A

AHMAD ZAKI RESOURCES BHD

v.

SIME ENGINEERING SDN BHD & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI FCJ
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEALS NO: W-02(IM)(NCVC)-2297-09-2011
C & W-02(IM)(NCVC)-2366-09-2011]
2 NOVEMBER 2012

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Application dismissed by High Court - Appeal against - Claim for*
D *specific performance to fulfil obligations under agreement - Whether respondent had locus standi to initiate action - Whether conditions in agreement adhered by respondent - Whether suit against appellants obviously unsustainable - Rules of the High Court 1980, O. 18 r. 19(1)*

CONTRACT: *Joint venture - Joint venture agreement - Claim for*
E *specific performance to fulfil obligations under agreement - Whether respondent had locus standi to initiate action - Whether conditions in agreement adhered by respondent - Whether Companies Act 1965 applicable to an unincorporated company issuing circular resolutions -*
F *Whether suit against appellants obviously unsustainable*

The appeals herein were filed against the decision of the High Court in dismissing the appellants' application to strike out the respondent's writ and statement of claim under O. 18 r. 19(1) Rules of the High Court 1980 ('RHC'). In brief, the facts showed
G that the respondent was part of an unincorporated joint venture company known as Malaysia-China Hydro Joint Venture ('MCHJV') which was formed under a Joint Venture Agreement ('JVA') and managed by a Joint Venture Executive Committee ('JV Exco'). The MCHJV consists of an unincorporated joint venture
H entity formed by, *inter alia*, an entity called Sime JV and Sime JV on the other hand consists of, among others, a third unincorporated joint venture entity called the WMAI Joint Venture. The appellants however were a part of the WMAI Joint Venture entity. The main purpose of setting up the MCHJV was
I to prepare and submit a joint tender for the Bakun Hydroelectric Project ('Bakun Project'). The JV Exco issued three circular resolutions respectively calling for the injection by the members of

the MCHJV of additional working capital ('cash calls'), the amount of which was in accordance with the proportion of their respective equity in the MCHJV. It was alleged that since the appellants failed to comply with the cash calls, the respondent was forced to top up the capital to ensure there was sufficient funding for the completion of the Bakun Project. In the High Court, the respondent's suit against the appellants was, *inter alia*, to seek specific performance in compelling the latter to fulfil their obligations under the JV Agreement. However, the appellants filed their respective applications to strike out the suits against them based on the grounds that, (i) the respondent lacked the requisite *locus standi*; (ii) the resolutions for the cash calls were not made in a physical meeting of the JV Exco as required by the JV Agreement; and (iii) the revision of the overall cost budget required the unanimous approval of the JV Exco and this was not obtained. Since the appellants' application was dismissed by the High Court, their respective appeals were filed to this court.

Held (allowing appeals with costs)
Per Zaharah Ibrahim JCA (majority):

(1) Clause 16.1(a) of the JV Agreement deals, *inter alia*, with the failure to pay, by the stipulated date, amounts due upon cash calls made. Under cl. 16.1, a defaulting party shall be excluded from the execution of the works, but not the JV itself. The respondent's reliance on cls. 16.1 and 16.2 as a basis for the suit against the first appellant was misplaced and those clauses did not clothe the respondent with the necessary *locus standi* to commence the suit against it. (paras 16, 18 & 19)

(1a) The second appellant's reliance of cl. 4.4 of the JV Agreement showed that except in cases of legal suits instituted by third parties, all other actions, including a claim against a party, would require the unanimous prior approval of the JV Exco. However, this was not obtained before the respondent commenced this suit. In the absence of such unanimous approval, the respondent thus lacked the *locus standi* to commence this suit. As such, having closely examined cls. 4.4, 16.1 and 16.2 of the JV Agreement, this court agreed with the positions taken by the appellants that the respondent had no *locus standi* to commence the suits against them. (paras 21 & 22)

(2) The appellants were not bound to comply with the cash calls since the respondent's claim of material breach was not sustainable. This was because the decision of the JV Exco for matters under cl. 4.4 of the JV Agreement must be made in a physical meeting of the JV Exco. There was no provision in the said JV Agreement which provides for decisions of the JV Exco to be made by way of circular resolution. Further, the MCHJV was an unincorporated entity and therefore, whatever provisions in the Companies Act 1965 which may permit circular resolutions would not be applicable in this case. Hence, any decision to make cash calls must have been made at a properly convened physical meeting of the JV Exco. (paras 26-28, 30 & 33)

(3) It was quite clear from the cash call notices that the amounts sought were for additional working capital. It must therefore be additional to the project cost which was already within the knowledge of the parties. Hence, any call for the injection of additional working capital must be in the nature of a revision of the prevailing cost budget. That being so, the JV Agreement required such a revision to be done at a physical meeting of the JV Exco and this could only be done with the unanimous approval of the JV Exco. As this was not done, there was no valid basis for the amounts sought by the cash calls. (paras 37 & 38)

(4) On the issues of *locus standi*, the non-binding cash calls and the revision of the cost budget demonstrated that there were sufficient grounds to conclude that the respondent's suits against the appellants were obviously unsustainable. As such, the appellants' applications to strike out the suits should have therefore been allowed by the High Court. (para 39)

Per Ramly Ali JCA (dissenting):

(1) The summary process under O. 18 r. 19 RHC can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable. The root word is not 'unsustainable' but rather 'obviously'. It means that the claim must be plainly and evidently unsustainable at law. So long as the pleadings disclose a cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is not ground for the pleadings and the statement of claim to be struck out. (para 48)

(2) On the issue of *locus standi*, the respondent was privy to both the JV Agreement and the Indemnity Agreement and this formed the basis for its claim against the appellants. In initiating the action, the respondent was merely exercising its contractual right under both the agreements. (para 49)

(3) *Prima facie*, the pleadings in the respondent's statement of claim showed that the respondent had the requisite *locus standi* to initiate the action against the appellants and the cash calls were validly made which was enforceable against them. The respondent's case may be weak and the issues raised need further serious argument and careful consideration in law, but that alone was not a sufficient ground to strike out the respondent's claim. Those issues could be dealt with at trial and argued on the basis of O. 33 r. 2 RHC. Hence, this was not a plain and obvious case to be struck out under O. 18 r. 19 RHC. (paras 55 & 56)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan-rayuan di sini telah difailkan terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu-perayu untuk membatalkan writ dan penyata tuntutan responden di bawah A. 18 k. 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Secara ringkas, fakta menunjukkan bahawa responden merupakan sebahagian daripada syarikat usahasama tidak diperbadankan yang dikenali sebagai Malaysia-China Hydro Joint Venture ('MCHJV') yang dibentuk di bawah satu Perjanjian Usahasama ('JVA') dan diurus oleh Jawatankuasa Eksekutif Usahasama ('Exco JV'). MCHJV merangkumi entiti usahasama tidak diperbadankan yang dibentuk oleh, antara lain, Sime JV dan Sime JV pula merangkumi, antara lain, entiti ketiga usahasama tidak diperbadankan yang dipanggil WMAI Joint Venture. Perayu-perayu adalah sebahagian daripada entiti WMAI Joint Venture. Tujuan utama penubuhan MCHJV adalah untuk menyediakan dan menyerahkan tender bersama bagi Projek Hydroelektrik Bakun ('Projek Bakun'). Exco JV telah mengeluarkan tiga pekeliling resolusi masing-masing memanggil untuk kemasukan penambahan modal kerja oleh ahli-ahli MCHJV ('panggilan tunai'), jumlah mana adalah mengikut bahagian ekuiti masing-masing dalam MCHJV. Adalah dihujah bahawa memandangkan perayu-perayu gagal mematuhi panggilan tunai itu, responden telah dipaksa menambah modal bagi memastikan adanya dana mencukupi untuk penghabisan Projek Bakun. Di Mahkamah Tinggi, tindakan responden terhadap perayu-perayu adalah untuk, antara lain, menuntut pelaksanaan

A spesifik dalam memaksa perayu-perayu untuk memenuhi obligasi mereka di bawah Perjanjian JV. Walau bagaimanapun, perayu-perayu telah memfailkan permohonan mereka masing-masing untuk membatalkan tuntutan itu terhadap mereka berdasarkan alasan-alasan bahawa, (i) responden tidak mempunyai *locus standi* yang
B diperlukan; (ii) resolusi panggilan tunai tidak dibuat dalam satu mesyuarat fizikal Exco JV seperti dikehendaki oleh Perjanjian JV; dan semakan kos belanjawan keseluruhannya memerlukan persetujuan sebulat suara Exco JV dan ini tidak diperolehi. Memandangkan permohonan perayu-perayu ditolak oleh Mahkamah
C Tinggi, rayuan mereka masing-masing telah difailkan di mahkamah ini.

Diputuskan (membenarkan rayuan-rayuan dengan kos)
Oleh Zaharah Ibrahim HMR (majoriti):

D **(1)** Fasal 16.1(a) Perjanjian JV merujuk, antara lain, kepada kegagalan membayar, dalam masa yang ditetapkan, jumlah tertunggak bagi panggilan tunai yang dibuat. Di bawah fasal 16.1, pihak yang ingkar akan dikecualikan daripada pelaksanaan kerja-kerja tetapi bukan JV. Kebergantungan
E responden terhadap fasal 16.1 dan fasal 16.2 sebagai asas tuntutan terhadap perayu pertama adalah tersilap arah dan fasal-fasal tersebut tidak memberi responden *locus standi* yang diperlukan bagi memulakan tindakan terhadap perayu
F pertama.

(1a) Kebergantungan perayu kedua terhadap fasal 4.4 Perjanjian JV menunjukkan bahawa kecuali dalam tindakan undang-undang yang dimulakan oleh pihak ketiga, semua tindakan lain, termasuk tuntutan terhadap sesuatu pihak, akan
G memerlukan kebenaran awal sebulat suara Exco JV. Walau bagaimanapun, kebenaran ini tidak diperolehi sebelum responden memulakan tindakan ini. Dalam ketidakhadiran kebenaran sebulat suara itu, responden tidak mempunyai *locus standi* untuk memulakan tindakan ini. Oleh itu, setelah
H memeriksa fasal-fasal 4.4, 16.1 dan 16.2 Perjanjian JV, mahkamah bersetuju dengan kedudukan yang diambil oleh perayu-perayu bahawa responden tidak mempunyai *locus standi* untuk memulakan tindakan ini terhadap mereka.

I

(2) Perayu-perayu tidak terikat untuk mematuhi panggilan tunai memandangkan tuntutan responden berkenaan kemungkiran material tidak boleh bertahan. Ini adalah kerana keputusan Exco JV bagi perkara-perkara di bawah fasal 4.4 Perjanjian JV mestilah dibuat dalam satu mesyuarat fizikal Exco JV. Tiada peruntukan di dalam Perjanjian JV tersebut yang menyatakan keputusan Exco JV boleh dibuat melalui pekeliling resolusi. Tambahan, MCHJV merupakan entiti tidak diperbadankan dan oleh itu, apa-apa peruntukan di dalam Akta Syarikat 1965 yang boleh membenarkan pekeliling resolusi tidak terpakai dalam kes ini. Oleh itu, keputusan panggilan tunai mestilah dibuat dalam satu mesyuarat fizikal Exco JV.

(3) Adalah jelas daripada notis panggilan tunai bahawa jumlah yang diminta adalah untuk modal kerja tambahan. Ianya adalah tambahan kepada kos projek yang telah pun dalam pengetahuan pihak-pihak. Oleh itu, sebarang panggilan bagi kemasukan modal kerja tambahan mestilah dalam sifat penyemakan belanjawan kos semasa. Dengan itu, Perjanjian JV memerlukan semakan sebegitu dibuat semasa mesyuarat fizikal Exco JV dan ini hanya boleh dibuat dengan persetujuan sebulat suara Exco JV. Memandangkan ianya tidak dibuat, tiada sebarang asas sah bagi jumlah yang diminta melalui panggilan tunai.

(4) Isu-isu berkenaan *locus standi*, panggilan tunai yang tidak terikat dan semakan kos belanjawan menunjukkan terdapat alasan-alasan yang mencukupi untuk menyimpulkan bahawa tindakan responden terhadap perayu-perayu jelas tidak boleh dipertahankan. Dengan itu, permohonan perayu-perayu untuk membatalkan tindakan sepatutnya dibenarkan oleh Mahkamah Tinggi.

Oleh Ramly Ali HMR (menentang):

(1) Proses ringkas di bawah A. 18 k. 19 KMT hanya boleh digunakan apabila suatu tuntutan atau jawapan adalah pada permukaannya jelas tidak boleh dipertahankan. Kata akarnya bukanlah 'tidak boleh dipertahankan' tetapi adalah 'jelas'. Ini bermakna bahawa tuntutan mestilah dengan jelasnya tidak boleh dipertahankan di bawah undang-undang. Asalkan pliding mengemukakan suatu kausa tindakan atau pun beberapa

soalan yang sesuai diputuskan oleh hakim, fakta bahawa kes adalah lemah dan tidak mungkin berjaya semasa perbicaraan bukanlah alasan untuk pliding dan penyata tuntutan dibatalkan.

(2) Berkenaan isu *locus standi*, responden adalah privi kepada kedua-dua Perjanjian JV dan Perjanjian Tanggung Rugi dan ini membentuk asas bagi tuntutannya terhadap perayu-perayu. Dalam memulakan tindakan itu, responden hanya melaksanakan hak kontraktual di bawah kedua-dua perjanjian itu.

(3) *Prima facie*, pliding-pliding dalam penyata tuntutan responden menunjukkan bahawa responden mempunyai *locus standi* mencukupi untuk memulakan tindakan terhadap perayu-perayu dan panggilan tunai telah dibuat dengan sah yang boleh dikuatkuasakan terhadap mereka. Kes responden mungkin lemah dan isu-isu yang dibangkitkan memerlukan hujahan lanjut dan pertimbangan undang-undang, tetapi itu sahaja bukanlah satu alasan mencukupi untuk membatalkan tuntutan responden. Isu-isu tersebut boleh dikendalikan semasa perbicaraan dan dihujah di bawah A. 33 k. 2 KMT. Oleh itu, ini bukanlah kes yang nyata dan jelas untuk dibatalkan di bawah A. 18 k. 19 KMT.

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Sivakumar Varatharaju Naidu v. Ganesan Retanam [2010] 9 CLJ 825 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d), O. 33 r. 2

(Appeal No: W-02(IM)(NCVC)-2297-09-2011)

For the appellant - Alan Adrian Gomez (Rahayu Mumazaini with him); M/s Tommy Thomas

For the respondent - Ivan Loo (Celine Chelladurai & K Yogarajah with him); M/s Zaid Ibrahim & Co

(Appeal No: W-02(IM)(NCVC)-2366-09-2011)

For the appellant - Joseph Ting; M/s Joseph Ting & Co

For the respondent - Ivan Loo (Celine Chelladurai & K Yogarajah with him); M/s Zaid Ibrahim & Co

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suits No: S-22NCVC-29-2010 & S-22NCVC-28-2010]

Reported by Kumitha Abd Majid

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] These appeals were heard together as they arose from the same set of facts.

[2] The appellant in each of the appeals applied to the High Court at Kuala Lumpur to have the respondent's writ and statement of claim against it struck out under O. 18 r. 19(1) of the Rules of the High Court 1980.

[3] Their respective application was dismissed. The appellants appealed to this court against the dismissal of their respective application. By a majority (our learned brother Datuk Ramly bin Hj Ali dissenting), we allowed the appeals. We now give our reasons for allowing the appeals.

Background Facts

[4] The respondent in both appeals, Sime Engineering Sdn Bhd ("Sime"), was part of an unincorporated joint venture company known as the Malaysia-China Hydro Joint Venture (after this referred to as "MCHJV"). The MCHJV is a "nested" entity as will be explained below.

[5] The MCHJV was formed under a Joint Venture Agreement dated 12 June 2002 ("JV agreement") and consists of an unincorporated joint venture entity formed by an entity called Sime JV (with 70% of the share in the responsibilities, assets, liabilities, profits and losses of MCHJV) and the China National Water Resources and Hydropower Engineering Corporation (with 30% of such share).

[6] Sime JV in turn consists of three entities, namely, Sime Engineering Sdn Bhd ("Sime") (holding 51% of the "shareholding" of Sime JV), Edwards and Sons (EM Sdn Bhd) (holding 5% of the "shareholding"), and a third unincorporated joint venture entity called the WMAI joint venture (holding 44% of the "shareholding").

[7] WMAI joint venture consists of four entities, namely, Ahmad Zaki Resources Berhad ("AZR") (which is the appellant in Appeal No. W-02(IM)(NCVC)-2297-09/2011) Syarikat Ismail Ibrahim

A Sdn Bhd ("SII") (which is the appellant in Appeal No. W-02(IM)(NCVC)-2366-09/2011), WCT Engineering Berhad and MTD Capital Berhad.

[8] The MCHJV was to be managed by a Joint Venture
B Executive Committee ("JV Exco").

[9] The main purpose of the setting up of MCHJV was to prepare and submit a joint tender for the Bakun Hydroelectric Project package CW2 Main Civil Works ("the Bakun Project"). The MCHJV entered into the contract for the CW2 main civil
C works on 31 March 2003.

[10] The JV Exco subsequently issued three circular resolutions, dated 29 October 2004, 17 February 2005 and 31 May 2005 respectively, calling for the injection by the members of the
D MCHJV of additional working capital ("cash calls"). The amounts called for in the cash calls were in accordance with the proportion of their respective equity in the MCHJV.

[11] The appellants failed to comply with the cash calls.
E The respondent averred that as a result of their failure, the respondent was forced to top up the capital to ensure there was sufficient funding for the completion of the Bakun Project.

The Respondent's Suits

F **[12]** The respondent then initiated the present suits against the appellants to compel the appellants to fulfil their obligations under the JV agreement (ie, seeking specific performance) or alternatively for damages *in lieu* thereof. The respondent also, in the alternative, sought an order that the outstanding amount be paid to the
G respondent or the MCHJV under an indemnity agreement which the entities in the MCHJV and Malaysian Oriental Holdings Berhad entered into on 22 October 2002.

[13] AZR applied by way of summons in chambers dated
H 19 January 2011 to strike out the respondent's suit under O. 18 r. 19(1)(b), (c) and/or (d) of the Rules of the High Court 1980. A similar application was made by SII on 11 March 2011.

[14] AZR and SII advanced three main grounds for making their
I respective application to strike out the suits against them. They were:

(a) the respondent lacked the requisite *locus standi* to initiate the suit;

(b) the resolutions for the cash calls were not made in a physical meeting of the JV Exco as required by cls. 4.3.1 and 4.3.2 of the JV agreement and therefore the cash calls were not binding on the MCHJV parties;

(c) the revision of the overall cost budget required the unanimous approval of the JV Exco and this was not obtained.

Decision

Issue Of Locus Standi

AZR's Position

[15] AZR contended that a proper reading of the respondent's statement of claim shows that the claim is premised upon the alleged material breach by AZR under cl. 16.1(a) of the JV agreement for failing to comply with the cash calls.

[16] Clause 16.1(a) deals, *inter alia*, with the failure to pay, by the stipulated date, amounts due upon cash calls made. Under cl. 16.1, a defaulting party shall be excluded from the execution of the works, but not the JV itself.

[17] Clause 16.2 of the JV agreement however provides as follows:

> 16.2. *In the event of a loss suffered by the MCH JV resulting from the events set out in clause 16.1 caused by the defaulting Party*, all such loss arising out of or in connection with the aforementioned events shall be the sole responsibility of the defaulting Party. All such loss arising out of the default shall be made good by the defaulting party **to the non-defaulting Parties** within thirty (30) days from the date of notification of the exclusion from further participation in the execution of the WORKS as mentioned in Clause 16.1 above or from the date of the non-defaulting Party or Parties' demand for payment whichever is the earlier. (emphasis added)

[18] AZR's contention was that nowhere in its claim has the respondent averred that the MCHJV had incurred any loss as a result of AZR's default. AZR also contended that its obligation to make good the loss was to the non-defaulting party/parties, not to MCHJV, nor to the respondent acting for the MCHJV or the other parties.

[19] AZR therefore contended that the respondent's reliance on cl. 16.1 and cl. 16.2 of the JV agreement as a basis for the suit against AZR is misplaced and those clauses do not clothe the respondent with the necessary *locus standi* to commence this suit against AZR.

SII's Position

[20] SII on the other hand relied on cl. 4.4 of the JV agreement for their contention that the respondent has no *locus standi* to commence the suit against it. In particular they relied on para. (j) of cl. 4.4. It provides as follows:

> 4.4. Subject to Clause 4.3 above, none of the following actions shall be done, resolved or otherwise implemented unless it shall be passed unanimously by all members of the JOINT VENTURE EXECUTIVE COMMITTEE:
>
> ...
>
> (j) action to be taken in respect of **claims exceeding RM3 million from third parties**, excluding legal suits instituted by third parties, **claims from the CLIENT or the Parties to the MCH JV**. (emphasis added)

[21] SII contended that a proper reading of cl. 4.4, para. (j), would show that except in cases of legal suits instituted by third parties (which would naturally require the MCHJV or its component parties to mount a defence) all other actions, including a claim against a party, require the unanimous prior approval of the JV Exco. That was not obtained in this case before the respondent commenced this suit. SII therefore took the position that the respondent, in the absence of such unanimous approval, lacked the *locus standi* to commence this suit.

Finding

[22] Having closely examined cls. 4.4 and 16.1 and 16.2 of the JV agreement, we agree with the positions taken by the appellants that the respondent had no *locus standi* to commence these suits.

Issue Of Cash Calls Not Binding On The Appellants

[23] Both appellants relied on the provisions of cl. 4.3 of the JV agreement as a basis for claiming that the cash calls were not binding on them.

[24] Their contention was that any decision for a cash call to be made must be by resolution of the JV Exco in a physical meeting under cl. 4.3. It was not disputed that the resolutions approving the cash calls were made by way of circular resolutions.

[25] The respondent's response to this was that the appellants had never objected to the JV Exco conducting its affairs in this manner and that the appellants at all times had a representative in the JV Exco.

[26] Clause 4.3 deals with physical meetings of the JV Exco. Clause 4.4 (the introductory portion of which has been set out above) is made subject to cl. 4.3. In other words the decision of the JV Exco for matters under cl. 4.4 must be made in a physical meeting of the JV Exco.

[27] We have observed that the JV agreement contains an "entire agreement clause" in cl. 24. We were not able to find, nor was our attention drawn to any provision of the JV agreement which provides for decisions of the JV Exco to be made by way of circular resolution.

[28] We took note of the fact that the MCHJV was an unincorporated entity and therefore whatever provisions in the Companies Act 1965 which may permit circular resolutions would not be applicable in this case.

[29] We also observed that cl. 4.5 provides for a Project Management Team comprising at least a Project Director and one Project Manager. The Project Manager is given the mandate to make decisions on important emergency matters with the concurrence of the Project Director so long as those decisions conform with the policies laid down by the JV Exco. If a decision cannot be reached by the Project Manager and the Project Director, the matter must be referred to the JV Exco who must make a decision within seven days of the matter being referred to them. That decision of the JV Exco is binding "until it shall be rescinded at any **future meeting** of the JOINT VENTURE EXECUTIVE COMMITTEE" (emphasis added). Clearly the parties had already envisaged situations where decisions would have to be made on an urgent basis that cannot wait for a physical meeting of the JV Exco and the JV agreement has provided for such a situation.

[30] We therefore agree with the contention of the appellants that any decision or resolution by the JV Exco, including a decision to make cash calls, must be made at a properly convened physical meeting of the JV Exco.

[31] As for the alleged "acquiescence" of the appellants, AZR brought our attention to cl. 20 of the JV agreement which states as follows:

> 20.1 No relaxation, forbearance, delay or indulgence by any party in enforcing any of the terms and conditions of this Agreement or the granting of time by any Party to the other shall prejudice, affect or restrict the rights of that Party under this Agreement, nor shall any waiver by any Party of any breach of this Agreement operate as a waiver of any subsequent or continuing breach of this Agreement.

[32] AZR further submitted that the fact that it had refused to heed the cash calls shows that it did not condone or waive the breach of cl. 4.3.

Finding

[33] Having examined the JV agreement, in particular cl. 4 and cl. 20, we agree with the appellants that they are not bound to comply with the cash calls. As such, the respondent's claims of material breach are not sustainable.

Issue Of Revision Of Cost Budget

[34] It was the contention of both appellants that the cash calls amounted to an increase in the cost budget. As the total amount called for by the cash calls exceeded 5% of the prevailing project cost budget, the unanimous approval of the JV Exco at a physical meeting is required as provided for under cl. 4.4 of the JV agreement.

[35] The respondent sought to distinguish the cash calls made under cl. 9.1 of the JV agreement for working capital from the project cost budget referred to in para. (k) of cl. 4.4. According to the respondent, that paragraph refers to "budget price".

[36] There is no dispute that the project cost budget at the time of the submission of the tender for the Bakun Project was RM1,505,200,000. Based on the JV agreement it would be obvious that the liability of each party to contribute to that cost budget would be proportionate to their respective equity in

MCHJV. If the amount called to be contributed is part of that cost budget, it would be part of that liability for which the parties would already be aware of.

Finding

[37] It is quite clear from the cash call notices that that amounts sought were for additional working capital. It must therefore be additional to the project cost that was already within the knowledge of the parties. Hence, any call for the injection of additional working capital must be in the nature of a revision of the prevailing cost budget.

[38] That being so, we agree with the appellants that para. (k) of cl. 4.4, read with cl. 4.3 of the JV agreement, requires such a revision to be done at a physical meeting of the JV Exco and can only be done with the unanimous approval of the JV Exco. As this was not done, there is no valid basis for the amounts sought by the cash calls.

Conclusion

[39] Our findings on the issues of *locus standi*, the non-binding cash calls and the revision of the cost budget as discussed above demonstrate that there were sufficient grounds to conclude that the respondent's suits against the appellants were obviously unsustainable. The appellants' applications to strike out the suits should have therefore have been allowed by the High Court.

[40] We therefore allowed the appeals by the appellants with costs of RM15,000 in favour of AZR and RM10,000 in favour of SII.

Ramly Ali JCA:

[41] This is an appeal by the appellant (Ahmad Zaki Resources Berhad) against the decision of the learned High Court judge handed down on 17 August 2011 in dismissing its application to strike out the respondent's writ of summons and statement of claim with costs.

[42] On 11 October 2010 the respondent (as the plaintiff in the present suit) filed this suit at the Kuala Lumpur High Court against the appellant (as the defendant). The defendant then, on 2 December 2012 filed its defence and counter-claim against the respondent and five others.

[43] The pleaded cause of action against the appellant is for breach of contract involving the following contracts, namely:

(a) the Joint Venture Agreement entered into by the parties to the counter claim dated 12 June 2002 (JVA); and

(b) the indemnity agreement entered into by the parties dated 22 October 2012 (indemnity agreement).

[44] The respondent claimed that the appellant had refused to pay its portion on three cash calls made by the Malaysia China Hydro Joint Venture (MCHJV) based on the above contracts. The respondent initiated the claim against the appellant to require the appellant to adhere to its obligations in respect of the cash calls under the said JV and Indemnity agreements.

[45] The appellant then, on 19 December 2011 filed an application to strike out the respondent's action pursuant to O. 18 r. 19(1)(b), (c) and/or (d) of the RHC 1980 on the grounds:

(a) that the respondent lacks the requisite *locus standi* to initiate this action; and

(b) that the cash calls were not validly made and thus not binding on the appellant.

[46] In opposing the appellant's application for striking out, the respondent submitted that the said application was misconceived on the grounds that:

(a) the respondent has requisite *locus standi* to initiate the action against the appellant;

(b) the cash calls were validly made and enforceable against the appellant; and

(c) the respondent's action is not a clear and obvious case which warrant striking out.

[47] After hearing the parties, the learned High Court judge had on 17 August 2011 dismissed the appellant's application. Hence the present appeal.

[48] The law on striking out of an action is well-settled. It is only in plain and obvious cases that recourse should be had to summary process under this rule (O. 18 r. 19 (RHC) 1980). This summary process can only be adopted when it can be clearly

seen that a claim or answer is on the face of it obviously unsustainable. The root word is not 'unsustainable' but rather 'obviously'. It means that the claim must be plainly and evidently unsustainable at law. So long as the pleadings disclose cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is not ground for the pleadings and the statement of claim to be struck out. (see: *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 (Supreme Court); and *Sivakumar Varatharaju Naidu v. Ganesan Retanam* (Court of Appeal) [2010] 9 CLJ 825).

[49] On the issue of *locus standi* the respondent is privy to both the JV agreement and the indemnity agreement; and this formed the basis for its claim against the appellant. In initiating the action against the appellant, the respondent is merely exercising its contractual right under both the agreements. Clauses 9.1, 16.1 and 16.2 of the JV agreements are relevant to the respondent's claim against the appellant in respect of the cash calls. Clause 3(a) of the indemnity agreement (together with the provisions of the JV agreements) create a contractual basis and right for the respondent to initiate the action against the appellant.

[50] Clause 9.1 of the JV agreement provides that the parties (which include both the appellant and the respondent) "shall pay such sums to the credit of the bank account in proportion of their participation upon notification by the JV Executive Committee and failure to make proper payment on due date is deemed a material breach of this agreement".

[51] Clause 16.1 of the JV agreement provides for the effect in the event any party breaches its obligations under the agreement, ie, the defaulting party shall immediately cease to actively participate in the execution of the works and shall forthwith withdraw its nominees from the JV Executive Committee.

[52] Clause 16.2 of the JV agreement further provides that "all such loss in connection with the abovementioned events shall be the sole responsibility of the defaulting party ... and shall be made good by the defaulting party to the non-defaulting parties within (30) days from the date of notification … or from the date of the non-defaulting parties demand for payment".

A **[53]** Clause 3(a) of the indemnity agreement *inter alia* stipulates that parties thereto "covenant and undertake with each other to pay … immediately on demand all sums claimed by such one or more of them as paid or payable or incurred under or in connection with the contract or the parental guarantee". The
B parties further government to make immediate payment to the party making the claim or demand upon such written claim or demand.

[54] The respondent has established that the action is one which
C discloses reasonable cause of action; is not scandalous, frivolous and vexatious; and is not an abuse of the process of the court.

[55] *Prima facie*, the pleadings in the respondent's statement of claim have shown that the respondent has the requisite *locus standi*
D to initiate the action against the appellant; and the cash calls were validly made and enforceable against the appellant. The respondent's case may be weak and those issues above need further serious argument and careful consideration in law, but that alone is not a sufficient ground to strike out the respondent's claim. Those issues can be dealt with at trial.
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[56] In exercise of his discretion, the learned High Court judge has not erred in dismissing the appellant's application for striking out and directing that the issues raised by the appellant to be argued on the basis of O. 33 r. 2 of the RHC 1980. This is
F clearly not a plain and obvious case to be struck out under O. 18 r. 19 (RHC) 1980.

[57] In the circumstances, I dismiss the appeal. This decision is also applicable to Appeal No. W-02(IM)(NCVC)-2366-09/2011.

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