaintiffs' Faiza Logo [paragraphs 14-17 SOC (2nd Suit)].

D. Defendants' Defence and Counterclaim

7. The Defence pleaded, among others, as follows:

- (1) the 2nd Plaintiff was co-founded by the 2nd Defendant's father, 2nd Plaintiff and 2nd Defendant (paragraph 4 of the Defence);
- (2) the Plaintiffs' Registered Trade Marks, including the Plaintiffs' Faiza Logo, have been wrongly entered in the Register of Trade Marks (**Register**) because the 2nd Defendant is the proprietor of the copyright claimed by the Plaintiffs (paragraph 8 of the Defence). Paragraphs 12 to 21 of the Defence pleaded that the 2nd Defendant had independently created the design and get-up of the Plaintiffs' rice packaging; and

(3) the Defendants denied infringing the 4 causes of action pleaded by the Plaintiffs' (**4 Causes of Action**) -

(a) infringement of the Plaintiffs' Registered Trade Marks (paragraphs 24, 27 and 28 of the Defence);

(b) infringement of the Plaintiffs' Copyright (paragraph 33 of the Defence);

(c) commission of the tort of passing off against the Plaintiffs (paragraph 37 of the Defence); and

(d) unlawful interference with the Plaintiffs' trade (paragraph 44 of the Defence).

8. The Counterclaim alleged, among others:

(1) the Defendants are aggrieved by the Plaintiffs' Registered Trade Marks and the Defendants therefore apply to expunge the Plaintiffs' Registered Trade Marks from the Register (paragraphs 51-57);

(2) the Plaintiffs have unlawfully interfered with the 1st Defendant's trade (paragraphs 58-65);

(3) the 1st Plaintiff has willfully and maliciously registered the following 2 domain names (**2 Domain Names**) –

(a) <http://www.faizrice.com> in the 1st Plaintiff's name on 4.1.2016; and

(b) <http://www.faizrice.my> in the name of Halawa Enterprise which is owned by Hoda bt. Mohamed Bayumi, the 2nd Plaintiff's niece and adopted daughter on 7.1.2016

(paragraph 66); and

(4) the Plaintiffs and the 1st Plaintiff's directors have acted in bad faith in misappropriating the 1st Defendant's name as part of the 2 Domain Names and this has consequently interfered unlawfully with the 1st Defendant's trade (paragraphs 67 and 68).

E. Defendants' submission

9. Mr. Michael Soo Chow Ming, the Defendants' learned lead counsel, contended as follows, among others, in support of This Application:

(1) the Plaintiffs have no cause of action against the 2nd Defendant in his personal capacity because -

- (a) it is only the 1st Defendant which manufactures, distributes, sells and offers for sale rice in packages (which bear certain trade marks and packaging designs). As such, only the 1st Defendant can be liable for the 4 Causes of Action;
- (b) the 2nd Defendant has not manufactured, distributed, sold and offered for sale rice in packages in his personal capacity;
- (c) the 2nd Defendant is merely the MD and shareholder of the 1st Defendant;
- (d) it is “*wholly insufficient*” for the Plaintiffs to attempt to make the 2nd Defendant personally liable in These Suits by merely making “*wide sweeping statements with regard to the 2nd Defendant’s alleged wrongdoings*” in the ASOC (1st Suit) and SOC (2nd Suit); and
- (e) the Court should exercise its discretion to strike out the ASOC (1st Suit) and SOC (2nd Suit) against the 2nd Defendant under Order 18 rule 19(1) RC. Reliance has been placed on the following cases –

- (i) Hamid Sultan JC's (as he then was) judgment in the High Court case of **Duta Arif Sdn Bhd & Ors v Chartered Development Corp & Ors** [2008] 6 MLJ 139;
 - (ii) the majority judgment of Salleh Abas LP in the Supreme Court case of **Government of Malaysia v Lim Kit Siang & another appeal** [1988] 2 MLJ 12; and
 - (iii) GP Selvam J's decision in the Singapore High Court case of **Philip Morris Products Inc v Power Circle Sdn Bhd & Ors** [1999] 1 SLR (R) 964;
- (2) there is no basis for the 2nd Defendant to be made personally liable for the acts of the 1st Defendant merely because the 2nd Defendant is the MD and shareholder of the 1st Defendant. This is particularly so when the Plaintiffs have failed to aver in the ASOC (1st Suit) and SOC (2nd Suit) that the 1st Defendant is personally liable for the 4 Causes of Action. The Defendants cited the judgment of Kadir Sulaiman JCA (as he then was) in the Court of Appeal in **Tan Sri Datuk Paduka Ting Pek Khiing v Dato' Hamzah Abdul Majid & Anor** [2004] 6 AMR 172;
- (3) even if this Court subsequently finds the 1st Defendant liable for the 4 Causes of Action after a trial (**1st Defendant's Infringements**), the 2nd

Defendant is not personally liable for the 1st Defendant's Infringements because –

- (a) the Plaintiffs have not pleaded in the ASOC (1st Suit) and SOC (2nd Suit) any particular regarding the 2nd Defendant's exact role and/or involvement in causing or bringing about the 1st Defendant's Infringements;
- (b) a "*cease and desist*" demand dated 11.11.2015 was sent by the Plaintiffs' previous solicitors to the 1st Defendant and not the 2nd Defendant;
- (c) there is no basis for the Court to lift the corporate veil of the 1st Defendant so as to impose personal liability on the 2nd Defendant for the 1st Defendant's Infringements;
- (d) the 2nd Defendant has only acted in his capacity as the 1st Defendant's MD in the interest of the 1st Defendant's trade and business. There is no evidence to suggest that the 2nd Defendant has acted in his personal capacity or has unlawfully benefited from the 1st Defendant's Infringements. Nor is there any evidence that the 2nd Defendant has acted recklessly and/or in bad faith in the execution of the 2nd Defendant's duties as the 1st Defendant's MD; and

(e) the Defendants relied on the following cases in support of the above contention –

(i) Tomlin J's (as he then was) judgment in the English High Court case of **British Thomson-Houston Co Ltd v Sterling Accessories Ltd & Anor Case** (1924) 41 RPC 311;

(ii) the decision of Nourse J (as he then was) in the English High Court in **White Horse Distillers Ltd & Ors v Gregson Associates Ltd & Ors** [1984] RPC 61;

(iii) the Hong Kong Court of Appeal's judgment in **Canon Kabushiki Kaisha v Green Cartridge Company (HK) Ltd & Anor** [1996] FSR 874;

(iv) Aldous J's (as he then was) decision in the English High Court case of **PLG Research Ltd & Anor v Ardon International Ltd & Ors** [1993] FSR 197; and

- (v) the judgment of Slade LJ (as he then was) in the English Court of Appeal in **C. Evans & Sons Ltd v Spritebrand Ltd & Anor** [1985] FSR 267; and
- (4) as an alternative to the above submission based on Order 18 rule 19(1) RC, premised on the above reasons, the 2nd Defendant has been improperly joined in These Suits. This is because the real dispute is between the Plaintiffs and the 1st Defendant. Accordingly, this Court should exercise its “*wide powers*” under Rule 6(2)(a) to remove the 2nd Defendant as a party in These Suits. Mr. Michael Soo cited the following cases -
- (a) Abdul Malik Ishak J’s (as he then was) judgment in the High Court case of **Abdul Mohd Khalid Hj Ali & Ors v Dato’ Hj Mustapha Kamal & Anor** [2003] 5 CLJ 85;
- (b) the decision of Siti Norma Yaakob J (as she then was) in the High Court in **Double Crane Enterprise Co Ltd v Double Crane Enterprise (M) Sdn Bhd & Ors** [1990] 2 CLJ 62; and
- (c) the Court of Appeal’s judgment delivered by Azahar Mohamed JCA (as he then was) in **Hiap-Taih Welding & Construction Sdn Bhd & Anor v Boustead Pelita Tinjar Sdn Bhd (formerly**

known as Loagan Bunut Plantations Sdn Bhd) [2014] 5 MLJ 576.

F. Plaintiffs' contentions

10. Ms. Kuek Pei Yee, the Plaintiffs' learned lead counsel, advanced the following submission, among others, to resist This Application:

- (1) This Application was "*flawed*" for its failure to specify which subparagraph of Order 18 rule 19(1) RC that This Application was premised upon. Ms. Kuek relied on the judgment of the Court of Appeal given by Abdul Malik Ishak JCA in **Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd** [2009] 2 MLJ 102;
- (2) by reason of Paragraph (2), no evidence shall be admissible in deciding a striking out application under Subparagraph (a). As such, this Court can only decide This Application under Subparagraph (a) based on the pleadings filed in this case. The ASOC (1st Suit) and SOC (2nd Suit) disclose 4 Causes of Action against the 2nd Defendant;
- (3) the 2nd Defendant has failed to show by way of affidavit evidence on how –

- (a) These Suits are scandalous, frivolous or vexatious against the 2nd Defendant under Order 18 rule 19(1)(b) RC [**Subparagraph (b)**];

 - (b) the fair trial of These Suits may be prejudiced, embarrassed or delayed against the 2nd Defendant within the meaning of Order 18 rule 19(1)(c) RC [**Subparagraph (c)**]; and

 - (c) These Suits constitute an abuse of Court process against the 2nd Defendant under Order 18 rule 19(1)(d) RC [**Subparagraph (d)**]; and
- (4) this Court should not exercise its discretion to order the 2nd Defendant to cease to be a party in These Suits under Rule 6(2)(a) because –
- (a) the 2nd Defendant will be directly affected by the judgment of These Suits as follows -
 - (i) the 2nd Defendant is the applicant for the registration of 2 trade marks in TM Application Nos. 2015002095 and 2015002096 (**2nd Defendant's 2 Trade Mark Applications**);

- (ii) the 2nd Defendant has claimed that he is the creator and proprietor of the get-up of “*FAIZ*” rice packaging and “*FAIZ*” trade marks; and

 - (iii) the 2nd Defendant has alleged that he is the owner of the Plaintiffs’ Copyright and hence, the Counterclaim for the Plaintiffs’ Registered Trade Marks to be expunged from the Register; and
- (b) reliance has been placed on the following cases –
- (i) Abdul Malik Ishak J’s (as he then was) judgment in the High Court in **MBF Property Services Sdn Bhd v Madihill Development Sdn Bhd & Ors** [1998] 1 CLJ Supp 110;

 - (ii) Sundaresh Menon JC’s (as he then was) decision in the Singapore High Court case of **Tan Yow Kon v Tan Swat Ping & Ors** [2006] 3 SLR 881; and

 - (iii) the judgment of Low Hop Bing J (as he then was) in the High Court in **Jone Theseira v Eileen Tan Ee Lian & Anor** [2002] 4 MLJ 629.

G. Relevant provisions in RC

11. The following provisions in RC will be discussed in this judgment:

“Regard shall be to justice

Order 1A *In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.*

Non-compliance with Rules

Order 2 rule 1

- (1) *Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been non-compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*
- (2) *These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.*
- (3) *The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these*

Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity.

Misjoinder and non-joinder of parties

Order 15 rule 6

- (1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.**
- (2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application –**

 - (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;**
 - (b) order any of the following persons to be added as a party, namely**

 -
 - (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon;**
 - or**

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

...

Notice of action to non-parties

Order 15 rule 13A

(1) At any stage in an action to which this rule applies, the Court may, on the application of any party or of its own motion, direct that a notice of the action be served on any person who is not a party thereto but who will or may be affected by any judgment given therein.

...

(4) A person may, within fourteen days of service on him of a notice under this rule, enter an appearance and shall thereupon become a party to the action, but in default of such appearance and subject to paragraph (5) he is bound by any judgment given in the action as if he were a party thereto.

...

Striking out pleadings and endorsements

Order 18 rule 19

(1) **The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that -**

(a) **it discloses no reasonable cause of action or defence, as the case may be;**

(b) **it is scandalous, frivolous or vexatious;**

(c) **it may prejudice, embarrass or delay the fair trial of the action; or**

(d) **it is otherwise an abuse of the process of the Court,**

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) **No evidence shall be admissible on an application under subparagraph (1)(a).**

...

Inherent powers of the Court

Order 92 rule 4

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.”

(emphasis added).

H. **Can Court consider affidavit evidence in deciding striking out applications under Subparagraph (a)?**

12. Mr. Michael Soo has cited the High Court's decision in **Suppulechmi v Palmco Bina Sdn Bhd** [1994] 2 MLJ 368 to contend that Paragraph 2 does not prohibit the Court from considering affidavit evidence when This Application is premised on the Court's inherent jurisdiction. Vincent Ng J (as he then was) decided as follows in **Suppulechmi**, at p. 380:

“Even though O 18 r 19(2) provides that 'no evidence shall be admissible on an application under paragraph (1)(a)', yet O 92 r 4 states that 'nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.' Clearly O 92 r 4 would appear to override r 19(2). However, such a construction may not be necessary as in my opinion O 92 r 4 could be triggered into action only when the court, upon reading the affidavits, decides to exercise its inherent powers.

As such, even in an application under O 18 r 19(1)(a), the court would still be entitled, in its inherent jurisdiction, to look at and decide upon the contents of the affidavits. By the time that such applications come up for hearing, the parties would have had ample opportunities to cure by amendments, any shortfalls in drafting the pleadings, and the application for

striking off would necessarily be based on the amended pleadings. It does not preclude the court from studying the affidavits to ask itself whether, from the affidavit evidence before the court, it is satisfied that the claim discloses a reasonable cause of action or defence as the case may be.”

(emphasis added).

13. With respect, I am of the view that Paragraph 2 disallows the Court from considering affidavit evidence in an application to strike out a party in a suit under Subparagraph (a) even when the application is also made pursuant to Order 92 rule 4 RC and/or the Court’s inherent jurisdiction. This view is premised on the following reasons:

(1) based on the doctrine of *stare decisis*, I am bound by Ramly Ali JCA’s (as he then was) judgment in the Court of Appeal case of **See Thong & Anor v Saw Beng Chong** [2013] 3 MLJ 235, in paragraph 9, as follows -

“[9] An applicant for striking out under O. 18 r. 19 can rely on any one or more than one sub-paras. (a) to (d). So far, there is no authority to say otherwise. Halsbury’s Laws of Malaysia clearly confirms that an applicant under this rule is entitled to rely on any or all of the grounds specified in the rule. An application under this rule is not void and ineffective merely because sub-para. (a) had been pleaded together with sub-paras. (b), (c) and (d). **The only limitation imposed under sub-r. (2) is that for an application under sub-para. (a), no evidence**

is admissible. However, where the court proceeds to decide an application under any other sub-paragraph, affidavit evidence should be admissible. ...”

(emphasis added);

- (2) when there is an express provision in the RC, such as Paragraph 2, there cannot be any resort to Order 92 rule 4 RC and/or the Court’s inherent jurisdiction. I rely on the following 2 judgments of our apex court:
 - (a) the Supreme Court’s judgment delivered by Syed Agil Barakbah SCJ in **Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors** [1988] 1 MLJ 178, at 181; and
 - (b) the judgment of Zulkefli Makinudin FCJ (as he then was) in the Federal Court case of **Majlis Agama Islam Selangor v Bong Boon Chuen** [2009] 6 MLJ 307, at paragraph 28;
- (3) if there is a conflict between the specific provision of Paragraph 2 and the general provision of Order 92 rule 4 RC, the specific provision should be favoured over the general provision as provided by the rule of statutory interpretation, “*generalibus specialia derogant*”. In

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, at 758-759, the Court of Appeal applied the maxim “*generalibus specialia derogant*” to give effect to a specific provision of the National Land Code (**NLC**) in preference to a general provision in NLC; and

- (4) if this Court admits affidavit evidence and considers such evidence in deciding an application under Subparagraph (a), this will render the Paragraph 2 redundant.

I. **Whether a striking out application should specify subparagraph in Order 18 rule 19(1) RC which is relied on by application**

14. In response to Mr. Kuek’s submission that This Application was defective (for failing to state which subparagraph in Order 18 rule 19(1) RC is relied on by the Defendants) (**Defendants’ Omission**), Mr. Michael Soo replied as follows:

- (1) the Plaintiffs had waived their right to object regarding the Defendants’ Omission because the Plaintiff had filed 2 affidavits to oppose This Application (**Plaintiffs’ 2 Affidavits**). The Defendants relied on Abdul Malik Ishak J’s (as he then was) judgment in the High Court case of **Subramaniam Vythilingam v The Human Rights Commission of Malaysia (SUHAKAM) & Ors** [2003] 6 CLJ 175; and

(2) despite the Defendants' Omission, this Court may nevertheless still consider This Application pursuant to its inherent powers and Order 92 rule 4 RC. The Defendants cited Vincent Ng J's (as he then was) decision in the High Court in **Suppuleetchmi**.

15. I am of the view that an applicant under Order 18 rule 19(1) RC (**Applicant**) should specify which subparagraph in Order 18 rule 19(1) RC is relied on by the Applicant. This is because if the Applicant relies on Subparagraph (a), the Applicant cannot depend on affidavit evidence due to the bar imposed by Paragraph 2 (please see the above Part H). The Applicant can only rely on affidavit evidence to support a striking out application under Subparagraphs (b), (c), (d), Order 92 rule 4 RC and/or the Court's inherent jurisdiction.

16. Despite the Defendants' Omission, this Court may still consider This Application for the following reasons:

(1) the Plaintiffs' 2 Affidavits constituted evidence of a waiver of the Plaintiffs' right to object to This Application based on the Defendants' Omission (**Plaintiffs' Waiver**) – please see **Subramaniam Vythilingam**, at p. 183-184; and

(2) even if the Plaintiffs' 2 Affidavits did not constitute evidence of the Plaintiffs' Waiver –

(a) Order 1A RC provides that in the administration of RC, including the application of Order 18 rule 19(1) RC, the Court shall have regard to the overriding interest of justice and not only to the technical non-compliance with RC. Order 2 rule 1(2) RC further provides that the RC are a procedural code subject to the overriding objective of enabling the Court to deal with cases justly. I do not see how the overriding interest of justice regarding This Application can be defeated merely by the Defendants' Omission;

(b) the fact that the Plaintiffs' 2 Affidavits had been filed to resist This Application, shows that the Plaintiffs had not been prejudiced in any manner by the Defendants' Omission; and

(c) even if the Plaintiffs have suffered any prejudice due to the Defendants' Omission, I find that such a prejudice can be compensated in the form of costs to be paid by the Defendants to the Plaintiffs. Accordingly, the Defendants' Omission is only an irregularity which –

- (i) shall not nullify This Application under Order 2 rule 1(1) RC;
and
- (ii) can be cured by the Court's discretionary power under Order 2 rule 1(3) RC.

17. **Razshah Enterprise**, at paragraphs 47-56, can be easily distinguished from This Application on the following grounds:

- (1) the plaintiff finance company's application to strike out the defendant's counterclaim in **Razshah Enterprise** was only made after an inordinate delay of 9 years, 2 months and 21 days (from the date the parties entered into a consent order to continue the originating summons in that case as if it had been begun by writ). There was no excessive delay on the part of the Defendants in filing This Application;
- (2) in **Razshah Enterprise**, there was no waiver by the defendant to the failure of the plaintiff to specify the subparagraph in Order 18 rule 19(1) RC in the plaintiff's striking out application; and
- (3) there was no discussion of Order 1A, Order 2 rule 1(1), (2) and (3) RC in **Razshah Enterprise**.

J. Have ASOC (1st Suit) and SOC (2nd Suit) disclosed reasonable cause of action against 2nd Defendant (1st Inquiry)?

18. In deciding the 1st Inquiry-

- (1) the Court cannot consider any affidavit evidence which is barred by Paragraph 2 (please see the above Part H);
- (2) the Court shall assume that the contents of the ASOC (1st Suit) and SOC (2nd Suit) are true. I rely on the following cases –
 - (a) the Court of Appeal's judgment given by Mahadev Shankar JCA in **Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd & other appeals** [1996] 1 MLJ 661, at 679; and
 - (b) the judgment of Lord Moulton in the House of Lords in **Vacher & Sons Ltd v London Society of Compositors & Ors** [1911-13] All ER Rep 241, at 254; and
- (3) the mere fact that a pleaded case is weak and is not likely to succeed, is not a ground to strike out that pleading - please see the Supreme Court's judgment delivered by Mohd. Dzaidin SCJ (as he then was)

in **Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd** [1993] 3 MLJ 36, at 44.

19. The 1st Inquiry must be resolved in favour of the Plaintiffs. This is because a perusal of the ASOC (1st Suit) and SOC (2nd Suit) clearly discloses 4 Causes of Action against the 2nd Defendant. It is to be noted that the ASOC (1st Suit) and SOC (2nd Suit) have expressly pleaded that the 2nd Defendant is personally liable, jointly (with the 1st Defendant) and severally, for the 4 Causes of Action. Such a pleading against the 2nd Defendant in the ASOC (1st Suit) and SOC (2nd Suit), distinguishes all the cases cited by the Defendants in support of This Application.

K. Whether This Application should be allowed by reason of Subparagraphs (b), (c), (d), Order 92 rule 4 RC and/or Court's inherent jurisdiction (2nd Inquiry)

20. For the purpose of the 2nd Inquiry, this Court may consider affidavit evidence – please see **See Thong**, at paragraphs 9 and 10. I am of the view that the 2nd Inquiry should be answered in the Plaintiffs' favour for the following reasons:

(1) applying the test laid down in **Bandar Builder**, at p. 43, in view of the 4 Causes Of Action, it is **not** plain and obvious that These Suits –

- (a) are scandalous, frivolous or vexatious against the 2nd Defendant within the meaning of Subparagraph (b); and
 - (b) constitute an abuse of Court process against the 2nd Defendant under Subparagraph (d), Order 92 rule 4 RC and/or the Court's inherent jurisdiction; and
- (2) there is no affidavit evidence adduced by the Defendants to show that a fair trial of These Suits will be prejudiced, embarrassed or delayed against the 2nd Defendant under Subparagraph (c).

L. Relationship between Order 15 rules 6(1), (2), 13A(1), (4), Order 18 rule 19(1) and (3) RC

21. I am of the following view regarding the interplay between Order 15 rules 6(1), (2), 13A(1), (4), Order 18 rule 19(1) and (3) RC:

- (1) Order 18 rule 19(1) and (3) RC concern the Court's discretionary power to -
 - (a) strike out any pleading, endorsement on any writ, writ and originating summons;

- (b) amend any pleading, endorsement on any writ, writ and originating summons;
- (c) dismiss any action;
- (d) enter any judgment; and
- (e) stay any action;

(2) Order 18 rule 19(1) and (3) RC do not provide any power for the Court to strike out a party. It is Rule 6(2)(a) which provides for the Court's discretionary power to strike out a party in the following 2 circumstances –

- (a) when the party “*has been improperly or unnecessarily made a party*”; or
- (b) when the party “*has for any reason ceased to be a proper or necessary party*”;

(3) our Order 15 rule 6(2) RC is identical to Order 15 rule 6(2) of the Singapore's Rules of Court [**RC (Singapore)**]. As such, Singapore cases on the construction of Order 15 rule 6(2) RC (Singapore) are persuasive regarding the interpretation of our Order 15 rule 6(2) RC. The word “*or*” in Rule 6(2)(a) should be read conjunctively and I rely on the following judgment of Sundaresh Menon JC (now the present

Chief Justice of Singapore) in **Tan Yow Kon**, at paragraphs 48 and 49

—

“48 Ms Lim [defendants’ learned counsel] correctly noted that r 6(2)(a) deals with the court’s power to remove a party to the action whilst r 6(2)(b) deals with its power to add a party. She went on to submit that in an application under r 6(2)(a) (as is the present) the court’s discretion to order that a person cease to be a party arises in relation to a person who has either improperly or unnecessarily been joined or who has ceased to be either a proper party or a necessary party. I do not think this is correct for the reasons that follow.

49 In my view, having regard to the objects of O 15 r 6, r 6(2)(a):

- (a) should be construed in the light of r 6(2)(b) especially since the terms "proper" and "necessary" are not defined and the two provisions stand metaphorically on either side of the one door in the sense that one governs entry into the proceedings, while the other governs exit; and**
- (b) should not be construed in a way that treats the words "proper" and "necessary" as two disjunctive concepts.”**

(emphasis added);

- (4) when a plaintiff has a cause of action against a defendant, it cannot be said that the defendant has been improperly and unnecessarily made a party in a suit within the meaning of Rule 6(2)(a);
- (5) as to when a party in a suit has been improperly **and** unnecessarily made a party in that suit under Rule 6(2)(a), I adopt **Tan Yow Kon** which has decided that Rule 6(2)(a) should be construed with reference to Order 15 rule 6(2)(b)(i) and (ii) RC. It was decided in **Tan Yow Kon**, at paragraphs 50-53, as follows –

“50 Elaborating on the first point, the terms "proper" and "necessary" are not defined. However, the overall scheme of O 15 r 6 is to enable the court in its discretion to make such order as would ensure that parties who are necessary or proper (presumably even if they are not strictly necessary) are before it. Rule 6(2)(b) identifies parties who could be ordered to be added as parties and it seems reasonable to infer that such parties at least would fall within the ambit of those considered necessary or proper to be parties to the action. I note that r 6(2)(b) is itself broken into two limbs. The first limb repeats the terms of the former r 6(2)(b) but the second limb, ie, r 6(2)(b)(ii) has been held in Tetra Molectric Limited v Japan Imports Limited [1976] RPC 541 at 544 to have widened the court's discretion to join parties to an action "to a great extent".

51 *It would seem logical in my view to hold that a party who could be joined including under the wider r 6(2)(b)(ii), should be considered a "necessary" or "proper" party to the action and hence not liable to an order of cessation under r 6(2)(a). A broad correspondence between the scope and ambit of r 6(2)(a) on the one hand and r 6(2)(b) on the other is to be expected since otherwise, one could encounter a situation of an unwilling party being joined under the latter rule and then applying to be released under the former. The notion that the Rule should be construed in a way that conjures the image of a revolving door spinning somewhat out of control is not one to which I am drawn.*

52 *This brings me to the second point. I begin with the observation that a party who was "improperly or unnecessarily made a party" or who "ceased to be a proper or necessary party" in its context can be construed in at least the following ways:*

- (a) to refer to a party who is not a "proper" party even though he is a "necessary" party and conversely a party who is not a "necessary" party even though he is a "proper" party; or*
- (b) to refer to a party who is neither a "proper" nor a "necessary" party.*

53 *Ms Lim advances the former construction and I find it unattractive for the same reasons that I have taken the view that r 6(2)(a) is to be understood in the light of r 6(2)(b). It is plain that an applicant seeking to have a party joined needs only to come within*

any one of the categories identified in r 6(2)(b) to warrant invoking the court's consideration. It would be illogical to hold for instance that a party joined as a proper party could apply to be released on the ground that he was not a necessary party for some reason. I therefore prefer the latter construction."

(emphasis added).

Based on **Tan Yow Kon**, even if a plaintiff has no cause of action against a defendant, this in itself is not a ground to strike out the defendant as a party in a suit under Rule 6(2)(a) if the defendant falls within one of the following 2 circumstances –

- (a) the defendant “*ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon*” within the meaning of Order 15 rule 6(2)(b)(i) RC (**1st Limb**); **or**

- (b) there exists “*a question or issue arising out of or relating to or connected with any relief or remedy claimed*” in the suit which in the opinion of the Court, would be just and convenient to determine as between the plaintiff and defendant – please see Order 15 rule 6(2)(b)(ii) RC (**2nd Limb**).

I cite the following passage in **Tan Yow Kon**, at paragraph 58:

“58 It follows from the foregoing that the court's power under O 15 r 6(2) to bring and keep the appropriate parties before it is broad indeed and may be exercised even where no cause of action is asserted against a particular defendant. There is no doubt in my mind, having regard to the sort of reliefs being sought against them, that the Remaining Defendants would in principle be necessary or proper parties to the action.”

(emphasis added);

- (6) Order 15 rule 13A RC is not found in the Rules of High Court 1980 and has been introduced in RC. According to Order 15 rule 13A(1) RC, the Court “*may, on the application of any party or of its own motion, direct that a notice of the action be served on any person who is not a party thereto but who will or may be affected by any judgment*”. If a notice is served on a person under Order 15 rule 13A(1) RC, the person on whom the notice is served may “*enter an appearance and shall thereupon become a party to the action*” [please see Order 15 rule 13A(4) RC].

Order 15 rule 13A(1) and (4) RC, in my opinion, provide another avenue to join a party in a suit, in addition to the 1st and 2nd Limbs. This view is supported by the following reasons –

- (a) if a party can be joined in an action by virtue of Order 15 rule 13A(1) and (4) RC on the ground that the party “*will or may be affected by any judgment*” of the action, the party should not therefore be struck out if it can be shown that the party “*will or may be affected by any judgment*” of the action. In other words, if a party “*will or may be affected by any judgment*” of the suit, that party is not improperly and unnecessarily made a party within the meaning of Rule 6(2)(a);
 - (b) the above view is supported by a harmonious construction of Rule 6(2)(a), 1st Limb, 2nd Limb and Order 15 rule 13A(1) and (4) RC; and
 - (c) if the above interpretation is not applied, Order 15 rule 13A(1) and (4) RC will be rendered nugatory;
- (7) a wide application of the 1st Limb, 2nd Limb, Order 15 rule 13A(1) and (4) RC has the advantage of ensuring that all persons who have any interest in an action, are brought before the Court so as to secure a just, expeditious and economical disposal of the suit;
- (8) if a person (**X**) is wrongly joined as a party in an action (**Misjoinder**) -
- (a) by reason of Order 15 rule 6(1) RC -
 - (i) the action “*shall not be defeated*” by the Misjoinder; and

- (ii) the Court may still decide the issues in that action which affect the rights and interests of the parties who have been rightly joined in the action; and
- (b) X is not without a remedy. X may apply for following relief in respect of the Misjoinder -
- (i) X may apply to Court under Rule 6(2)(a) for an order that –
 - (ia) X has been improperly **and** unnecessarily made a party in the suit [please see the above sub-paragraphs 21(2) and (3)]; and
 - (ib) X shall cease to be a party in the suit
(Cessation Order); and
 - (ii) if X cannot obtain a Cessation Order and if the action is subsequently decided in X's favour, X may apply for costs of the suit either on a standard basis [Order 59 rule 16(2) RC] or on an indemnity basis [Order 59 rule 16(2) and (4) RC]. If X has suffered substantial loss and damage due to the Misjoinder which exceeds costs payable to X, X may claim for damages for -

- (iia) the tort of abuse of court process (in respect of the Misjoinder) – please see Gopal Sri Ram JCA’s (as he then was) judgment in the Court of Appeal case of **Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Ungku Mohamed** [1998] 2 CLJ 340, at 352-356; and/or
 - (iib) the tort of malicious prosecution – please see Thomson LP’s judgment in the Federal Court in **Rawther v Abdul Kareem** [1966] 2 MLJ 201, at 203 and 204-205; and
- (9) a party who applies for a Cessation Order should have the legal onus to satisfy the Court why that party should not be joined in the suit in question pursuant to –
 - (a) 1st Limb;
 - (b) 2nd Limb; **and**
 - (c) Order 15 rule 13A(1) RC; and
- (10) the Court has a discretion to allow or dismiss an application for a Cessation Order. This is clear from the use of the permissive term “*may*” in Rule 6(2)(a). The exercise of the Court’s discretion to grant a Cessation Order or otherwise, must necessarily depend on the particular pleading and affidavit evidence adduced in the case in question. As such, the exercise of judicial discretion in an application

for a Cessation Order, is not a binding precedent from the view point of the *stare decisis* doctrine.

22. All the cases cited by Mr. Michael Soo did not discuss the wide scope of the 1st Limb, 2nd Limb, Order 15 rule 13A(1) and (4) RC. In fact, I am unable to find any Malaysian case which has construed Order 15 rule 13A(1) and (4) RC.

M. Had Plaintiffs wrongly sued 2nd Defendant in These Suits?

23. I am of the view that the 2nd Defendant has been rightly sued by the Plaintiffs in These Suits. This decision is premised on the following reasons:

(1) in the ASOC (1st Suit) and SOC (2nd Suit), the Plaintiffs have pleaded 4 Causes of Action against the 2nd Defendant (please see the above Part J). Accordingly, the 2nd Defendant has not been improperly **and** unnecessarily made a party in These Suits within the meaning of Rule 6(2)(a); and

(2) even if it is assumed that the Plaintiffs have no cause of action against the 2nd Defendant –

(a) the 1st Limb is satisfied because the 2nd Defendant ought to have been joined in These Suits or his presence is necessary in These Suits so that all the following matters in dispute in These Suits may be “*effectually and completely determined and adjudicated upon*” -

(i) in the Counterclaim, among others, the 2nd Defendant has averred that he is aggrieved by the Plaintiff’s Registered Trade Marks and he has therefore applied to Court to expunge the Plaintiff’s Registered Trade Marks from the Register (**2nd Defendant’s Expungement Application**). There is thus a need to join the 2nd Defendant in These Suits so that the 2nd Defendant’s Expungement Application can be “*effectually and completely determined and adjudicated upon*” in These Suits; **and/or**

(ii) during the hearing of the Plaintiffs’ interlocutory injunction application, the Defendants had exhibited a statutory declaration affirmed by the 2nd Defendant (**2nd Defendant’s SD**) under s 42(1) of the Copyright Act 1987. The 2nd Defendant’s SD alleged that the 2nd Defendant is the owner of

copyright in certain rice packaging. As such, the 2nd Defendant's presence in These Suits is necessary to ensure that the question on who is entitled to copyright in certain rice packaging, can be "*effectually and completely determined and adjudicated upon*" in These Suits;

(b) the 2nd Limb is fulfilled because there exists the following questions which arise out of or relate to or connected with any relief or remedy claimed by the Plaintiffs in These Suits which would be just and convenient to determine as between the Plaintiffs and the 2nd Defendant –

(i) whether the 2nd Defendant's Expungement Application should be allowed by this Court; **and/or**

(ii) in view of the 2nd Defendant's SD, who is entitled to copyright in certain rice packaging; **and/or**

(c) the 2nd Defendant "*will or may be affected by any judgment*" given in These Suits within the meaning of Order 15 rule 13A(1) RC. This is because this Court's judgment "*will or may*" affect –

(i) the 2nd Defendant's Expungement Application;

(ii) the 2nd Defendant's 2 Trade Marks Applications which are still pending before the Registrar of Trade Marks;

(iii) the 2nd Defendant's claim to copyright in certain rice packaging; **and/or**

(iv) the weight to be attached to the 2nd Defendant's SD.

N. Court's decision

24. In view of the above reasons, I am constrained to dismiss This Application with costs (**This Dismissal**).

25. In closing, I must state the following:

(1) in respect of This Dismissal, this Court does not express any view in respect of the strength or weakness of the parties in These Suits;

(2) no finding of fact is made regarding This Dismissal. In deciding This Application, the court should not and did not embark on a trial based on the affidavits filed in This Application, especially when there were conflicting averments in the affidavits. This is because in an

interlocutory application, such as This Application, the Court should not resolve any conflict in affidavit evidence – please see **Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor** [2014] 5 AMR 57, at paragraph 18; and

- (3) the integrity of These Suits is preserved and the parties are at liberty to conduct their cases during the trial of These Suits as they see fit without being constrained in any manner by This Dismissal. In other words, This Dismissal does not trigger the application of the issue estoppel doctrine to bar the parties in respect of These Suits.

sgd.

WONG KIAN KHEONG
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

DATE: 9 NOVEMBER 2016

*Counsel for Plaintiff: Ms. Kuek Pei Yee, Mr. Sri Richgopinath a/l Salvam
& Ms. Alyshea Low (Messrs Skrine)*

*Counsel for Defendant: Mr. Michael Soo Chow Ming, Ms. Wendy Lee Wan Chieh,
Mr. Loo Wai Hoong & Ms. Su Min Yuen
(Messrs Shook Lin & Bok)*