LAI SOON ONN v. CHEW FEI MENG & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEALS NO: W-02(IM)(NCC)-2221-12-2016,
W-02(IM)(NCC)-324-02-2017, W-02(IM)(NCC)-325-02-2017
& W-02(IM)(NCC)-326-02-2017]
30 MARCH 2018

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out claim based on tort of conspiracy – Whether claimant entitled to reliefs sought – Whether claimant had locus standi and existing legal right – Whether claim premature – Whether provisions of Capital Markets and Services Act 2007 complied with – Whether there was prior ruling by Securities Commission on contravention of provisions Capital Markets and Services Act 2007 – Rules of Court 2012, O. 18 r. 19(1)*

SECURITIES: *General mandatory offer – Control of shares in company – Failure by shareholders to make mandatory general offer – Claim for declaratory reliefs under ss. 357 and 360 of Capital Markets and Services Act 2007 – Whether claimant entitled to reliefs sought – Whether claimant satisfied conditions under s. 41 of Specific Relief Act 1950 – Whether compliance with Malaysian Code on Take-over and Mergers relevant requirement – Whether ruling by Securities Commission condition precedent to action – Whether claim premature*

TORT: *Conspiracy – Breach of statutory duties – Allegation that shareholders breached statutory duties under Capital Markets and Services Act 2007 – Failure to make certain individuals co-defendants – Whether claim sustainable – Whether non-inclusion of other tortfeasors amounted to release of their liability*

The appellant ('the plaintiff') was a former employee and shareholder of 3,600 shares of Panpages Bhd ('the fifth defendant'). The first defendant at the High Court was the director while the second to fourth defendants were the shareholders of the fifth defendant. The plaintiff commenced an action against the first to fourth defendants on the grounds that (i) they acted in concert with unknown parties in acquiring, jointly and severally, the control of the fifth defendant through their collective shareholding of 33.74% shares; (ii) the first to fourth defendants had breached their statutory duties under the Capital Markets and Services Act 2007 ('the CMSA') and the Code on Take-Over and Mergers 2010 ('the Code') and for their failure to make a mandatory general offer upon assuming control; and (iii) the first to fourth defendants, together with unknown parties, had unlawfully conspired prejudicing the plaintiff's economic interest through unlawful means. The first to fourth defendants applied to strike out the plaintiff's claim, pursuant to O. 18 r. 19(1) of the Rules of Court 2012 ('the ROC'). In support of their application, it was argued, *inter alia*, that (i) to entitle the plaintiff to the

reliefs sought, he must have the *locus standi* and existing legal right and the court may, in its discretion, grant the declaratory reliefs; (ii) the claim under ss. 357 and 360 of the CMSA was premature as there has not been any prior ruling by the Securities Commission ('the SC') on the contravention of the provisions of the CMSA and the Code by the defendants; (iii) the plaintiff failed to show any contravention of a 'relevant requirement' to entitle him to invoke s. 360(1) of the CMSA. The Judicial Commissioner ('the JC') allowed the striking out application by the defendants on the grounds that (i) the plaintiff did not have the *locus standi* and existing right to seek for the declaratory relief prayed for; (ii) the claim by the plaintiff for damages under s. 357 of the CMSA was premature; (iii) where the plaintiff had not obtained the prior ruling from the SC prior to the commencement of the suit, he does not have a cause of action to seek damages; (iv) the plaintiff could not sustain the action of conspiracy as he failed to make certain individuals as co-defendants. Hence, the present appeal. The issues that arose for the court's adjudication were (i) whether the plaintiff had the *locus standi* and existing right; (ii) whether a ruling from the SC is a requirement before s. 357 of the CMSA applied; (iii) whether compliance with the Code was a 'relevant requirement' under the CMSA; and (iv) whether the non-joining of other parties as co-defendants amounted to a release of liability.

Held (dismissing appeal with costs)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) The plaintiff argued that his legal right, as required under s. 41 of the Specific Relief Act 1950 was triggered once he made out a claim under the tort of unlawful conspiracy. There was no nexus between the declaratory relief sought, to the pleading of unlawful conspiracy. The tort of unlawful conspiracy does not give the court the power to grant the declaratory order that the defendants contravened the provisions of the CMSA. The plaintiff must have an existing right, to be entitled to the declaratory reliefs sought. What the plaintiff sought were for reliefs which he was not entitled to under ss. 357 and 360 of the CMSA. (para 33)

(2) The wordings of s. 357 of the CMSA made no mention of any prior ruling from the SC before a plaintiff could make a claim of pecuniary loss as a result of a contravention of the provisions of the CMSA. However, in construing s. 357 of the same, it should not be read literally and in isolation, oblivious to the other provisions of the CMSA. It is the intention of the CMSA that the bodies established under the CMSA are regulatory bodies and it is not the function of the court to usurp their function nor to second guess their decisions. Therefore, a person who has suffered loss or incurred damage may institute a civil action to recover the amount of the loss or damage after a contravention of any provision or any regulations made under the CMSA has been determined by the SC. It is not necessary for the courts to adjudicate

whether there is a contravention of the CMSA before s. 357(1) could be applied. All that was required was for the SC to first determine whether there was a contravention. (paras 38, 43 & 44)

(3) If the phrase 'relevant requirement' in s. 360 of the CMSA applies to Division 2 Part VI of the CMSA, it would render s. 220 superfluous as it would result in overlapping with s. 360(1)(a) of the CMSA. To interpret and construe such that the SC had the right to recourse against the non-compliance with the Code pursuant to ss. 220 and 360 of the CMSA is not harmonious but absurd. In addition, s. 219 of the CMSA confers on the SC the statutory right to grant exemption, in writing, to any person from the provisions of Division 2, the Code and any ruling made under s. 217(4) of the CMSA. Parliament would be acting in vain in enacting s. 219 of the CMSA if the courts are conferred with the power to take away the statutory right accorded to the SC under s. 360. (paras 58 & 59)

(4) Such findings on the release of the joint tortfeasors, due to the non-inclusion, was too early to be determined at this stage and the JC erred in this respect when Her Ladyship concluded that the non-inclusion of the other tortfeasors amounted to a release of their liability. The application for striking out was under limb (a) of O. 18 r. 19(1) of the ROC and no other evidence, except the pleading, was available before the court. Whether there was a release of the other joint tortfeasors was a matter for the defendants to plead in their respective defences and for the JC to decide after hearing the evidence, whether there was indeed an intention of the plaintiff to release the other joint tortfeasors. In the present case, the defendants have yet to file their defences. (para 71)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') ialah bekas pekerja dan pemegang saham 3,600 saham Panpages Bhd ('defendan kelima'). Defendan pertama di Mahkamah Tinggi ialah pengarah manakala defendan kedua hingga kelima adalah pemegang saham defendan kelima. Plaintif memulakan satu tindakan terhadap defendan pertama hingga keempat atas alasan (i) mereka bertindak, bersama-sama dengan pihak-pihak yang tidak diketahui, dalam memperoleh, secara bersama atau berasingan, kawalan defendan kelima melalui pegangan saham kolektif sebanyak 33.74%; (ii) defendan pertama hingga keempat melanggar kewajipan statutori mereka bawah Akta Pasaran Modal dan Perkhidmatan ('CMSA') dan Kod Pengambilalihan dan Percantuman (2010) ('Kod') dan kegagalan mereka membuat tawaran am wajib apabila memperoleh kawalan; dan (iii) defendan pertama hingga keempat, bersama-sama pihak-pihak yang tidak diketahui, bersubahat secara tidak sah, memprejudis kepentingan ekonomi plaintif dengan cara tidak sah. Defendan pertama hingga keempat memohon membatalkan tuntutan plaintif, bawah A. 18 k. 19(1) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Menyokong permohonan mereka,

dihujahkan, antara lain, (i) untuk melayakkan plaintif akan relief yang dipohon, dia mesti mempunyai *locus standi* dan hak undang-undang sedia ada dan mahkamah boleh, dengan budi bicaranya, membenarkan relief-relief pengisytiharan; (ii) tuntutan bawah ss. 357 dan 360 CMSA pra-matang kerana tiada keputusan terdahulu oleh Suruhanjaya Sekuriti ('SS') tentang pelanggaran peruntukan CMSA dan Kod oleh defendan-defendan; (iii) plaintif gagal menunjukkan apa-apa pelanggaran 'relevant requirement' untuk melayakkan dia membangkitkan s. 360(1) CMSA. Pesuruhjaya Kehakiman ('PK') membenarkan permohonan pembatalan oleh defendan-defendan atas alasan (i) plaintif tidak mempunyai *locus standi* dan hak sedia ada untuk memohon relief pengisytiharan yang dipohon; (ii) tuntutan ganti rugi oleh plaintif bawah s. 357 CMSA pra-matang; (iii) apabila plaintif tidak memperoleh keputusan SS terlebih dahulu sebelum memulakan guaman, dia tidak mempunyai kausa tindakan memohon ganti rugi; (iv) plaintif tidak boleh mengekalkan tindakan konspirasi kerana dia gagal menjadikan beberapa individu sebagai defendan bersama. Maka timbul rayuan ini. Isu-isu yang timbul untuk diputuskan oleh mahkamah adalah (i) sama ada plaintif mempunyai *locus standi* dan hak sedia ada; (ii) sama ada keputusan SS adalah syarat sebelum s. 357 CMSA terpakai; (iii) sama ada pematuhan Kod adalah 'relevant requirement' bawah CMSA; dan (iv) sama ada kegagalan memasukkan pihak-pihak lain sebagai defendan bersama terjumlah sebagai pelepasan dari liabiliti.

Diputuskan (menolak rayuan dengan kos)
Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Plaintif menghujahkan haknya bawah undang-undang, seperti yang dikehendaki bawah s. 41 Akta Relief Spesifik 1950 timbul apabila dia berjaya membuktikan tuntutan bawah tort konspirasi tidak sah. Tiada kaitan antara relief pengisytiharan yang dipohon, dengan konspirasi tidak sah. Tort konspirasi tidak sah tidak memberi mahkamah kuasa memberi perintah pengisytiharan bahawa defendan-defendan melanggar peruntukan-peruntukan CMSA. Plaintif mestilah mempunyai hak sedia ada agar layak mendapat relief pengisytiharan yang dipohon. Yang dipohon oleh plaintif adalah relief-relief yang dia tidak layan pohon bawah ss. 357 dan 360 CMSA.

(2) Perkataan-perkataan dalam s. 357 tidak menyebut apa-apa keputusan terdahulu daripada SS sebelum plaintif boleh membuat tuntutan kerugian kewangan akibat pelanggaran peruntukan CMSA. Walau bagaimanapun, dalam mentafsir s. 357 CMSA, bacaan tidak patut dibuat secara harfiah atau berasingan, tidak mengendahkan peruntukan-peruntukan CMSA. CMSA meniatkan agar badan-badan yang diwujudkan bawah CMSA adalah badan-badan kawal selia dan bukan fungsi mahkamah untuk merampas fungsi badan-badan ini mahupun meneka keputusan mereka. Oleh itu, seseorang yang mengalami

kerugian atau kerosakan boleh memulakan tindakan sivil untuk memperoleh jumlah kerugian atau kerosakan sebelum satu pelanggaran apa-apa peruntukan atau apa-apa peraturan yang dibuat bawah CMSA diputuskan oleh SS. Mahkamah tidak perlu mengadili sama ada berlaku pelanggaran CMSA sebelum s. 357(1) boleh diguna pakai. Yang dikehendaki adalah agar SS memutuskan sama ada berlaku pelanggaran.

(3) Jika frasa 'relevant requirement' dalam s. 360 terpakai pada s. 2 Bahagian VI, ini akan menjadikan s. 220 tidak diperlukan kerana menyebabkan pertindanan dengan s. 360(1)(a) CMSA. Tafsiran bahawa SS mempunyai hak merayu terhadap ketakpatuhan Kod bawah ss. 220 dan 360 CMSA bukan tidak harmoni tetapi mustahil. Tambahan lagi, s. 219 CMSA memberi SS hak statutori memberi pengecualian, secara bertulis, kepada mana-mana orang bawah peruntukan s. 2, Kod dan mana-mana keputusan yang dibuat bawah s. 217(4) CMSA. Parlimen bertindak sia-sia menggubal s. 219 CMSA jika mahkamah diberi kuasa mengambil hak statutori yang diberi kepada SS bawah s. 360.

(4) Dapatan tentang pelepasan pelaku bersama tort, akibat kegagalan memasukkan, terlalu awal untuk diputuskan pada peringkat ini dan PK terkhilaf dalam hal ini apabila beliau memutuskan kegagalan memasukkan pelaku-pelaku tort lain yang terjumlah sebagai pelepasan liabiliti. Permohonan pembatalan dibuat bawah cabang (a) A. 18 k. 19(1) KKM dan tiada keterangan lain, kecuali pliding, yang dikemukakan di mahkamah. Sama ada terdapat pelepasan pelaku bersama tort adalah hal perkara yang harus diplidkan oleh defendan-defendan dalam pembelaan masing-masing dan untuk diputuskan oleh PK selepas mendengar keterangan, sama ada plaintif berniat melepaskan pelaku tort bersama yang lain. Dalam kes ini, defendan-defendan belum memfailkan pembelaan mereka.

Case(s) referred to:

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(refd)***

Chan Kern Miang v. Kea Resources Pte Ltd [1998] 2 SLR (R) 85 ***(refd)***

Dato' Abdullah Ahmad & Ors v. Bank Bumiputera Malaysia Bhd [2001] 1 LNS 352 HC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Johnson v. Davies [1999] Ch 117 ***(refd)***

Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case [2012] 7 CLJ 407 HC ***(refd)***

Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor [2004] 6 CLJ 242 HC ***(refd)***

Mak Siew Wei v. Dato' Dr Norbik Bashah Idris & Ors [2016] 6 CLJ 64 HC ***(refd)***

Malbai v. Nawi [1961] 1 LNS 59 HC ***(refd)***

R v. International Stock Exchange of UK and Ireland, ex parte Else Ltd [1993] 1 QB 534 ***(refd)***

Re: Barnato [1949] Ch 258 ***(refd)***
Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor [2017] 4 CLJ 587 CA ***(refd)***
Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(refd)***
Tengku Jaffar Tengku Ahmad v. Karpal Singh [1993] 4 CLJ 183 HC ***(refd)***
Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(refd)***
Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal [2012] 8 CLJ 678 CA ***(refd)***
Yii Ming Tung v. PP [2014] 9 CLJ 1102 CA ***(refd)***
Yung Ing Ing v. Hunfara Construction Sdn Bhd [2015] 8 CLJ 1019 CA ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, ss. 11, 199(1), 201, 210, 216(1), 217(1), (2), (3), (4), 218(2), 218A, 218B, 218C, 218D, 219, 220, 221, 222, 223, 224, 225, 357(1), 360(1)(a), (b), (c), (d), (A), (B), (C), (D), (E), (f), (G), (H), (I), (J), (K), (L), (M), (N), (O), (P), (13)(c)
Federal Constitution, art. 145(3)
Rules of Court 2012, O. 15 r. 4(3), O. 18 r. 19(1)(a)
Securities Commission Malaysia Act 1993, ss. 15(1)(d), 33, 33A, 33B, 33C, 33D, 33E, 34, 34A, 34B, 34C, 153
Specific Relief Act 1950, s. 41

(Civil Appeal No: W-02(IM)(NCC)-2221-12-2016)
For the appellant - Alex Tan Che Sian; M/s Wong Kian Kheong
For the respondent - Justin Wee Kim Fang; M/s Justin Wee

(Civil Appeal No: W-02(IM)(NCC)-324-02-2017)
For the appellant - Alex Tan Che Sian; M/s Wong Kian Kheong
For the respondent - Richard Tee & Karen Tan; M/s Richard Tee & Chin

(Civil Appeal No: W-02(IM)(NCC)-325-02-2017)
For the appellant - Alex Tan Che Sian; M/s Wong Kian Kheong
For the Respondent - Tay Yee Boon & Felix Saw Chia Hui; M/s David Lai & Tan

(Civil Appeal No: W-02(IM)(NCC)-326-02-2017)
For the appellant - Alex Tan Che Sian; M/s Wong Kian Kheong
For the respondent - Sankar Supramaniam; M/s Khaw & Partners

[Editor's note: For the High Court judgment, please see Lai Soon Onn v. Tan Tian Sin & Ors [2017] 7 CLJ 733 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] The appellant (plaintiff in the High Court) appeals against the decision by the learned Judicial Commissioner (JC) in allowing the application by the first to fourth respondents (first to fourth defendants in the High Court) in striking out the writ and the statement of claim of the appellant under O. 18 r. 19(1)(a) of the Rules of Court 2012.

[2] Parties shall be referred to as they were, in the High Court. The first, second, third, fourth and fifth defendants will be referred to as D1, D2, D3, D4 and D5 respectively.

[3] Each of the defendants filed their appeal to the Court of Appeal separately as follows:

(i) Civil Appeal No: W-02(IM)(NCC)-2221-12-2016 concerns the appeal on the striking out application by D3;

(ii) Civil Appeal No: W-02(IM)(NCC)-324-02-2017 concerns the appeal on the striking out application by D2;

(iii) Civil Appeal No: W-02(IM)(NCC)-325-02-2017 concerns the appeal on the striking out application by D4;

(iv) Civil Appeal No: W-02 (IM)(NCC)-326-02-2017 concerns the appeal on the striking out application by D1.

All the appeals were ordered to be heard together by order of the court dated 19 June 2017.

[4] After perusing the appeal records and hearing submissions from learned counsel, we dismissed the appeal by the plaintiff with costs for the reasons hereinafter stated.

Background

[5] The plaintiff is a former employee and shareholder of 3,600 shares of D5.

[6] D1 is a director and shareholder whilst D2-D4 are shareholders of D5.

[7] The pleaded claim by the plaintiff against D1-D4 is that, they were persons acting in concert with parties unknown, in acquiring jointly and severally the control of D5 through their collective shareholding of 33.74 % shares in D5 wherein:

(i) D1 held 43,762,400 shares, equivalent to 18.25% of the voting shares in D5;

(ii) D2 held 3,597,700 shares, equivalent to 1.5% of the voting shares in the D5;

(iii) D3 held 9,228,200 shares, equivalent to 3.85% of the voting shares in the D5;

(iv) D4 held 24,327,875 shares, equivalent to 10.14% of the voting shares in the D5.

[8] In doing so, the plaintiff alleged that D1-D4 had breached their statutory duties under the Capital Markets and Services Act 2007 (CMSA) and the Malaysian Code on Take-Over and Mergers 2010 (the Take-Over Code) for their failure to make a mandatory general offer (MGO) upon assuming control of D5 on 27 March 2012.

[9] It is also pleaded that D1-D4, together with unknown parties had unlawfully conspired prejudicing the plaintiff's economic interest through unlawful means. Particulars of the alleged conspiracy are as listed in paras. 12, 15-17 of the statement of claim.

[10] The plaintiff in his statement of claim sought for, *inter alia*, declaratory as well as other reliefs that:

(a) D1-D4 were persons acting in concert to obtain control of D5;

(b) D1-D4 had contravened s. 218(2) of the CMSA and s. 9(1) of the Take-Over Code upon their failure to undertake an MGO for the shares in D5;

(c) Damages for the losses suffered by the plaintiff as a result of the alleged breach of statutory duties by D1-D4; and

(d) An order to compel D1-D4 to undertake an MGO.

[11] At this juncture, it is pertinent to note that the Securities Commission (SC) has yet to make any ruling on D1-D4's purported contravention/breach of the CMSA and the Take-Over Code.

[12] D1-D4 filed their applications to strike out the plaintiff's claim under O. 18 r. 19(1)(a) of the Rules of Court 2012. The application by D3 was allowed by the High Court on 11 November 2016, whilst the applications by D1, D2 and D4 were allowed by the High Court on 18 January 2017.

Arguments By The Defendants

[13] D3 argued that to entitle the plaintiff to the reliefs sought, he must have the *locus standi* and an existing legal right and the court may in its discretion grant the declaratory reliefs (refer to s. 41 of the Specific Relief Act (SRA)).

[14] The plaintiff pleaded two causes of action against the defendants ie, breach of statutory duties and unlawful conspiracy. The statutory duties that the plaintiff is relying upon, are the statutory duties as stipulated under the CMSA.

The argument by the plaintiff that once he makes out the claim under the tort of unlawful conspiracy, he has no difficulty to meet the wordings of "legal right" as stipulated under s. 41 of the SRA, is misconceived. The declaratory reliefs prayed for, by the plaintiff are in relation to a purported breach of the statutory duties under the CMSA which is not related to the tort of conspiracy at all. Hence the learned JC was correct in exercising her discretion in not granting the declaratory reliefs.

[15] The plaintiff claimed that his right to damages against the defendants is pursuant to ss. 357(1) and 360 of the CMSA.

On the claim by the plaintiff under s. 357 of the CMSA, it is premature, at this juncture, as there has not been any prior ruling by the SC on the contravention of the provisions of the CMSA and the Take-Over Code by the

defendants. The defendants rely on the decision of the Court of Appeal in *Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor* [2017] 4 CLJ 587 in the construction of s. 153 of the Securities Commission Malaysia Act 1993 (SCA) (which has since been repealed) which is in *pari materia* with s. 357 of the CMSA.

As for the claim by the plaintiff under s. 360 of the CMSA, the plaintiff bears the burden of satisfying the court that he had been aggrieved by an alleged contravention by the defendants of a "relevant requirement", as under s. 360 of the CMSA, the court's discretion is only exercisable on the application by a person aggrieved by an alleged contravention by another person of a "relevant requirement". Compliance of the Take-Over Code is not a contravention of a "relevant requirement" as defined in s. 360(13)(c) of the CMSA. The plaintiff failed to show any contravention of a "relevant requirement" as defined, to entitle him to invoke s. 360(1)(d) of the CMSA.

[16] Section 360 of the CMSA is not intended to compel the defendants to undertake an MGO and neither does it give the plaintiff the private right to enforce the MGO.

[17] If s. 360 of the CMSA is intended to confer on the courts with the discretion to compel the defendants to undertake an MGO upon the plaintiff's application, then the courts will deprive the SC of its statutory right pursuant to s. 219 of the CMSA, to grant exemptions in writing to any person from the provisions of division 2 of the CMSA, the Take-Over Code and any ruling made under s. 217(4) of the CMSA. Granting this order would mean that this court is usurping the SC's discretion to grant an exemption.

[18] Further, D1 and D2 submit that, in view of the court granting the application of striking out by D3 earlier, the plaintiff's claim is no longer sustainable against D1 given that the statutory minimum shareholding of 33% under ss. 216(1) and 218(2) of the CMSA 2007 and s. 9(1) of the Take-Over Code 2010 has not been met to require an MGO to be made. By reason of D3's striking out order earlier by the court, D3's purported shareholding in D5 can no longer be taken into account by the court. After excluding D3's shareholding, the collective shareholding of D1, D2 and D4 will only amount to 29.89% which is less than the statutory minimum shareholding of 33% as prescribed by CMSA and the Take-Over Code. Hence, D1, D2 and D4 cannot be categorised as persons who have control of D5 as defined in s. 216 of the CMSA and the need to make an MGO does not arise against D1, D2 and D4.

[19] It is also the pleaded case of the plaintiff that D1-D4 had conspired with "other unknown parties" to jeopardise the plaintiff's economic interest through unlawful means. A perusal of para. 12(c) of the statement of claim shows that the "other unknown parties" refers to Wong Kim Sun, Lau Kok

A Fui and Teh Chai Leng. These tortfeasors were not named as co-defendants by the plaintiff. There was no reason given as to why they were not named as co-defendants. Such failure, had in effect discharged their liabilities.

[20] The plaintiff pleads that there is a concerted action by the co-conspirators towards the common end, namely to cause pecuniary loss
B and damage to the plaintiff. The defendants referred to the High Court cases of *Malbai v. Nawi* [1961] 1 LNS 59; [1962] 28 MLJ 99 and *Dato' Abdullah Ahmad & Ors v. Bank Bumiputera Malaysia Berhad* [2001] 1 LNS 352; [2001] MLJU 638, to contend that the entire allegation of conspiracy cannot be sustained as the entire substratum of the plaintiff's claim falls by his failure
C to make the three individuals as co-defendants. Therefore, the plaintiff has no cause of action for damages against the defendants under the tort of conspiracy.

[21] Further, courts will not grant academic declarations (see *Re: Barnato* [1949] Ch 258). The declaratory relief prayed for, by the plaintiff is for a
D declaration that the defendants committed a criminal offence under the CMSA. In essence, the plaintiff is inviting the court to step in and usurp the powers of the Attorney General. Once the court grants the declaratory relief of the contravention by the defendants, then there is no need for the Attorney General to institute criminal charges against the defendants. The declaratory
E reliefs will then be academic as the plaintiff cannot enforce them by way of a criminal prosecution. (See the case of *Tengku Jaffar Tengku Ahmad v. Karpal Singh* [1993] 4 CLJ 183; [1993] 2 AMR 35.)

[22] In addition, civil courts will not entertain matters pertaining to criminal jurisdiction. (see *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan*
F *& Anor* [2004] 6 CLJ 242; [2004] 2 MLJ 119 at para. 51).

[23] The SC is tasked to regulate the take-over and mergers of companies. (See s. 15(1)(d) of the SCA). It is also clear that the SC is mandated to administer the Take-Over Code. (see s. 217(4) of the CMSA).

G Section 11 of the CMSA empowers Bursa to carry out its duties to ensure an orderly and fair market in the securities or derivatives that are traded through its facilities.

It is not for the courts to usurp the functions of the market regulatory bodies like the SC and the Bursa in carrying out its objective as stipulated under the
H law. In addition, it is a trite principle of law that a court will not second-guess the decisions of the market regulators (see *R v. Securities and Futures Authority ex p Panton (Unreported)* where Sir Thomas Bingham said that:

> It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but
I recognition of that jurisdiction must in my judgment be combined with a recognition that the clear intention of the Act is that the bodies

> established under the Act should be regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were to look over their shoulder.

[24] The same principle was referred to and approved in our local case of *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698; [2009] 4 MLJ 695 at p. 599 (CLJ); p. 719 (MLJ) and *Shahidan Shafie* (*supra*) where the Court of Appeal in its decision in *Shahidan Shafie* (*supra*) said that:

> If we were to adopt the interpretation of section 153 of the SC Act of the plaintiff, it would amount to the court stepping into the shoes of the Securities Commission which is tasked to supervise and regulate the conduct of companies. As we have said earlier, that is not and cannot be the intention of Parliament ... .

(Also refer to *R v. International Stock Exchange of UK and Ireland, ex parte Else Ltd* [1993] 1 QB 534)

Arguments By The Plaintiff

[25] It is the submission of the plaintiff that once he makes out a claim under the tort of unlawful conspiracy, he will be able to meet the requirement of "legal right" under s. 41 of the SRA. The plaintiff also submits that apart from the provision of s. 41 of the SRA, the court has the inherent power to grant the declaratory reliefs sought for by the plaintiff.

[26] The learned JC erred when she equated the non-joining of the other parties as co-defendants, as a form of release. It is settled law that where two or more persons are liable for the tort of conspiracy, liability of each is joint and several, as was pleaded in this case. As a rule, where liability is joint and several, a plaintiff is entitled to sue whomsoever he wishes. This is provided under O. 15 r. 4(3) of Rules of Court 2012. The issue as to whether there was in fact a release of the other co-conspirators is a matter to be adjudicated upon, at full trial based on evidence adduced.

[27] On *Shahidan Shafie* (*supra*), the plaintiff submits that it was decided *per incuriam* and the plaintiff invites the court not to follow *Shahidan Shafie* (*supra*) for the following reasons:

(a) section 357 of CMSA is clear and unambiguous and ought to be given a literal construction;

(b) there is no requirement of any prior ruling from the SC of any contravention to be obtained before the claim for the loss can be made under s. 357 of the CMSA. Apart from s. 357 of the CMSA there are other similar provisions, namely ss. 199(1), 201, 210 of the CMSA which provide for similar provisions where the person who suffers loss or damage by reason of the conduct of another person who has contravened the provisions of the CMSA may recover the amount of loss or damage by instituting civil proceedings against the other person,

regardless whether the other person has been charged with an offence in respect of the contravention or whether or not such contravention has been proved in a prosecution;

(c) it is incomprehensible to require an aggrieved person to first secure a ruling from the SC bearing in mind that the section sets down the limitation period for the aggrieved person to commence civil proceedings, in the event SC's rulings come after six years. The law on this issue is unsettled and hence it raises questions of law that are sufficiently arguable to justify proceeding to trial. The issue of limitation was never considered by the court in *Shahidan Shafie* (*supra)* and by the learned JC in our present case;

(d) to construe a ruling from SC is necessary before a claim for economic loss can sustain is contrary to the overall scheme of the CMSA.

[28] The plaintiff is of the view that the interpretation of the learned JC in the High Court case of *Mak Siew Wei v. Dr Norbik Bashah Idris & Ors* [2016] 6 CLJ 64; [2016] 11 MLJ 772 is to be preferred, in the construction and interpretation of the scope of s. 357 of the CMSA, where prior ruling of the SC is not a pre-requisite before a claim of damages under s. 357 CMSA can be instituted.

[29] The learned JC erred in concluding that ss. 357 and 360 cater for different situations and took an over-simplistic approach in construing s. 360 of CMSA when she found that the obligation on the part of the defendants to make an MGO was not a "relevant requirement". There is nothing in s. 360 of the CMSA which limits its application to breach or non-compliance of a provision where the word "requirement" appears.

[30] The plaintiff is of the view that this court in *Shahidan Shafie* (*supra*) failed to consider s. 360 of the CMSA. Section 360 of the CMSA can stand alone and is independent of s. 357 of the same.

[31] The learned JC also erred when she held that the declaratory relief sought by the plaintiff is academic. The declaratory relief relates to a contravention of a provision of the CMSA which also gives rise to a civil remedy and it is not abstract or hypothetical.

The Findings By The Learned JC

[32] The learned JC allowed the striking out applications by the defendants premised upon the following:

(i) The plaintiff does not have the *locus standi* and an existing right to seek for the declaratory relief prayed for. Section 357 of the CMSA does not confer a private cause of action to the plaintiff to claim for pecuniary loss against the defendants due to contravention by the defendants of the provisions of the CMSA or its regulations thereunder, without a prior ruling from the SC as to the alleged contravention. Section 360 of the

CMSA is not applicable as it does not confer upon the court the powers to grant declaratory reliefs for failure to comply with the Take-Over Code. The court is bound by *Shahidan Shafie* (*supra*). Where the plaintiff has not obtained the prior ruling from the SC prior to the commencement of the suit, he does not have a cause of action to ask for damages. Hence the claim by the plaintiff for damages under s. 357 of the CMSA is premature;

(ii) Section 360 of the CMSA envisaged a situation where one becomes an aggrieved person only when there is a contravention of a "relevant requirement". The requirement can be ascertained *via* an objective test. Compliance with the Code is not a "relevant requirement". The word "requirement" is not found in ss. 217-220 of the CMSA, thus s. 360 of the CMSA is not intended to confer on the plaintiff a right to apply to compel the defendants to undertake an MGO;

(iii) Division 2 of part VI of the CMSA does not provide for a private right to enforce the Take-Over Code. Section 220 of the CMSA (which is in Division 2 Part VI) provides for recourse to the SC to take action in cases of non-compliance with the Take-Over Code. The learned JC was of the view that s. 360 of the CMSA does not apply to division 2 part VI and that ss. 220 and 360 of the CMSA cannot be the same;

(iv) The learned JC disagreed with the findings in *Mak Siew Wei* (*supra*) as there was no consideration of s. 41 of the SRA, the relevant requirement under s. 360 of the CMSA and the different components of the reliefs sought;

(v) The plaintiff is not entitled to the declaratory reliefs sought under ss. 357 and 360 of the CMSA and that the relief sought is academic as it is unacceptable that criminal law should be enforced by means of civil proceedings through a mere declaration;

(vi) The plaintiff cannot sustain the action of conspiracy as he failed to make certain individuals as co-defendants. The learned JC was of the view that, a charge of collusion or conspiracy cannot be sustained when not all tortfeasors are charged or sued in the same case, as the entire substratum of the claim is affected by the failure of the plaintiff to make the three individuals named in para. 12(c) of the statement of claim as co-defendants. The learned JC held that the failure to include them as co-defendants amounts to a release of their liability;

(vii) D1, D2 and D4 filed similar applications for striking out as D3 which was struck out earlier by the court. D1, D2 and D4 contend that since the plaintiff's writ and statement of claim had been struck out against D3, the plaintiff's claim against D1, D2 and D4 is no longer sustainable as D1, D2 and D4's collective shareholding amount only to 29.89%

which is less than the statutory minimum requirement shareholding of 33% as prescribed by CMSA and the Take-Over Code for MGO to take effect. Hence the plaintiff does not have a cause of action against D1, D2 and D4.

Our Decision

Whether The Plaintiff Has The Locus Standi And Existing Right

[33] We disagree with the argument of the plaintiff that his legal right as required under s. 41 of the SRA is triggered once he makes out a claim under the tort of unlawful conspiracy. There is no nexus between the declaratory relief sought, to the pleading of unlawful conspiracy. The tort of unlawful conspiracy does not give the court the power to grant the declaratory order that the defendants contravened the provisions of the CMSA. The plaintiff must have an existing legal right, to be entitled to the declaratory reliefs sought. What the plaintiff is seeking from this court is for reliefs which he is not entitled to under ss. 357 and 360 of the CMSA.

Sections 357(1) and 360 of the CMSA do not empower the court to grant the plaintiff the declaratory reliefs sought for. Section 357(1) of the CMSA is to cater for the recovery of pecuniary losses and s. 360 of the CMSA confers the court with a discretionary power to make a variety of orders (which will be elaborated in detail in the later part of this judgment).

The facts and circumstances of the present case show that the plaintiff does not possess the required standing or the legal right to seek for the declaratory reliefs prayed for, in the claim.

Whether A Ruling From The SC Is A Requirement Before Section 357 Of The CMSA Applies

[34] The claim by the plaintiff on breach of statutory duties places heavy reliance on s. 357 of the CMSA which states:

> (1) A person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part V1 or any regulations made under this Act may recover the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the 19 contravention or whether or not a contravention has been proved in a prosecution.
>
> (2) Notwithstanding the provisions of any written law relating to limitation of time, an action under subsection (1) may be begun at any time within six years from the date on which the cause of action accrued or the date on which the person referred to in subsection (1) became aware of the contravention, whichever is the later.

[35] The learned JC held that prior ruling by the SC of contravention is mandatory before a private action under s. 357 of the CMSA can be invoked. The learned JC finds support in *Shahidan Shafie* (*supra*) where this court held that a breach of the SCA and Take-Over Code does not give rise to an independent private cause of action for breach of statutory duties under s. 153 of the SCA until the SC has made a ruling.

[36] The plaintiff submits that *Shahidan Shafie* (*supra*) was decided *per incuriam* and the plaintiff invites this court not to follow *Shahidan Shafie* (*supra*) and submits that s. 357 of the CMSA ought to be given its literal and ordinary construction in view of the wordings being explicit and unambiguous.

[37] We disagree with the arguments of the plaintiff in this respect for the reasons that follow.

[38] We do not deny the wordings of s. 357 of the CMSA which made no mention of any prior ruling from SC before a plaintiff can make a claim of pecuniary loss as a result of a contravention of the provisions of the Act. However, in construing s. 357 of the same, it should not be read literally and in isolation, oblivious to the other provisions of the CMSA. Section 357 must be looked at holistically, together with the other provisions of CMSA and the conceptual context in which it was drafted. This aspect was addressed in *Shahidan Shafie* (*supra*) at paras. 24 and 28 of the judgment.

[39] By the very nature of the declaratory reliefs prayed for, essentially the plaintiff seeks a declaration that the defendants committed a criminal offence under the CMSA. Before such a declaration can be made there must be a determination of a contravention. By filing his claim in the civil courts, the plaintiff is seeking for such determination to be made by the civil court in a civil proceeding. Such cannot be the case. The burden of proof between the two is different. Essentially, it is not for the civil court to intrude into the domain of the criminal court. That cannot be the intention of s. 357 of the CMSA.

[40] It is the Attorney General who has the conduct of prosecution and not the court. It is also the prerogative of the Attorney General under art. 145(3) of the Federal Constitution to institute, conduct or discontinue any proceedings for an offence. By asking for the declaratory reliefs, the plaintiff is urging this court to usurp the powers of the Public Prosecutor, who has control of criminal prosecution in the country. We agree with the submission of D3 that this is a collateral attempt to bypass the role of the Attorney General, and if allowed will open floodgates to litigation of this nature.

[41] Criminal law cannot be enforced by civil proceedings to obtain a declaration that a criminal offence has been committed. This principle is aptly ruled in *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, by Salleh Abas LP wherein he said that:

> It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the court's powers to grant that remedy is only at the discretion of the court. Jurisdiction of a criminal court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney General is the guardian of public interest and as the Public Prosecutor, he, not the court, is in control of all prosecutions.

[42] Similarly, it is not for the court to usurp the function of the market regulatory bodies in carrying out its objective as stipulated under the law. The functions of the SC are statutorily provided in s. 15(1)(d) of the SCA, where it is tasked to regulate the take-over and mergers of companies. Section 217(4) of the CMSA provides that:

> The Commission shall administer the Code and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code and without limiting the generality of the foregoing:
>
> (a) issue rulings:
>
> (i) to interpret this Division and the Code;
>
> (ii) on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition; and
>
> (b) enquire into any matter relating to any take over offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission thinks fit with respect thereto.

[43] Gleaning through the provisions of the CMSA, it is the intention of the Act that the bodies established under the Act are regulatory bodies and it is not the function of the court to usurp their function nor to second guess their decisions. In *R v. International Stock Exchange of UK and Ireland Ltd, ex parte Else Ltd* [1993] 1 QB 534, Lord Bingham observed that "the court will not second guess the informed judgment of responsible regulators steeped in knowledge of their particular market." This court applied the same principle in *Shahidan Shafie* (*supra*) in arriving at its decision when interpreting s. 153 of the SCA. To interpret otherwise would result in a situation where there would be two decisions, one of the court and the other from the SC. That cannot be the position in law (refer to para. 29 of *Shahidan Shafie* (*supra*). The courts have shown a reluctance to interfere with the decision of regulatory bodies in carrying out its objective in the absence of *mala fide* or acting in excess of jurisdiction. A similar stance was taken by this court in *Bursa Malaysia Securities Berhad* (*supra*) and also in *Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case* [2012] 7 CLJ 407; [2012] 6 MLJ 131 which had referred to various Commonwealth jurisdictions, which demonstrated the attitude of the courts in reviewing the decision made

by the regulators in different jurisdictions. Therefore, it is not within this court's jurisdiction to interfere with the duties mandated to the market regulatory bodies in maintaining and promoting the interests of the public in dealing on the exchange and these bodies should be left to carry out its objective as stipulated under the Act.

[44] Therefore, a person who has suffered loss or incurred damage may institute a civil action to recover the amount of the loss or damage after a contravention of any provision or any regulations made under the CMSA has been determined by the SC. It is not necessary for the courts to adjudicate whether there is a contravention of the Act before s. 357(1) of the CMSA can be applied. All that is required is for the SC first to determine whether there was a contravention.

[45] In *Shahidan Shafie* (*supra*), this court considered the application of s. 153 of the SCA, together with other provisions of the SCA in arriving at its decision, namely ss. 33-34C of the SCA which are in *pari materia* with ss. 216-225 of the CMSA. Sections 216-225 of the CMSA are in division 2 part VI of the same. Hence s. 153 of the SCA was not considered in isolation by this court then. The court in *Shahidan Shafie* (*supra*) has undertaken the correct purposive approach in determining the scope and applicability of s. 153 of the SCA and to reflect the intention of Parliament.

Section 357 And section 360 Of The CMSA

[46] Apart from s. 357 of the CMSA, the plaintiff also relies on s. 360 of the CMSA in his claim against the defendants. The plaintiff submits that the learned JC erred when she concluded that s. 360 of the CMSA was not applicable because the obligation on the part of the defendants to make a take-over offer was not a "relevant requirement" under s. 360 of the CMSA. The learned JC premised her decision on the fact that the word "requirement" does not appear in ss. 217-220 of the CMSA. The effect of the learned JC's decision would be that s. 360 of the CMSA is only applicable to a breach or contravention of the provisions in CMSA where the word "relevant requirement" appears. The plaintiff submitted that this is where the learned JC erred when the word "requirement" must be given its ordinary meaning ie, a requirement which is imposed by or under the CMSA. There is nothing in s. 360 of the CMSA which limits its application to breach or non-compliance where the word "requirement" appears. In any event, plaintiff is of the view that the word "relevant requirement" under s. 360 of the CMSA is a novel area of the law which has not been specifically considered by the Federal Court. In the circumstances, the plaintiff submits that further argument on this novel point of law is necessary and therefore, the plaintiff's claim is unsuitable to be struck out.

[47] We are not persuaded by the arguments from the plaintiff in this respect.

Firstly, although this may be a novel point of law, it does not justify it going to trial as the facts are not in dispute. The issues are in relation to the interpretation of ss. 357 and 360 of the CMSA, therefore it concerns the construction of the relevant sections of the CMSA. Evidence of witnesses with regard to the construction of provisions of the CMSA is of no effect and irrelevant.

Secondly, we agree with the learned JC's findings that ss. 357 and 360 of the CMSA cater for two separate eventualities.

Section 357 of the CMSA is a specific provision which confers the right to a plaintiff to claim for pecuniary losses due to the act of the other party who had contravened the provisions of CMSA or its regulations, whilst s. 360 of the CMSA is a general provision which confers upon the court with discretion to make various orders where it appears to the court that certain persons had "contravened a relevant requirement". Section 360 of the CMSA confers the right to claim on three classes of persons or bodies to apply to court to make one or two of the orders as prescribed in s. 360(1)(A) to (P) of the same. The three classes of persons are:

(i) The SC (s. 360(1)(a) and (b) of the CMSA);

(ii) The Bursa, exchange holding company, futures exchange or an approved clearing house (section 360(1)(c) of the CMSA);

(iii) a person aggrieved by an alleged contravention by another person of a relevant requirement (s. 360(1)(d) of the CMSA).

[48] The word "relevant requirement" is used in s. 360(1)(a), (c) and (d) of the CMSA. It appears from the reading of s. 360 of the CMSA that a contravention of a "relevant requirement" is a condition precedent before a person aggrieved can invoke s. 360 of the CMSA.

[49] The word "aggrieved person" is not defined in the CMSA, however, under s. 360(1)(d) of the CMSA, it appears that an "aggrieved person" is a person aggrieved by an alleged contravention by another person of a "relevant requirement." The term "relevant requirement" is defined in s. 360(13)(c) of the CMSA where it provides that:

> [13] For the purposes of this section, "relevant requirement":
>
> (c) in relation to an application by the **aggrieved person, means** a requirement:
>
> (i) which is imposed by or under this Act;
>
> (ii) which is imposed as a condition or restriction of any approval or licence that is given or issued under or pursuant to this Act or any securities laws;
>
> (iii) which is imposed by or under the rules of a stock exchange, a derivatives exchange or an approved clearing house.
>
> (emphasis added)

[50] The usage of the word "means" in s. 360(13)(c) of the CMSA indicates that "relevant requirement" is meant to be exhaustive, restrictive and not open-ended, as opposed to the word "includes". (refer to *Yii Ming Tung v. PP* [2014] 9 CLJ 1102; [2015] 3 MLJ 596 and *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624).

[51] The CMSA expressly provides for requirements to be complied with in various sections of the Act, namely:

(i) Section 58 - Requirement for Capital Markets Services Licence;

(ii) Section 59 - Requirement for Capital Markets Services Representative's Licence;

(iii) Section 67 - Minimum financial requirements;

(iv) Section 139B - Requirement for approval to establish or operate a private retirement scheme administrator;

(v) Section 212 - Requirement for approval, registration, authorisation or recognition;

(vi) Section 232 - Requirement to register prospectus in relation to securities;

(vii) Section 234 - Requirement to lodge prospectus with Registrar;

(viii) Section 258 - Requirement for trust deed and trustee;

(ix) Section 288 - Requirement for trustee and deed.

Whether Compliance With The Take-Over Code Is A "Relevant Requirement" Under The CMSA

[52] Thus, the question arises whether compliance with the Take-Over Code is a "relevant requirement" under the CMSA.

[53] The Take-Over Code is prescribed by the Finance Minister on the recommendation of the SC - s. 217(1) of the CMSA. The Finance Minister, may from time to time, on the recommendation of the SC, amend the provision of the Take-Over Code - s. 217(2) of the CMSA. The Take-Over Code contains principles governing take-over offer, merger or compulsory acquisition- s. 217(3) of the CMSA.

[54] The word "requirement" does not appear in ss. 217-220 of the CMSA. In fact, s. 218 of the CMSA uses the words "compliance with Code, guidelines, directions and practice notes and rulings". What is the rule of construction to be applied when there are such wordings in the legislation? In the Court of Appeal case of *Yung Ing Ing v. Hunfara Construction Sdn Bhd* [2015] 8 CLJ 1019; [2015] 5 MLJ 668 this court had the occasion to consider the implication of such wordings in the statute, when Parliament includes a particular term in one part or section of the statute but omits it in another part or section of the same statute. In such instance, this court held that:

A [30] ... it is a principle of interpretation of statutes that where the Legislature includes a particular term in one part or section of a statute but omits it in another part or section of the same, it must be presumed that the Legislature acts intentionally and purposely in the disparate inclusion or exclusion. There are the principles of construction as pointed out by *Bennion on Statutory Interpretation* (LexisNexis (5th Ed). at
B p. 1157, 1160):

> Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are that every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should be given different
C meanings.
>
> Every word to be given meaning On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must
D not be disregarded.
>
> Different words to be given different meanings Similarly it is presumed that the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning...

E [30] Therefore, the inclusion of the word 'cheque' in limb (c) of subsection (2) of section 121 and the exclusion of the word 'cheque' in the latter limb of that subsection was done intentionally and purposely by Parliament; and the court must give effect to the intention of Parliament: that whilst the former limb (limb (c)) applies to cheques, the latter (subsequent) limb does not.

F **[55]** Therefore, guided by the principle of construction in the above case, as the word "requirement" is not found in ss. 217-220 of the CMSA, it must therefore follow that it was never the intention of Parliament when it legislated s. 360 of the CMSA to confer on the plaintiff a right to apply to court to compel the defendants to undertake an MGO. This is fortified
G further if one is to examine the provisions of division 2 of part VI of the CMSA (comprising of ss. 217-220). This is in *pari materia* with division 2 part IV of the SCA (comprising of ss. 33-34C).

Division 2 Part VI Of CMSA

H **[56]** Division 2 Part VI of the CMSA does not provide for any right of a dissenting shareholder to apply to the courts for an order to compel the defendants to undertake an MGO. These rights of the minority shareholders are provided for under ss. 223 and 224 of the CMSA, however the provisions do not provide for a private right to enforce the Take-Over Code. If
I Parliament intended for a private right to enforce the Take-Over Code, it would have been provided for in either ss. 223 or 224 or in any of the provisions in division 2 of part VI of the CMSA.

[57] Sections 217 and 218 CMSA are specific provisions in relation to compliance to the Take-Over Code. Section 220 of the same provides for recourse to the SC for action to be taken in cases of non-compliance of the Take-Over Code. Section 360(1)(a) of the CMSA also provides a recourse for SC to obtain certain orders from the courts if there is a contravention of a "relevant requirement". This was illustrated in the Federal Court case of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 2 AMR 235 where s. 360(1) of the CMSA was invoked by SC. The court granted an *ex parte* interim injunction pursuant to s. 360 of the CMSA restraining the respondent from dissipating or dealing with funds believed to be proceeds of offences committed by the respondent under the security provisions. Another instance where s. 360 of the CMSA was applied, is in the Court of Appeal case of *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa Malaysia Securities Bhd & Another Appeal* [2012] 8 CLJ 678; [2013] 1 AMCR 213 where the respondent successfully applied under s. 360(1)(c) of the CMSA for orders to enforce penalties for breaching the listing requirement.

[58] We agree with the submission of counsel for D3, that if the phrase "relevant requirement" in s. 360 of the CMSA applies to division 2 part VI of the CMSA (in which s. 220 is part therein), then it would render s. 220 superfluous as it would result in overlapping with s. 360(1)(a) of the CMSA. To interpret and construe such that the SC has the right of recourse against non-compliance with the Take-Over Code pursuant to s. 220 and 360 of the CMSA is not harmonious but absurd.

[59] In addition, s. 219 of the CMSA confers on the SC the statutory right to grant exemption in writing to any person from the provisions of division 2, the Take-Over Code and any ruling made under s. 217(4) of the same. Parliament would be acting in vain in enacting s. 219 of the CMSA if the courts are conferred with the power to take away the statutory right accorded to the SC under s. 360 of the same.

[60] Therefore, it is our conclusion that it was never the intention of the Legislature that s. 360 of the CMSA is to confer a private right to compel the defendants to undertake an MGO.

[61] The plaintiff relied heavily on *Mak Siew Wei* (*supra*) whereby the learned JC held that s. 357 of the CMSA allows any person who have suffered loss or damage as a result of the breach by another in not complying with the mandatory general offer requirements, the right to recover by instituting civil proceedings against the person in breach, without the need for the SC to make a prior ruling that there was a breach, or whether a person has been acting in concert to obtain control, or that there was a breach as a result. The court in *Mak Siew Wei* (*supra*) held that:

> [6] The decision in *Shaidan Shafie* was based on the construction of s 153 of the Securities Commission Act 1993, which has since been repealed. Although subsequently resurrected in identical versions, it was removed

A from the SCA and instead now found in s 357 in an entirely different legislative framework and contextual existence of the much consolidated CMSA, justifying a fresh examination of the true jurisdictional remit of s. 357.

[62] This court in *Shahidan Shafie* (*supra*) "apart from giving the words used
B their natural meaning" did not look at s. 153 of the SCA "in isolation but viewed it in the context of the other provisions in the Act so as the whole Act can be read consistently" (refer to paras. 23, 24 and 25 of the judgment of *Shahidan Shafie* (*supra*)).

[63] The court in *Mak Siew Wei* (*supra)* failed to address the difference in
C the scope of s. 357 and the generality of s. 360 of the CMSA. It also failed to address the issue on the usurping of the powers of the SC and the powers of the Attorney General in the institution of prosecution of criminal cases. The learned JC in *Mak Siew Wei* (*supra*) said in his judgment at p. 96 (CLJ); para. 59 at p. 809 (MLJ) of the report that:

D [59] The fundamental and pivotal point is for all intents and purposes, for the claimant to establish his case of a contravention by the alleged defaulter occasioning a loss to the former on the civil standard of proof of a balance of probabilities. This requires the parties to invoke the civil litigation court processes and procedures principally in respect of pleadings and discovery to present a case of contravention of the relevant
E mandatory offer provisions.

[64] The effect of that stance may create a situation that, there may be two conflicting decisions between the SC and the civil courts, as we have alluded to in the earlier part of this judgment. How do we reconcile such differences?

F We are of the view, that cannot be the case. Such interpretation would create an absurd situation, which cannot be the intention of the Legislature. It makes more sense if we are to construe that s. 357 of the CMSA can only be invoked once there is a ruling from the SC as to whether there is a contravention rather than be left to the civil courts to make such findings.
G *Shahidan Shafie* (*supra*) had addressed the problem that could be encountered if prior ruling from the SC was not obtained as follows:

[29] ... Our interpretation reconciles s. 153 with the other provisions in the SC Act and that is the private cause of action for breach of statutory duty is preserved to the extent only after the Securities Commission has made
H a specific ruling. This would avoid a situation where there would be two decisions, one of the court and the other the Securities Commission. This scenario would bring uncertainty to the business world which must be avoided. Our interpretation allows only one decision at one time and that is the decision of the Securities Commission until the same is either set aside or substituted by the courts.

I **[65]** The court in *Mak Siew Wei* (*supra*) also failed to consider s. 41 of the SRA as to the existence of the rights of the plaintiff therein in seeking for a declaration that the seven defendants were acting in concert to obtain control of the eighth defendant (company), that they had contravened s. 218(2) of the

CMSA and s. 9(1) of the Take-Over Code for their failure to undertake an MGO for the shares in the eighth defendant. Like in our present case, the defendants therein also submitted that the plaintiff's claim on the tort of unlawful conspiracy could not be sustain premised on the same alleged breach of the CMSA and the Take-Over Code, which, following from *Shahidan Shafie* (*supra)* was only actionable if there was a prior ruling of the same by the SC.

[66] The learned JC in *Mak Siew Wei* (*supra*) took into account the policy of the SC in introducing the new Bill of CMSA which promotes activism from the public whereby the court referred to the Corporate Governance Blueprint 2011 issued by the SC which states that "Malaysian laws empower shareholders to seek civil remedies through private enforcement actions …". That statement failed to provide any assistance in the construction of s. 357 of the CMSA as to whether prior ruling from SC is required. There is no doubt that private action is available, as held by this court in *Shahidan Shafie* (*supra*), but a prior ruling of contravention from the SC must be obtained.

Whether The Non-joining Of The Other Parties As Co-defendants Amounts To A Release

[67] The plaintiff's pleaded case is that the defendants are jointly and severally liable for the acts of unlawful conspiracy, where they pleaded as follows:

> 17. Setiap tindakan yang dinyatakan di atas telah dilakukan oleh pihak-pihak yang disebut di atas, sama ada bagi pihak mereka sendiri atau pun bagi pihak pekomplot-pekomplot yang lain menurut konspirasi yang disebut di atas. Selanjutnya atau secara alternatifnya, Defendan-defendan ialah pelaku-pelaku tort bersama (joint tortfeasors).

[68] It is trite law that where there are two or more persons liable for the tort of conspiracy, and where the liability of each person is joint and several, a plaintiff is entitled to sue whomsoever that he wishes (see the Court of Appeal of Singapore case of *Chan Kern Miang v. Kea Resources Pte Ltd* [1998] 2 SLR (R) 85 at p. 91). This is fortified by O. 15 r. 4(3) of the Rules of Court 2012 which states:

> **Where relief is claimed in an action against a defendant who is jointly liable with some other person and also severally liable, that other person need not be made a defendant to the action**; but where persons are jointly, but not severally, liable under a contract and relief is claimed against some but not all of those persons in action in respect of that contract, the court may, on the application of any defendant to the action, by order stay the proceedings in the action until the other persons so liable are added as defendants.
>
> (emphasis added)

[69] The learned JC concluded that the plaintiff's cause of action on conspiracy is unsustainable due to the purported failure of the plaintiff to join three other individuals who were mentioned in the statement of claim as co-defendants (non-joinder issue). The learned JC was of the view that such non-inclusion amounts to a release of the joint tortfeasors. The learned JC referred to the High Court case of *Malbai* (*supra*) in support, where Rigby J highlighted the general rule that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all, if it is proven that there is a concerted action towards the common end. The learned JC in her grounds also referred to the case of *Dato Abdullah Ahmad & Ors* (*supra*) where the issue of the release of a joint tortfeasor was raised and the court dismissed the allegation of conspiracy when one of the parties ceased to be a party in the suit. Hence the learned JC found that a charge of collusion or conspiracy cannot be initiated when not all tortfeasors are charged or sued in the same case.

[70] We disagree with the conclusion arrived at, by the learned JC in this respect.

In cases of a joint cause of action or joint tortfeasors, the issue on whether there was a release of any tortfeasor has to be determined after having regard to the facts and circumstances of the case. (See *Johnson v. Davies* [1999] Ch 117). In *Malbai* (*supra*) where there is a joint cause of action against two or more persons, settlement and payment of compensation by one tortfeasor to the plaintiff was held by the court as not constituting a release of liability of the other tortfeasor as it was found that the criminal act by the two tortfeasors was separate and distinct. This was a finding after a full trial. Similarly, in *Dato' Abdullah bin Ahmad & Ors* (*supra)*, it involved a claim by Dato Abdullah Ahmad (plaintiff) against BBMB, Syarikat Permodalan Kebangsaan (SPK) and Dato Ahmad Azizuddin (defendants). The contention by Dato Abdullah Ahmad was that BBMB had colluded with Dato' Ahmad Azizuddin to cheat so as to deprive Dato Abdullah Ahmad of the SPK shares. There was a settlement agreement and withdrawal of the claim by Dato Abdullah Ahmad against BBMB. The court concluded that the settlement agreement and withdrawal of the claim by Dato Abdullah Ahmad against BBMB had resulted in "the substratum of the claim by the Dato' Abdullah against BBMB and Dato Ahmad Azizuddin evaporated the moment BBMB ceased to be a party to the proceedings". Essentially, there were facts in which the court could make a finding as to whether there was indeed a release of the tortfeasors.

[71] Coming back to our present case, such findings on the release of the joint tortfeasors due to non-inclusion, is too early to be determined at this stage, and the learned JC erred in this respect when she concluded that the non-inclusion of the other tortfeasors amounts to a release of their liability. The application for striking out herein is under limb (a) of O. 18 r. 19(1)

ROC and therefore no other evidence except the pleadings which is available before the court. Whether there was a release of the other joint tortfeasors is a matter for the defendants to plead in their respective defences and for the learned JC to decide after hearing the evidence, whether there was indeed an intention of the plaintiff to release the other joint tortfeasors. In our present case the defendants have yet to file their defences.

[72] Therefore, the learned JC's conclusion on the non-joinder issue is clearly misconceived.

[73] On the issue that the plaintiff's claim cannot be sustained as against D1, D2 and D4 in view of the D3's earlier striking out application which renders the threshold of 33% requirement no longer available for the MGO to take effect, we are of the view that this argument from the defendants cannot stand. The claim is that all the defendants have contravened the CMSA in failing to make the MGO and they have engaged in an unlawful conspiracy to deprive the plaintiff of the MGO. The act of the defendants ought to be taken together. It was unfortunate that the striking out action by D3 was heard earlier. In any event, the defendants' appeals are all taken together before us.

Conclusion

[74] Therefore, we are unanimous in our view that the learned JC did not err when she found that the plaintiff failed to fulfil the criteria that he has an existing legal right and that he has no *locus standi* to seek for the declaratory relief that he is seeking in the statement of claim. He failed to show his entitlement of a right to the declaration.

[75] The plaintiff is not entitled to the declaratory reliefs under ss. 357 and 360 of the CMSA as pleaded as those provisions do not empower the court to grant the plaintiff the declaratory reliefs that he prayed for. The plaintiff is not entitled to damages and also not entitled to compel the defendants to undertake an MGO.

[76] Therefore, the plaintiff does not have a cause of action against the defendants. We find no appealable error on the part of the learned JC in striking out the plaintiff's writ and statement of claim under O. 18 r. 19(1)(a) of the ROC 2012.

[77] The appeal by the plaintiff is dismissed with costs. The decision of the learned JC is affirmed.