

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA
(COMMERCIAL DIVISION)
SUIT NO.: WA-22NCC-356-06/2019**

BETWEEN

- 1. YEE TECK FAH
(I/C No.: 570530-10-6115)**
 - 2. YEE MI KENN
(I/C No.: 880922-43-5763)**
- ... PLAINTIFFS**

AND

- 1. WONG NGIAP LIM
(I/C No.: 670913-10-5695)**
 - 2. WORTHY BUILDERS SDN BHD
(Company No.: 248077U)**
- ... DEFENDANTS**

GROUND OF JUDGMENT

- [1]** A company secretary was instructed to adjudicate, stamp and register the transfer of shares from the registered shareholder to the beneficial owners. Midway through the adjudication process, the registered owner made a volte-face and instructed the company to stop the transfer. Does the company secretary owe the beneficial owners (whose claim to beneficial ownership of the

shares is now disputed), a duty of care to proceed with the adjudication and transfer? What if the company secretary had issued the beneficial owners an invoice for carrying out the instructions? Does this give rise to a contract between the company secretary and the beneficial owners?

Background Facts

- [2]** The 1st Plaintiff ('**YTF**') and the 2nd Plaintiff ('**YMK**') are advocates and solicitors practising under the name and style of 'Messrs Yee Teck Fah & Co' ('**YTF & Co**'). YMK is YTF's son.
- [3]** Up until sometime in June 2019, YTF & Co had been acting for the 2nd Defendant, Worthy Builders Sdn Bhd ('**WBSB**') as its solicitors, handling all its legal matters including various litigation actions in Court.
- [4]** Lee Chee Meng ('**LCM**') was and still is the registered shareholder of WBSB holding 99.5% of the shares in WBSB. He was also the Managing Director of WBSB. It was LCM who had dealt with YTF on behalf of WBSB at the material times.
- [5]** The 1st Defendant, Wong Ngiap Lim ('**WNL**') was and is the Company Secretary of WBSB. WNL provides company secretarial services to WBSB through a company known as GE Corporate Consultants Sdn Bhd ('**GE**').
- [6]** The dispute in the present action relates to the ownership of 17,910,000 shares in WBSB that are registered in the name of

LCM representing 99.5% of WBSB's entire shareholdings (**'the Shares'**). It is YTF's and YMK's case that they are the beneficial owners of the Shares in the proportion of 16,110,000 and 1,800,000 shares respectively.

- [7] YTF and YMK had through YTF & Co forwarded the transfer documents of the Shares to GE after GE obtained instruction from WBSB to proceed with the adjudication, stamping and registration of the Shares in the names of YTF and YMK (**'the Transfer'**).
- [8] However, before the Transfer could be completed, LCM had instructed GE to stop the Transfer. LCM also filed a police report claiming that the Transfer was fraudulent and that the Shares were supposed to be held in trust for him. Following from LCM's police report, WNL was called in by the police to give a statement and was instructed by the police not to proceed with the Transfer.
- [9] The Plaintiffs filled this action against WNL claiming there was a direct contract between the Plaintiffs and him in relation to the Transfer and that WNL had breached the terms of the said contract in not proceeding with the Transfer. Alternatively, the Plaintiffs claim against WNL in tort for negligence on the ground that WNL owed them a duty of care in carrying out the Transfer and that WNL had breached that duty when he failed to proceed with the Transfer.
- [10] The Plaintiffs have named WBSB in this action as a nominal party. WBSB, however, filed a Counterclaim against the Plaintiffs seeking declaratory reliefs to invalidate various transactions involving LCM

and the Plaintiffs and transactions involving WBSB and one Syarikat Mikien Sdn Bhd.

[11] Prior to the commencement of the trial, this Court had struck out those reliefs that do not at all involved WBSB on the ground that WBSB had no *locus standi* to seek such reliefs. There was no appeal against this order.

[12] After reading the parties' respective written submissions and hearing oral submissions from learned counsel, I have no hesitation in dismissing both the Plaintiffs' claims against the 1st Defendant and the 2nd Defendant's Counterclaim. In arriving at my judgment, I must stress that no decision is made on the merits or otherwise of the Plaintiffs' claim to beneficial ownership of the Shares. This issue is a matter for a separate proceedings.

Chronology of Events

i. Events in 2018

[13] After hearing the oral testimonies of the parties, there is really not much disputes between the parties on the relevant factual events leading to the present action. It is useful to set out the events in chronological order to appreciate the contentions by the parties.

[14] In respect of the Transfer, the relevant event as disclosed from the evidence to this Court began on 30.4.2018 with YTF & Co writing to GE stating thus:

'We have been given to understand that *Mr Lee Chee Meng has instructed you* to transfer the 17,910,000 shares to Yee Teck Fah and Yee Mi Kenn at the nominal consideration of RM 10.00 for each transfer in the following proportions:

YEE TECK FAH	16,110,000
YEE MI KENN	1,800,000'

[Emphasis added]

In the said letter, YTF & Co also attached the relevant Directors' resolutions to transfer 2,910,000 and 15,000,000 shares of WBSB to YTF and the relevant original share certificates for the Shares to GE.

[15] On 12.6.2018, YTF & Co wrote to GE this time forwarding a copy of the Directors' resolution to transfer 1,800,000 shares from LCM to YMK with the original share certificate and the duly signed Form of Transfer of Securities and the letter from the transferee to WBSB agreeing to the transfer. In respect of the transfer of 16,110,000 shares from LCM to YTF, YTF & Co requested for the original share certificates for the shares.

[16] On 13.6.2018, GE forwarded to YTF & Co, the original share certificates nos. 007, 009, 018, 020, 024 and 026 registered in the name of LCM totalling 17,910,000 shares of WBSB.

[17] Whilst the aforesaid correspondences suggest that steps were put in motion by both LCM and the Plaintiffs to have the Shares transferred to YTF and YMK pursuant to LCM's instructions, nevertheless, the Transfer was not effected as in 2018. It is not clear to the Court why this was the case.

ii. Events in 2019

- [18] The next significant event was on 20.3.2019 when YTF & Co wrote to GE stating that both YTF and YMK are the beneficial owners of the following shares in WBSB:
- a. YTF 16,110,000
 - b. YMK 1,800,000

In the said letter, GE was instructed to ensure that the Annual Returns of WBSB properly reflected YTF and YMK as the beneficial owners of the said number of shares in the company.

- [19] Following the receipt of the aforesaid letter, GE emailed to LCM as the registered shareholder of the Shares to seek the supporting documents and arrangement in respect of the beneficial ownership of the Shares as claimed by YTF & Co.

- [20] On 26.3.2019, LCM instructed Vincent Low (**DW3**) of GE to *'proceed with all necessary'* and that *'[t]he original documents with Dato Yee and they will bring them to u'*. On the same day, GE wrote to YTF & Co seeking, *inter alia*, to advise the effective date that YTF and YMK become the beneficial owners of the Shares in WBSB.

- [21] On 27.3.2019, YTF & Co replied to GE confirming that both YTF and YMK had become beneficial owners of their respective shares in WBSB on 30.4.2018. In this letter, GE was instructed to inform YTF & Co of all intended material/significant transaction of WBSB and to obtain their consent or approval in writing as both YTF's

and YMK's beneficial ownership of the shares in WBSB represented 99.5% of the entire issued and paid up capital of the company.

[22] On 16.5.2019, YTF & Co emailed to GE the following message:

'Hi Samantha Cheong/Vincent,
Please take this as our notice to you that unless you received our written consent or instruction, no action shall be taken that adversely affect our interests in Worthy Builders Sdn Bhd as beneficial owners. Further please take this as our notice to you to transfer Worthy Builders Sdn Bhd's shares to our names immediately.'

[23] On 17.5.2019, GE emailed to YTF & Co requesting for a scan copy of all the share transfer documents '*before deliver the original signed document for our processing*'. In the email, GE also informed YTF & Co of the estimated stamp duty payable in respect of the intended Transfer of the Shares.

[24] Following from the aforesaid, YTF & Co forwarded to GE the following documents and instructed GE to '*[p]lease attend to the transfer of the shares immediately and to keep us informed of all development in this matter*':

There is no dispute that by this letter, GE was to attend to the aforesaid transfer of 16,110,000 shares and 1,800,000 shares of WBSB which were registered in the name of LCM to YTF and YMK respectively. This is also reflected in the caption to the said letter.

[25] Also on 17.5.2019, Vincent Liow of GE emailed to LCM confirming that GE had received the share transfer documents from YTF & Co. GE also required LCM to arrange for a revised Directors' Resolution to be executed in respect of the splitting of LCM's 1,940,000 shares under certificate no. 024 into 140,000 shares under a new certificate no. 027 and 1,800,000 under a new certificate no. 028.

[26] Following a telephone conversation between Vincent Liow of GE and Miss Ong Gek Lin from YTF & Co, YTF & Co issued another letter to GE on 28.5.2019 the contents of which are similar to YTF & Co's letter dated 17.5.2019 referred to above.

[27] On 28.5.2019, GE issued to YTF & Co an invoice no. 067/lkl/19 for the sum of RM 850.00 (**'the GE Invoice'**). The description of the invoice states:

'Being time spent at preparation, sending and coordination with the stamp duty division of IRB on the valuation of shares & stamping of share transfers, and update Register of Members (ROM) for following shares in Worthy Builders Sdn Bhd :-

Transferor	Transferee	No. of Ord. Shares
Lee Chee Meng	Yee Teck Fah	16,110,000
Lee Chee Meng	Yee Mi Kenn	1,800,000'

[28] On 31.5.2019, Vincent Liow of GE emailed to YTF & Co to inform them that the share transfer documents had been submitted to LDHN online system for stamp duty valuation and that once the valuation is issued, GE would update them for arrangement of bank draft in respect thereof.

[29] On 3.6.2019, YTF & Co forwarded to GE its PBB cheque no. 445845 dated 3.6.2019 for the sum of RM 850 as payment for the GE Invoice.

[30] It must be noted that up until this point, there is no indication to GE that the Plaintiff's claim to the beneficial ownership of the Shares was disputed.

Disputes of Plaintiffs' beneficial ownership of the Shares

[31] On 17.6.2019, LCM lodged a police report against YTF alleging that YTF has perpetrated a deceit against him claiming, *inter alia*, that he had agreed to transfer the Shares in WBSB to YTF and YMK for them to hold in trust for him. In the police report, LCM alleged that he had never agreed to YTF and his son to have any interests in the Shares. He stated in the police report that each of the shares had a net tangible value of RM 3.00 suggesting that the value of the Shares is far in excess of the nominal RM 10.00 consideration in the Form of Transfer Securities for the Shares.

[32] On 17.6.2019, GE had logged into LHDN online system to delete the valuation for the transfer of shares. This, according to Vincent Liow was due to the instruction from the transferor, LCM to stop the Transfer. Vincent Liow was the person in GE who had handled the Transfer for the Shares.

[33] On the same day, GE emailed to YTF & Co to confirm receipt of the payment of RM 850 and to update YTF & Co on the status of the Transfer. In particular, the email stated that *'Both transactions*

are in status “Perlu indorsmen daripada TPDS” after “LDHNM Process” and “Sedia Untuk Taksiran Duti”. It is to be noted that by this time, GE had in fact cancelled the on-line valuation of the Shares. This was not informed to YTF & Co.

[34] On 18.6.2019, LCM in his capacity as the Managing Director of WBSB formally wrote to GE to instruct GE not to carry out the transfers of the Shares. In particular, the relevant paragraphs of the letter stated thus:

‘We refer to the above subject and Messrs Yee Teck Fah & Co, Advocates & Solicitors, Letter under ref. YTF/4323/YTF/001/G and dated 28.5.2019, directing you to attend to the above transfer of the shares immediately.

We wish to inform you that our Director, Lee Chee Meng, has lodged a police report for criminal investigation at IPD Police Hq in Petaling Jaya on the deceit and cheating that was intentionally done on Lee Chee Meng and/or the Company through advice to hold the assets on trusts but now purporting to execute the transfers in Dato Yee Teck Fah’s name and son’s name, Dato Yee Mi Kenn, which Lee Chee Meng nor the Company has not agreed and consented to.

We wish to instruct you, as our Company Secretary, not to carry out the transfers of the above shares pending the completion of the said police investigation.

We enclose herewith a copy of the police report for your attention.’

[35] On 18.6.2019, GE had proceeded to *reinstate* the adjudication for the Transfer of the Shares. According to WNL, the deletion of the valuation on 17.6.2020 was done by DW3 when he was instructed

by LCM to stop the Transfer. DW3 had deleted the same without consulting WNL. When WNL was briefed of the same on 18.6.2019, WNL instructed DW3 to re-instate the valuation for the Transfer because he was of the opinion that as the Company Secretary instructed to perform the Transfer, he ought not to be concerned with the dispute as to the ownership of the Shares between LCM and the Plaintiffs.

[36] On 20.6.2019, LCM wrote to GE stating as follow:

‘Please note that you should take instructions on the operations of WB only from me as I am the holder 99.5.% shareholdings in WB.

I shall take full responsibility on whatsoever on WB.

All others happenings, including the police report that I have lodged should be ignored by you when you come my instructions on WB.

Your cooperation on the operation is much appreciated.’

[37] On 21.6.2019, YTF & Co wrote to GE demanding that the adjudication, stamping and all necessary actions be taken to have the Shares registered in the names of YTF and YMK failing which legal proceedings would be commenced against GE for all loss and damages sustained by reason thereof.

[38] On 25.6.2019, GE wrote to YTF & Co to state that they were duty bound to LCM as the registered owner of the shares to discontinue the Transfer of the Shares pursuant to the letter dated 18.6.2019. In the letter, GE also informed YTF & Co that they had been called by the police to give a statement and that they were advised not to

disclose any information to any third party, including the parties named in the police report pending the police investigation.

[39] On 27.6.2019, LHDN wrote to YTF and YMK to notify them that the stamp duty payable in respect of the Transfer of the Shares to them amounted to RM 123,957.00 and RM13,851.00 respectively. LHDN had based its computation of the stamp duty on the net tangible asset value of the 16,110,000 shares and 1,800,000 shares to be transferred to YTF and YMK at RM 41,318,149.35 and RM 4,616,553.00 respectively. According to the Plaintiffs, they were not informed of this letter by GE.

[40] On 2.7.2019, the Commercial Crime Investigation Division of the Petaling Jaya District Police Headquarter wrote to the Companies Commission of Malaysia to inform them that they were investigating into the breach of trust complaint against YTF pursuant to the police report lodged by LCM in relation to the Shares. By the letter, the police requested that a Registrar's Caveat be lodged on the Shares on behalf of the police immediately. However, no Registrar's Caveat was lodged.

[41] At the trial of this action, YTF had produced 2 Trust Deeds, both dated 25.3.2019 where LCM purportedly had acknowledged to be trustee to YTF and YMK in respect of his 16,110,000 and 1,800,000 shares in WBSB respectively.

[42] Arising from the above facts, YTF and YMK commenced the present action against WNL as the Company Secretary of WBSB and WBSB seeking the following prayers:

- (a) For an order that the 1st Defendant shall within 14 days from the date of this Court Order to complete the adjudication of the transfers, stamping thereof and registration of the 1st and 2nd Plaintiffs as owners of 16,110,000 and 1,800,000 ordinary shares of the 2nd Defendant respectively.
- (b) For an order that the 1st Defendant pay damages to be assessed to the Plaintiffs.'

[43] As alluded to above, YTF and YMK have based their claims against WNL on contract and for breach of a duty of care in negligence.

Statement of Agreed Facts

[44] In the Plaintiff's Written Submission, learned counsel for the Plaintiff had referred to Enclosure 44 filed on 3.6.2020 which is stated as 'Agreed Facts' and said to have been filed pursuant to the direction of this Court given on 28.5.2020.

[45] On 28.5.2020, this Court gave directions for the trial to proceed based on the Bundle of Pleadings, Bundle of Documents, Agreed Facts and Agreed Issues that the Plaintiffs had forwarded to the counsel for the Defendant. The direction was given because counsel for the Defendant had not reverted with their comments since these documents were served on them in January 2020.

[46] Based on the aforesaid, learned counsel for the Plaintiffs contended that the 1st Defendant is now bound by the Plaintiffs' Agreed Facts.

[47] Citing the case of **Rajang Plywood Sawmill Sdn Bhd v. Jangkar Enterprise Sdn Bhd** [2008] MLJU 377, learned counsel for the Plaintiff contended that the parties, in particular the Defendants are bound by what are stated in the Plaintiffs' Agreed Facts and that the Court must in turn based its decision on what have been 'agreed' as the facts of the case in the Agreed Facts.

[48] The aforesaid case was followed in **Boustead Pelita Tinjar Sdn Bhd v. Niga Ak Ngayong & Ors and Anor** [2016] MLJU 309.

[49] Enclosure 44, which the Plaintiffs contended is the Agreed Facts, had included the following paragraphs:

- “6. On or about 28 May 2019, the 1st Defendant accepted the instruction and agreed to attend to the adjudication of the transfers, stamping thereof and registration of the 1st and 2nd Plaintiff as owners of 16,110,000 and 1,800,000 ordinary shares of the 2nd Defendant respectively (“**Agreement**”).
7. Pursuant to the Agreement, the Plaintiffs through their solicitors forwarded to the 1st Defendant the following for their attention and further action:

Transfer of 16,110,000 ordinary shares to the 1st
Plaintiff

- (a) Original Directors' resolution to transfer 16,110,000 shares from Lee Chee Meng to Yee Teck Fah and 1,800,000 shares from Lee Chee Meng to Yee Mi Kenn;
- (b) Original share certificate no. 007 dated 5 June 1995 for 1 share;
- (c) Original share certificate no. 009 dated 9 December 1996 for 29,999 shares;
- (d) Original share certificate no. 018 dated 19 September 1998 for 164,000 shares;
- (e) Original share certificate no. 020 dated 17 April 2000 for 776,000 shares;
- (f) Original share certificate no. 026 dated 23 November 2017 for 15,000,000 shares;
- (g) Original share certificate no. 027 for 140,000 shares;
- (h) Original Form of Transfer of Securities duly signed by both the transferor and transferee (Yee Teck Fah);
- (i) Original Letter from the transferee (Yee Teck Fah) to Worthy Builders Sdn Bhd agreeing to accept the transfer of the share;

Transfer of 1,800,000 ordinary shares to the 2nd

Plaintiff

- (j) Original Directors' resolution to transfer 16,110,000 shares from Lee Chee Meng to Yee Teck Fah and 1,800,000 shares from Lee Chee Meng to Yee Mi Kenn;
 - (k) Original share certificate no. 028 for 1,800,000 shares;
 - (l) Original Form of Transfer of Securities duly signed by both the transferor and transferee (Yee Mi Kenn);
 - (m) Original Letter from the transferee (Yee Mi Kenn) to Worthy Builders Sdn Bhd agreeing to accept the transfer of the share.
8. On or about 03/06/2019 and at the request of the 1st Defendant, the Plaintiffs paid the 1st Defendant in full for his services to attend to the adjudication of the transfers, stamping thereof and registration of the 1st and 2nd Plaintiff as owners of 16,110,000 and 1,800,000 ordinary shares of the 2nd Defendant respectively.
9. At all material times the 1st Defendant knew or ought to know that the Plaintiffs required the registration of their shares in the 2nd Defendant so that financial institutions, suppliers and employers have more confidence in dealing with the 2nd Defendant and hence improve the financial position of the 2nd Defendant.
10. It was an implied term of the Agreement that the 1st Defendant would exercise all due professional skill and care in the performance of his services.

11. Further and in the alternative the 1st Defendant as company secretary of the 2nd Defendant owed the Plaintiffs a duty of care:
- (a) to exercise the utmost good faith and act both responsibly and honestly with reasonable care and due diligence in the discharge of the duties of his office;
 - (b) to be impartial in his dealings with shareholders, directors and, without fear or favour, use his best endeavours to ensure that the directors and the company comply with the relevant legislation, contractual obligations and other relevant requirements.
12. In breach of the Agreement and/or in breach of the duty and/or negligently, the 1st Defendant failed to exercise reasonable skill and care in the adjudication of the transfers, stamping thereof and registration of the 1st and 2nd Plaintiff as owners of 16,110,000 and 1,800,000 ordinary shares of the 2nd Defendant respectively.

Particulars

- (a) refused, failed and/or neglected to complete the adjudication of the transfers, stamping thereof and registration of the 1st and 2nd Plaintiff as owners of 16,110,000 and 1,800,000 ordinary shares of the 2nd Defendant respectively.
- (b) refused, failed and/or neglected to exercise the utmost good faith and act both responsibly and

honestly with reasonable care and due diligence in the discharge of the duties of his office;

(c) refused, failed and/or neglected to be impartial in his dealings with the Plaintiffs;

(d) refused, failed and/or neglected to use his best endeavours to ensure that the directors and the company comply with the relevant legislation, contractual obligations and other relevant requirements.

13. To date despite repeated requests and demands the 1st Defendant has wrongfully refused, failed and neglected to complete the adjudication of the transfers, stamping thereof and registration of the 1st and 2nd Plaintiff as owners of 16,110,000 and 1,800,000 ordinary shares of the 2nd Defendant respectively.

14. By reason of the matters aforesaid the Plaintiffs suffered loss and damage which would include the penalties payable on the transfers and/or Stamp Duty Office, the deterioration of the financial position of the 2nd Defendant, the loss in the value of the Plaintiffs' shares in the 2nd Defendant and all other losses which the Plaintiffs may become aware subsequently."

[50] By the aforesaid paragraphs, there is an admission of an agreement by WNL that he had accepted the instruction and had agreed to attend to the adjudication of the transfers, stamping thereof and registration of the Shares. There is also an agreement that WNL owed a duty of care to the Plaintiffs and that he had breached that duty of care. Finally, in paragraph 14 of the 'Agreed

Facts', there is the admission that the Plaintiffs had suffered loss and damages by reason of the breach of duty.

[51] It is immediately obvious that by the 'Agreed Facts' all the ingredients necessary for the Plaintiffs to establish their claims are stated to have been agreed by the 1st Defendant. If the 1st Defendant had indeed agreed to the Plaintiffs' Agreed Facts as contended, the trial would not have been necessary. The entire conduct of the Plaintiffs in proceeding with the trial and seeking to prove the facts necessary for establishing their causes of action was inconsistent with an agreement by the 1st Defendant of the Agreed Facts.

[52] Learned counsel for the Defendants strenuously denied that Enclosure 44 represents the facts that were agreed upon between the parties.

[53] I accept the position of learned counsel for the Defendants that Enclosure 44 is not the facts that had been agreed upon by the Defendants. The document was filed by YTF & Co but it does not bear the signature of the Defendants and or their solicitors.

[54] It is also pertinent that counsel for the Plaintiffs had not any at time during the trial alluded to the Agreed Facts at all.

[55] When the direction was given by this Court on 28.5.2020 for the trial to proceed based on the documents that the Plaintiffs had forwarded to the Defendants, including the Agreed Facts, it does not follow that the Plaintiffs' Agreed Facts was to be treated as

accepted by the Defendants unless of course the Defendants chose to accept the same, which they did not. The 'Agreed Facts' was nothing more than the Plaintiffs' proposed agreed facts for the Defendants to accept.

[56] There is no evidence that the Defendants had accepted the Plaintiffs' Agreed Facts. It is improbable that the Defendants would have agreed to the Plaintiffs' entire case. If the Defendants had accepted the Agreed Facts, there would be no need to proceed with the trial. Indeed, the Plaintiffs themselves would have relied upon the Enclosure 44 to seek judgment by admission if the Defendants had agreed to the contents stated therein.

[57] Enclosure 44 is also inconsistent with Enclosure 43 which is the Plaintiff's Agreed Issues to be Tried where the 'agreed facts' are expressly presented as 'issues to be tried'.

[58] Accordingly, I hold that there was in fact no 'Agreed Facts' before the Court. I will now consider the merits of the parties' substantive submissions.

Claim based on Contract

[59] YTF and YMK claimed that sometime on 28.5.2019 WNL as the Company Secretary of WBSB had accepted their instruction and agreed to attend to the adjudication of the transfer, stamping and the registration of their shares of 16,110,000 and 1,800,000 of WBSB respectively.

- [60]** This contract, according to YTF and YMK, is evidenced by the fact that GE had issued the GE Invoice to YTF & Co and that the said invoice had been duly paid.
- [61]** WNL on the other hand denied that there was a contract between him on the one hand and YTF and YMK on the other. As the Company Secretary of WBSB, WNL would act on the instruction of WBSB only. In this regard, WNL would take instruction from LCM who was at the material times the 99.5% shareholder of WBSB and was its Managing Director.
- [62]** According to WNL, the GE Invoice was mistakenly issued to YTF & Co. The said invoice should have been issued to WBSB. There was never any contract with YTF and YMK as alleged by them. GE had proceeded to attend to the transfers, stamping and registration pursuant to the instruction from LCM as the Managing Director and the registered shareholders of the Shares.
- [63]** Having perused the documents and evaluated the testimony of the witnesses, I am in agreement with WNL that there was in fact no contract between him and both YTF and YMK as claimed.
- [64]** In determining whether there was a contract or otherwise, one must not only look at the letter dated 28.5.2019 from YTF & Co without also considering the previous correspondence between the parties in respect of the transfer of the Shares.
- [65]** The genesis for the instruction to GE to transfer the shares was in fact the letter dated 30.4.2018. This was the letter from YTF & Co

to GE where it clearly stated that it was LCM who had instructed GE to transfer his 17,910,000 shares to YTF and YMK in the proportion of 16,110,000 and 1,800,000 respectively for a mere consideration of RM 10.00.

[66] GE had, pursuant to the aforesaid letter, sought confirmation from LCM on 30.4.2018 and LCM in turn had on 2.5.2018 instructed GE to act accordingly and to follow the proper procedure in effecting the transfer.

[67] However, the Shares were not transferred and registered in the names of YTF and YMK even after almost a year. No explanation was proffered by the parties during the trial for the non-registration.

[68] On 20.3.2019, YTF & Co wrote to GE to give notice of their claim of beneficial ownership in LCM's Shares and to ensure that their interest is reflected in WBSB's Annual Return. Again, GE turned to LCM for instructions and for documents on the arrangement in respect of the Shares. This is reflected in GE's email of 22.3.2019 to LCM.

[69] During this time, it is clear that GE was liaising with YTF & Co as the Company Secretary of WBSB and was acting on the instruction of LCM as the registered shareholder of the Shares and also in his capacity as the Managing Director of WBSB. At all times, GE was dealing with YTF & Co because both YTF and YMK had claimed that they were the beneficial owners of LCM's Shares and that LCM had agreed to have the Shares transferred and registered in their respective names. This included the exchange

relating to the computation on the estimated stamp duty payable for the intended transfers.

[70] In my judgment, the letter dated 28.5.2019 issued by YTF & Co was nothing more than a continuing step towards the implementation of the instructions to GE by LCM to effect the transfers of the Shares. The fact that GE had attended to YTF & Co on the documents pertaining to the Transfer does not mean that there was a contractual relationship created between them at all. This is more so since YTF & Co was also at all times solicitors of WBSB and had prepared the relevant documents pertaining to the transfer of the Shares. LCM himself had also instructed GE to liaise directly with YTF for the documents.

[71] As regards the GE Invoice, I accept the testimony of WNL that the invoice was mistakenly issued to YTF & Co. The fact that the invoice was issued to YTF & Co and was duly paid by YTF & Co, in my judgment, does not *ipso facto* give rise to a creation of a contract as claimed by YTF and YMK.

[72] In any case, even if there was a contract created, it was a contract between YTF & Co on the one hand and GE on the other and not with WNL. The payment was made by YTF & Co to GE and not to WNL. The scope of the contract was confined only to the following:

‘Being time spent at preparation, sending and coordination with the stamp duty division of IRB on the valuation of shares & stamping of share transfers, and update Register of Members (ROM) for following shares in Worthy Builders Sdn Bhd’

- [73] There was no obligation on the part of GE under the Contract, if any, to proceed with the transfer, stamping and registration of the Shares in the event of an objection or contrary instructions received from WBSB and or LCM. There was certainly no obligation to proceed with the Transfer when there is pending a criminal investigation by the police alleging deceit and breach of trust in respect of the Shares against both YTF and YMK. In fact GE had stopped the Transfer on instructions by the police in order to facilitate their investigations.
- [74] As solicitors, both YTF and YMK ought to appreciate the position taken by GE to stop the adjudication and stamping of the Shares in view of the instruction from LCM as the registered shareholder of the Shares and the fact that there was a police report lodged by LCM alleging that the Transfers were fraudulent.
- [75] Instead, on 26.6.2019 YTF & Co chose to threaten WNL with legal action and to hold him personally liable for '*all loss and damage suffered*' for GE's action in discontinuing with the adjudication, stamping and registration of the Shares. If the Plaintiffs were aggrieved, the proper course was to seek their recourse against LCM.
- [76] Interestingly, prior to threatening WNL, YTF & Co had on 21.6.2019 issued a letter to '*The Company Secretary Worthy Builders Sdn Bhd*' for the first time pertaining to the transfers of the Shares instead of to GE as previously done in their correspondences on the Transfer with GE. In my mind, this was nothing more than an attempt set up a claim against WNL

personally although the dealings prior to the letter had always been between YTF & Co and GE.

[77] As the Company Secretary of WBSB, WNL's duty is owed only to WBSB and not to any third party. Given the express instructions from WBSB on 18.6.2019 not to carry out the Transfer pending the completion of the police investigation, WNL is duty bound not to proceed with the adjudication, stamping and registration of the Shares. There was clearly a dispute as to the ownership of the shares between LCM and both YTF and YMK. There was also the instruction from the police to WNL not to proceed with the Transfer of the Shares to YTF and YMK. Accordingly, in my judgment, it was not wrong for GE and or WNL to stop the adjudication, stamping and registration of the Shares. If there was a contract, there was no breach.

[78] Learned counsel for YTF and YMK contended that WNL had breached the contract when on 17.6.2020 at 07:42:10 a.m and 07:43:16 am, without YTF's and YMK's knowledge and or consent, WNL had terminated the adjudication of the Transfer. Further, when the notice of assessment was issued by LHDN on 27.6.2019, WNL did not inform YTF and YMK of the same.

[79] Despite having terminated the adjudication of the Transfer on 17.6.2020, WNL had falsely informed YTF & Co by an email on 17.6.2019 at 1:05 pm that the adjudication process was still being proceeded with and was at the stage where LDHN was still assessing the stamp duty payable.

[80] Whilst it is true that GE had terminated the online adjudication process on 17.6.2019 without the knowledge of YTF & Co, in my judgment, this was of no moment as the adjudication was promptly re-instated the following day without any prejudice to the adjudication process. Similarly, the claim that GE had failed to notify YTF & Co of the notice of assessment dated 27.6.2020 issued by LHDN is also of no significance as by that date, GE had already been instructed by LCM and WBSB to suspend the adjudication and Transfer of the Shares. GE had also been instructed by the police to stop all dealings with the Shares pending the police investigation into the complaint lodged by LCM.

[81] Hence, even if WNL had a contract between YTF and YMK, there was no breach of the same as the said contract was premised upon the assumption that the transfers would be without any challenge to YTF's and YMK's ownership of the Shares. It is a necessary term implied into the contract.

[82] Learned counsel for the Plaintiffs also contended that the 1st Defendant was not authorised to act on the instructions of LCM or the 2nd Defendant without a proper resolution from the 2nd Defendant's Board of Directors citing the case of **Goh Kim Ewe & Anor** v. **Cheng Ah Ching & Ors** [2016] MLJU 940 for the proposition that the Company Secretary is not to act on the instructions of individuals but in accordance with the resolutions passed by the company. In reliance on this proposition, learned counsel for the Plaintiffs contended that WNL was wrong when he acted on the instruction from LCM to stop the adjudication and the Transfer of the Shares.

[83] There is no dispute that the Company Secretary is expected to follow the instructions of the board of directors. However this does not mean that the Company Secretary could act only when there are resolutions passed by the Board of Directors. Instructions may be given to the Company Secretary through the Managing Director of the company who is duly authorised to give such instructions.

[84] In any case, in the instant case, WBSB has not disputed WNL's authority to suspend the adjudication, transfer and registration of the Shares at all. If there is a challenge to the authority of the Company Secretary, this ought to be taken up by the company, the principal providing the source of the authority. The authority for this legal proposition is stated by Low Hop Bing J (as he then was) in **Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd** [2003] 6 MLJ 311.

[85] Hence, for the reasons aforesaid, I see no merits in the Plaintiffs' claim based on contract.

Claim based on Negligence

[86] Learned counsel for the Plaintiffs contended that WNL in carrying out the instruction from WBSB to adjudicate, transfer and register the Shares, owed a duty of care to them as beneficial owners of the Shares to properly carry out the instructions citing the Federal Court decision of **Pushpaleela a/p R Selvarajah & Anor v. Rajamani d/o Meyappa** [2019] 2 MLJ 553 in support. In that case, the Federal Court held that to establish a duty of care in tort the

preferred test in Malaysia is the three-fold test of foreseeability, proximity and policy considerations.

[87] Learned counsel for the Defendants contended that the 1st Defendant only owed a duty of care to the company, WBSB and no others.

[88] Applying the threefold test to the facts of the present case, I find that WNL does indeed owe a duty of care to YTF and YMK as the intended beneficial owners of the Shares to properly carry out the instructions to adjudicate, transfer and register the Shares. It is clear that it was factually foreseeable that WNL's act or omission in carrying out WBSB's instructions, if any, might cause YTF and YMK to be deprived of their interests to the shares. WNL was fully aware of YTF's and YMK's claims to the Shares and as the person instructed to effect the Transfers, WNL is expected to take into account the Plaintiffs' interests in the shares as beneficial owners.

[89] Notwithstanding that the damages sought by YTF and YMK is pure economic loss not flowing from personal injury or damage to property which necessitated a more restrictive approach, I find that in the circumstances of this case, there is sufficient legal proximity between WNL and both YTF and YMK for a duty of care to arise. It is not unreasonable for YTF and YMK to expect the Company Secretary to properly discharge his duty. It is also reasonable for the Company Secretary to foresee of their reliance on him assuming the responsibility to them in the discharge of the instruction to adjudicate, transfer and register the Shares.

[90] I find no policy consideration militating the existence of a duty of care to the beneficial owner of the shares by the Company Secretary when the latter perform the adjudication, transfer and registration of the shares pursuant to the instruction of the company and the registered shareholder to the beneficial owners.

No breach of duty of care

[91] However, there is absolutely no evidence that WNL had been negligence in carrying out the adjudication, stamping and registration of the Transfer of the Shares in this case.

[92] The decision and action to stop the adjudication, stamping and registration process cannot be said to be negligent as there was a dispute relating to the beneficial ownership of the Shares. It was also a necessary step taken pursuant to the instructions from the police pending their investigation into the complaint lodged by LCM.

[93] There is nothing to suggest that WNL had not exercised the skill and care expected of him in the adjudication of the Shares, the stamping thereof and the registration of the same. The decision to suspend the adjudication, stamping and registration of the Shares was a deliberate action taken in the light of the dispute on the ownership of the Shares and under the express direction from the police, WBSB and LCM. There is no negligence in the same.

[94] In any case, YTF and YMK have not adduced any evidence that they have suffered any damages arising from the suspension of

the adjudication, stamping and registration of the Shares. If and when the issue as to the true ownership of the Shares is resolved in their favour, YTF and YMK could still proceed to transfer the Shares into their respective names.

[95] Accordingly, the claim by YTF and YMK based on negligence is also untenable.

WBSB's Counterclaim

[96] As regards the Counterclaim by WBSB, learned counsel for the Defendants had informed this Court that WBSB would only proceed with the relief in (a) which is for a declaration that the transfer forms executed by LCM in respect of the WBSB and delivered by YTF and or YTF & Co to WNL be cancelled forthwith.

[97] As can be immediately appreciated, the relief sought in (a) above relates to dealings between LCM and YTF and or YTF & Co. However, whilst LCM was a witness in this action, he is not a party to the same.

[98] It is trite that the Court will not make an order against a non-party to the action who has not been accorded the opportunity to be heard or who is not seeking any such reliefs from the Court. In any case, no evidence has been adduced during the trial of this action in relation to the reliefs sought. Accordingly, the Counterclaim filed by WBSB is dismissed purely on the ground of non-joinder of the relevant parties without the Court considering the merits of the claims.

Conclusion

[99] Based on the grounds above, the Plaintiffs' claim against the 1st Defendant is dismissed with costs fixed at RM 30,000.00 to be paid by the Plaintiffs jointly and severally and subject to the payment of the usual allocator.

[100] The 2nd Defendant's Counterclaim is also dismissed but with no order as to costs as the Plaintiffs had indicated that they are not seeking any costs against the 2nd Defendant.

Dated: 30 November 2020

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(ONG CHEE KWAN)

Judicial Commissioner

High Court of Malaya, Kuala Lumpur,

Commercial Division, NCC2.

COUNSEL:

1. Dato' Yee Teck Fah together with Ms. Ong Gek Lin and Ms Yee Mi Kenn for Plaintiffs.
(Messrs. Yee Teck Fah & Co. (Petaling Jaya))
2. Mr. Muhammad Azwar Bin Ab Manab together with Mr. Muhammad Azrul Haziq Bin Khirullah for the Defendants.
(Messrs. Azwar & Partners (Shah Alam))

CASE REFERENCE:

1. *Rajang Plywood Sawmill Sdn Bhd v. Jangkar Enterprise Sdn Bhd* [2008] MLJU 377
2. *Boustead Pelita Tinjar Sdn Bhd v. Niga Ak Ngayong & Ors and Anor* [2016] MLJU 309
3. *Goh Kim Ewe & Anor v. Cheng Ah Ching & Ors* [2016] MLJU 940
4. *Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311
5. *Pushpaleela a/p R Selvarajah & Anor v. Rajamani d/o Meyappa* [2019] 2 MLJ 553