DALAM MAHKAMAH TINGGI MALAYA DL KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
(BAHAGIAN DAGANG)
GUAMAN NO.: D-22NCC-776-2009

ANTARA

1.	**THEIN HONG TECK**	
2.	**YEE FOOK CHOY**	
3.	**YEE CHONG KHOON**	
4.	**YONG CHOONG YIM (Pentadbir Harta Pusaka Yong Kat Keong, Simati)**	
5.	**YEE KWEE FONG (Pentadbir Harta Pusaka Yee Fook Shin, Simati)**	**...PLAINTIF-PLAINTIF**

DAN

1.	**TRA MINING (MALAYSIA) SDN BHD (No. Syarikat: 370763-V)**	
2.	**MOHD AFRIZAN BIN HUSAIN (No. K/P: 670821-03-5159)**	
3.	**CEDRIC DAVID JOSEPH WILLIAMSON (No. Paspot: E3005631)**	**...DEFENDAN-DEFENDAN**

JUDGMENT

[1] This appeal concerns the decision of the learned Deputy Registrar on 23.4.2021 in respect of 2 assessments of damages ordered by Lee Swee Seng JC (now JCA) dated 27.12.2012 in favour of the Plaintiffs against TRA Mining (Malaysia) Sdn Bhd ("***TRA***"), the 1st Defendant (encl. 80) and Mohd Afrizan bin Hussain ("***Afrizan***"), the 2nd Defendant (encl. 81).

[2] The learned Deputy Registrar determined that only nominal damages were payable by TRA to the Plaintiffs, in the sum of RM5,000.00 together with costs of RM5,000.00. A similar order was made in respect of Afrizan.

Background Facts

[3] ARCI Enterprise (Registration No 000915175-X) was a registered partnership started by one Syed Kharul Azhar ("***Syed***") and one Yee Chang Men ("***Yee***") which was registered on 8.10.1992 for a fixed term of 8 years, expiring on 28.10.2000. This partnership will be referred to here as "***the 1st ARCI Enterprise***". The 5 plaintiffs in this action later joined Syed and Yee in the 1st ARCI Enterprise on 28.4.1993 resulting in there being together 7 partners in the partnership at that time. This partnership was formed to mine gold pursuant to a mining lease vide Mining Certificate No 1/113 at Mukim Ulu Jelai, Sungai Kermoi, Daerah Kuala Lipis, Pahang ("***MC 1/113***") which was granted on 18.11.1996.

[4] Syed held 5% shares in the 1st ARCI Enterprise. He sold all his rights, title and interests in his shares in the 1st ARCI Enterprise to TRA for a consideration of RM4 million and a deed of assignment dated 30.1.1997 was executed by Syed in favour of TRA for that purpose. To facilitate the execution of the assignment, Syed on the same date, executed a power of attorney dated 30.1.1997 in favour of the 3rd Defendant in this suit, Cedric David Joseph Williamson

("***Cedric***"), who was a director of TRA at the material time, as his attorney to do and perform all acts and/or exercise all powers and rights of the donor (Syed) as a partner of the 1st ARCI Enterprise. Cedric, whose address of service was in Melbourne, was not served with the writ, thus he was not a party to the action.

[5] On 25.2.1997 a joint venture agreement ("***the JVA***") was entered into by the 1st ARCI Enterprise (executed by all partners) and TRA to collaborate and co-operate in the exploration and exploitation activities and the mining operation on the mining land in question.

[6] Later, a dispute arose and the 1st ARCI Enterprise terminated the JVA. The 8 year period fixed for the partnership expired on 28.10.2000. In the meantime, Yee and Syed were respectively adjudicated bankrupt on 9.7.2003 and 19.4.2005.

[7] A second partnership comprising of 7 former partners of the 1st ARCI Enterprise was registered on 29.7.2004 with the same name for a period of one year until 28.7.2005. This second partnership will be referred to here as "***the 2nd ARCI Enterprise***". On 12.1.2006, after expiry of the 2nd ARCI Enterprise, the third partnership with the same name was registered but with only 5 surviving partners (excluding Syed and Yee) for a period of one year from 11.1.2007. This third partnership will be referred to here as "***the 3rd ARCI Enterprise***".

[8] 27.4.2007, Cedric, acting under the power of attorney granted to him earlier by Syed gave notice to convene a creditor's meeting by way of an advertisement in a local newspaper. The creditors meeting was subsequently held on 11.5.2007 whereby the 3rd ARCI Enterprise was determined to be insolvent. In the same creditor's meeting, Afrizan was appointed as a provisional liquidator for the 1st ARCI Enterprise.

[9] Subsequently, TRA, who claimed to be a creditor to 3rd ARCI Enterprise, filed a creditor's petition on 16.4.2007 at the Malacca High Court in Petition No. MT3-28-15 of 2007 ("***the Winding-Up Petition***") seeking to wind up the 3rd ARCI Enterprise based on an amount of RM6,157,121.57 which was said to be the amount owed to it by the 3rd ARCI Enterprise. The Malacca High Court had, on 8.8.2008 granted the petition and wound up the partnership. Afrizan was then appointed as liquidator for the wound-up partnership by the Court ("***the Winding-Up Order***").

[10] Subsequent to the 3rd ARCI Enterprise being wound up, all the 5 surviving partners who are the plaintiffs in this action, as contributories of the 3rd ARCI Enterprise, applied vide summons in chambers dated 13.6.2008, in the Malacca High Court to set aside the Winding-Up Order and for leave for the 3rd ARCI Enterprise to file an affidavit of objection against the Winding-Up Petition. On 8.7.2008, the application was dismissed.

[11] Later, on or about 29.12.2009 the Plaintiffs filed a writ action at the Kuala Lumpur High Court in this suit against TRA and Afrizan seeking, inter alia, to set aside the Winding-Up Order dated 8.5.2008 made by the Melaka High Court against the 3rd ARCI Enterprise and to set aside the appointment of Afrizan as the liquidator.

[12] TRA and Afrizan filed an application to have the writ and the statement of claim against them struck out under O 18 r 19(1)(b) and (1)(d) of the Rules of the High Court 1980 ("***RHC***"). The learned High Court judge, invoked summary procedure under O 14A of the RHC and held that the Winding-Up Order can be set-aside by another court of concurrent jurisdiction, and accordingly set-aside the Winding-Up Order granted by the Malacca High Court as well as the order appointing Afrizan as the liquidator of the 3rd ARCI Enterprise on the ground that the Winding-Up Order of the Malacca High Court was a nullity ab initio as a partnership was excluded from the regime of the Companies Act 1965.

[13] The Kuala Lumpur High Court decision was appealed against and the Court of Appeal allowed the appeal. The Plaintiffs obtained leave and appealed to the Federal Court against the decision of the Court of Appeal. The Federal Court allowed the appeal holding that a partnership with more than 5 members was an 'unregistered company' and can be wound up under Part X of the Companies Act 1965

by virtue of the definition of 'unregistered company' in sub-s 314(1) of the Act.

[14] The Federal Court expressed the view that from the facts of the case then it was not clear whether the 3rd ARCI Enterprise had only 5 members at the time of presentation of the Winding-Up Petition at the Malacca High Court. The Plaintiffs' writ was then remitted to the Kuala Lumpur High Court for full trial to determine the issue of how many members of the partnership were there at the time of the presentation of the Winding-Up Petition against the partnership.

[15] After a full trial before Justice Lee Swee Seng, His Lordship held that because 2 partners were bankrupt when TRA presented a winding up petition against the 3rd ARCI Enterprise, only 5 partners were left in the partnership out of the original 7 partners. That being so, His Lordship then set aside the Winding-Up Order as the law does not allow a partnership to be wound up under s. 314 of the Companies Act 1965 which refers to a partnership of more than 5 members.

[16] Subsequently, TRA and Afrizan appealed against the decision of the learned High Court Judge. This appeal was dismissed by the Court of Appeal on 24.3.2014 which was affirmed on 8.8.2019 by the Federal Court on further appeal.

[17] The Plaintiffs filed Assessments of Damages against TRA (via encl. 80) and against Afrizan (via encl. 81). The assessment of damages proceedings in encl. 80 and encl. 81 were conducted before the learned Deputy Registrar by way of affidavit evidence.

[18] On 23.4.2021, the learned Deputy Registrar handed down his award ("***the Award***") and he determined that only nominal damages were payable by TRA to the Plaintiffs, in the sum of RM5,000.00 together with costs of RM5,000.00. A similar order was made in respect of Afrizan.

[19] The Award is premised on the learned Deputy Registrar's finding that MC 1/113 was terminated due to the bankruptcies of the 2 former partners of the 3rd ARCI Enterprise and that the bankruptcies occurred before the Winding-Up Order. Based on the learned Deputy Registrar's Grounds of Judgment, it is the learned Deputy Registrar's conclusion, inter alia, that the Winding-Up Petition allegedly did not cause any actual damage to the Plaintiffs.

[20] On 30.4.2021, the Plaintiffs filed these appeals against the Award.

Findings of the Trial Judge

[21] The parameters of the assessment were set out by the learned trial judge, Justice Lee Swee Seng. The

Pronouncement of Justice Lee in the main action is reproduced below:

> *"Pronouncement*
>
> *Having set aside the Winding Up order of the Malacca High Court for the reasons given above I had made the following consequential orders.*
>
> *I directed the Senior Assistant Registrar (SAR) to assess damages as against the 1st Defendant bearing in mind the following:*
>
> *1. That the 1st ARCI Enterprise had already been dissolved by operation of law even before the Winding Up order was made and even before a notice by the 3rd Defendant to dissolve the partnership and the calling of a Creditors' Meeting on 11 May 2007;*
>
> *2. That it was a condition of the Mining Certificate and Lease that the State has a right to terminate or forfeit the Lease upon the bankruptcy of any one of the partners;*
>
> *3. That the State did issue a show cause letter to the provisional Liquidator to show cause why the Mining Certificate and Lease should not be terminated;*
>
> *4. That the reply of the provisional Liquidator was factually correct;*
>
> *5. That no evidence has been led to show that if an appeal had been made it would have been successful;*
>
> *6. That the Plaintiffs did not try to challenge the said decision of the State to terminate the Lease;*
>
> *7. That the provisional Liquidator did not consult the partners with respect to the appeal against termination or forfeiture of the Mining Lease.*
>
> *The period shall cover from the point of appointment of the provisional Liquidator on 11 May 2007 to the date of the setting aside of the order appointing the Liquidator on 27 December*

2012. The said period is justified on account of the fact that the 1st Defendant was the Creditor who in unison with the 3rd Defendant, called for the Creditors' Meeting that appointed the 2ndDefendant as the provisional Liquidator and the 1st Defendant was also the party that presented the Winding Up Petition that led to the granting of the Winding Up order which order I had set aside.

As for the 2nd Defendant the same assessment considerations shall apply but the period shall be from the date he was appointed the provisional Liquidator on 11 May 2007 to the date the Malacca High Court made the order to appoint him as the Liquidator on 8 May 2008. After that his appointment being via a Court order, it is valid until it is set aside, there being no evidence of conspiracy to injure the Plaintiffs or having acted in bad faith.

The Court also ordered the 2nd Defendant to give full details of the 1st ARCI Enterprise account if any to the Plaintiffs during the period when he exercised his duty as the provisional Liquidator and subsequently as the Liquidator appointed by the Court and to return all books, documents and other assets of the partnership, if any, that have come into the possession of the 2nd Defendant.

I also ordered costs of RM50,000.00 to be paid by the 1st and 2nd Defendants to the Plaintiffs."

Plaintiffs' submissions

[22] A summary of the Plaintiffs' submissions in these appeals is stated below.

[23] The question asked by the learned Deputy Registrar, in assessing damages, "Was there any damage suffered by the Plaintiffs as a consequence of the Winding-Up Order wrongfully procured by TRA?" was wrong.

[24] Justice Lee recognised that damages started to accrue when Afrizan was appointed as the 3rd ARCI Enterprise's Provisional Liquidator as at 11.5.2007 and not when the Winding-Up Petition was presented or the Winding-Up Order was made. Upon his appointment as the Provisional Liquidator, Afrizan took control of MC 1/113 to the exclusion of the Plaintiffs which caused damage.

[25] The Plaintiffs retain the rights to continue the business of the 3rd ARCI Enterprise including the rights to exploit the mining rights under MC 1/113, notwithstanding the bankruptcies of the 2 partners, Syed and Yee, which triggered a dissolution of the 1st ARCI Enterprise. This is implicit in Justice Lee's Judgment which had made orders to assess damages against TRA and Afrizan.

[26] The Plaintiffs mainly rely on the provision of s. 40 of the Partnership Act 1961 which provides that after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership.

[27] The computation of damages starts from the date of Afrizan's appointment as the 1st ARCI Enterprise's Provisional Liquidator and not the date of the Winding-Up Order and the learned Deputy Registrar was wrong to treat the main issue to be whether there was "damage suffered by the Plaintiffs as a consequence of the Winding-Up

Order". This was because Justice Lee set out the parameters of assessment in the Judgment as follows:

> *"The period shall cover from the point of appointment of the provisional Liquidator on 11 May 2007 to the date of the setting aside of the order appointing the Liquidator on 27 December 2012. ….*
>
> *As for the 2nd Defendant the same assessment considerations shall apply but the period shall be from the date he was appointed the provisional Liquidator on 11 May 2007 to the date the Malacca High Court made the order to appoint him as the Liquidator on 8 May 2008…."*

[28] Damages for the Plaintiffs should be quantifed at least up to the point that MC 1/113 was forfeited as Justice Lee did not order damages to be assessed as a result of the forfeiture of MC 1/113 but had expressly ordered for damages to be assessed to cover a period both before and after the forfeiture of MC 1/113, commencing from the date of appointment of Afrizan as ARCI's Provisional Liquidator.

[29] The Pahang State Government only exercised the "right" to terminate MC 1/113 due to the bankruptcy of the 1st ARCI Enterprise's former partners by publication of the Gazette on 13.3.2008 which occurred after Afrizan was appointed as ARCI's Provisional Liquidator. Before such date, MC 1/113 remained in effect and the Plaintiffs should have been awarded damages accordingly.

[30] As the Plaintiffs in this action are suing as individual former partners of the 1st ARCI Enterprise and not the partnership itself and the partners under a dissolved partnership may still carry on the affairs of the partnership pursuant to s. 40 of the Partnership Act 1961 the assessment of damages should be between 11.5.2007, when Afidzan was appointed as Provisional Liquidator, right up to 13.3.2008, when the termination of MC 1/113 was gazette. This is because the Plaintiffs would have sustained total damage which could not be mitigated during this period as Afrizan as Provisional Liquidator was in total control of the 1st ARCI Enterprise and MC 1/113 but did nothing to continue the 1st ARCI Enterprise's business.

[31] Based on the Pronouncement of Justice Lee's Judgment and if it is taken that termination of MC 1/113 was not challengeable, the worst case for the Plaintiffs would be for both TRA and Afrizan, actual damages should be assessed from 11.5.2007 to 13.3.2008 i.e. right up to the Gazette of the forfeiture of MC 1/113. As for nominal damages, for Afrizan, this would flow from the termination from 13.3.2008 to 8.5.2008 i.e. up to the date of the Winding-Up Order and for TRA, damages would flow from the forfeiture of MC 1/113 from 13.3.2008 to 27.12.2012 i.e. up to the date of Justice Lee's Judgment.

TRA's submissions

[32] A summary of TRA's submissions in these appeals is stated below.

[33] The Plaintiffs have no basis upon which to claim damages from TRA as the Plaintiffs have failed to plead a clear basis for the claim for damages. It cannot be determined from the pleadings whether the claim for damages is based in contract, or in tort. From the pleadings, the basis of the Plaintiffs' claim for damages appears to be in respect of any alleged conspiracy to injure but it is not pleaded whether the alleged conspiracy is a wrongful means conspiracy or a simple conspiracy. Justice Lee found no evidence of any such alleged conspiracy and any alleged conspiracy has not been established.

[34] The doctrine of res judicata bars the Plaintiffs' claim for damages. Previously in Originating Summons No. S7-21-48-2000 ("***OS 48***") the plaintiffs therein sought an account of profits which is similar to the damages sought herein, and an order for payment against the defendants therein and in Shah Alam High Court Civil Suit No. 22NCVC-291- 05/2015 ("***Suit 91***"), the plaintiffs therein sought similar relief against TRA and other parties. Both OS 48 and Suit 91 were struck out. The Plaintiffs' claim in this suit is the third bite at the cherry for the Plaintiffs, with a suit initiated by a different set of plaintiffs again.

[35] The claim for damages by the Plaintiffs herein does not represent an action necessary to wind up the affairs of the 1st ARCI Enterprise and does not complete a transaction begun but unfinished at the time of dissolution pursuant to s. 40 of the Partnership Act 1961. The 1st ARCI Enterprise no longer had any interest in MC 1/113 from 16.12.1998 upon the endorsement of the sub-lease on MC 1/113. Further, as a result of Yee's bankruptcy on 9.7.2003, the Pahang State Government acted properly and correctly in forfeiting MC 1/113 as held by Justice Lee.

[36] As a result of the grant of the sub-lease of MC 1/113 to Selinsing Mining Joint Venture Sdn Bhd ("***Selinsing Mining***") for the period of the mining lease or any renewal thereof, which was endorsed on MC 1/113 on 16.12.1998, the 1st ARCI Enterprise no longer had any interest in MC 1/113 from 16.12.1998 to the date of the forfeiture thereof by the Pahang State Government.

Afrizan's submissions

[37] A summary of Afrizan's submissions in these appeals is stated below.

[38] Since the 1st ARCI Enterprise had assigned all mining rights of MC 1/113 to Selinsing Mining and failed in OS 48 with the Court confirming that as the rights belong to Selinsing Mining, the loss due to the forfeiture of of MC 1/113 by the Pahang State Government due to Yee and

Syed's bankruptcy has nothing to do with the 1st ARCI Enterprise. Any rights to recover damages for losses, if they exist belongs to Selinsing Mining. Further, even if Afrizan communicated the Notice to Show Cause by the Pahang State Government to the partners of the 1st ARCI Enterprise with respect to the appeal against forfeiture of MC 1/113 and the partners had instructed Afrizan to appeal against the forfeiture, there was no evidence to show that had an appeal been lodged, it would have been successful.

[39] As s. 35 and s. 40 of the Partnership Act 1961 (read together) provides that upon dissolution, the only business to be conducted is only in respect to matters relating to the dissolution of the partnership, the 1st ARCI Enterprise is not legally permitted to continue its business. There was no valid reason to justify an appeal against the Pahang State Government's forfeiture of MC 1/113 after the legal dissolution of the 1st ARCI Enterprise due to the bankruptcies of Yee and Syed.

[40] Afrizan should not be held liable for damages when there was no causal connection shown between the breach and the damages arising. Justice Lee found that MC 1/113's forfeiture was not caused by Afrizan or by the presentation of the Winding-Up Petition by TRA but in fact was caused by partners of the Plaintiff who were adjudged bankrupt.

Findings and analysis of the Court

[41] The learned Deputy Registrar, in assessing damages, asked himself the question: was there any damage suffered by the Plaintiffs as a consequence of the Winding-Up Order wrongfully procured by TRA?

[42] However, learned counsel for the Plaintiffs argued in this appeal that this was the wrong question to ask. It should have been: Was there any damage suffered by the Plaintiffs as a consequence of the appointment of Afrizan as the 1st ARCI Enterprise's Provisional Liquidator? According to the Plaintiffs, this was because based on the parameters set out by Justice Lee in his grounds of judgment dated 26.3.2013 based on the judgment given on 27.12.2012 ("***Justice Lee's Judgment***") the learned Deputy Registrar was bound to compute damages from the date of Afrizan's appointment as the 1st ARCI Enterprise's Provisional Liquidator and not the date of the Winding-Up Order.

[43] The logic to this argument is that the Plaintiffs lost control of the partnership when Afrizan was appointed as the 1st ARCI Enterprise's Provisional Liquidator, before the Winding-Up Order was given and thus the Court must determine what damage was suffered by the Plaintiffs as a consequence of the appointment of Afrizan as the 1st ARCI Enterprise's Provisional Liquidator, not the Winding-Up Order.

[44] This proposition put forward by the Plaintiffs will then fit in with the Plaintiff's suggestion that if damages are not assessed up to the date of Justice Lee's Judgment, then actual damages should at least be assessed from the appointment of Afrizan as Provisional Liquidator on 11.5.2007 right up to the Gazette of the forfeiture of MC 1/113 on 13.3.2008.

[45] I will entertain this notion for a while and test this out based on the facts of the case.

[46] What is not in dispute is that Yee and Syed became bankrupt on 9.7.2003 and 19.4.2005 before the appointment of Afrizan as Provisional Liquidator on 11.5.2007. Learned counsel for the Plaintiffs argued that the bankruptcies did not immediately cause the forfeiture of MC 1/113 as the bankruptcy of the 1st ARCI Enterprise's former partners merely gave the Pahang State Government the "right" to terminate MC 1/113 and such right was only exercised by publication of the Gazette, which occurred after Afrizan was appointed as the 1st ARCI Enterprise's Provisional Liquidator. Therefore, there was a period between Afrizan's appointment as Provisional Liquidator and the actual forfeiture of MC 1/113 that the Plaintiffs could have exercised their rights over MC 1/113. What could the Plaintiffs do in respect of MC 1/113 during this period of 10 months and 3 days? The answer is suggested by the Plaintiffs in their affidavit in support at para. 7:

> *"7. I aver that but for the 1st and/or 2nd Defendant's actions and/or omissions, the Plaintiffs would be in the position to:*
>
> *7.1. Continue and complete any unfinished transactions involving ARC on their own terms including, but not limited to, the ability to deal with all matters relating to MC 1/113;*
>
> *7.2. Take all necessary steps to preserve ARC's rights, entitlements and/or interests under MC 1/113;*
>
> *7.3. Derive revenue from the gold ore which ARCI is entitled to mine pursuant to MC 1/113."*

[47] To consider whether the Plaintiffs' averments have merit, I come back to the bankruptcies of Yee and Syed. Justice Lee had made a finding that the 1st ARCI Enterprise had already been dissolved by operation of law even before it was wound up. His Lordship stated:

> *"It is to be noted that the 1st ARCI Enterprise had already been dissolved by operation of law by virtue of the Yee Chang Man's bankruptcy on 9 July 2003. Under section 35 of the Partnership Act, it is provided as follows:*
>
> > *"(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner."*

[48] In light of this, to answer the question "What could the Plaintiffs do in respect of MC 1/113 during this period of 10 months and 3 days?" I need to ask another question: After the dissolution of the 1st ARCI Enterprise, a partnership, what could the partners do? What is to be borne in mind here is that Afrizan was appointed as Provisional Liquidator

on 11.5.2007 after the 1st ARCI Enterprise was dissolved as a consequence of Yee's bankruptcy on 9.7.2003.

[49] Learned counsel for the Plaintiffs argued that even if the 1st ARCI Enterprise was dissolved, the Plaintiffs retained the rights to continue the business of the 1st ARCI Enterprise as remaining partners of the 1st ARCI Enterprise, including the rights to exploit the mining rights under MC 1/113. In support of this proposition, learned counsel referred the Court to s. 40 of the Partnership Act 1961 states:

> *"After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise".*

[50] He then went on to cite a number of cases to reinforce the argument that dissolution does not cause the partnership to discontinue abruptly but there are certain things that the remaining partners could still do notwithstanding the dissolution. He referred the Court to the cases of *Bufchart v. Dresser* (1853) 10 Hare 453, *Soo Boon Siong @ Saw Boon Siongv. Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi@ Saw Boon Kooy (deceased)) & Ors* [2008] 1 MLJ 27, *Robert Teo Keng Tuan v. Chew Chong Eu* [2015] MLJU 895, *Fatimah Hiew Yen Won & Anor v. Saroja a/p Palaniappan & Anor* [2013] 5 CLJ 522, *Sukhinderjit Singh Muker v. Arumugam Deva Rajah*

[1998] and *Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49.

[51] I went further and looked up an authoritative text on this matter, "Law of Partnerships in Singapore, Including LLP and LP" by the learned author Yeo Hwee Ying. I have to be clear that although from its title this book appears to deal with partnerships in Singapore, the learned author has also cited sections of the Malaysian Partnership Act 1961 which are in most parts in pari materia with the Singapore Partnership Act, on which much of the discussions in this book were based. The equivalent provision to s. 40 of the Malaysian act is s. 38 of the Singapore Act which is word for word the same. I wish to add that a number of cases of the Malaysian courts were cited in this book.

[52] I am particularly enlightened and guided by the following passage in the chapter "Winding Up Partnership Affairs" found at pages 341 and 342:

> *"11.1.1 Continuing authority*
>
> *During the winding-up phase, the partnership firm will have to settle its outstanding business affairs (eg completion of pending contracts, payments of debts and taxes, liquidation of assets to cash, adjustment of partners' rights and final distribution to partners of their respective interests). At this stage, the partnership is not to undertake any new enterprises and the partners lose the mutual authority to bind the firm in future dealings (although they do retain limited continuing authority to bind the firm in respect of matters incidental to the winding-up of the partnership).*

> *Existing obligations remain unaffected by the dissolution in as far as there is authority to complete the performance of such contracts in the usual manner.*
>
> *…..*
>
> ***The existing obligations continue only 'so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution'. it appears that the latter phrase ('to complete unfinished transactions') should be read in conjunction with the first phrase ('necessary to wind up the partnership'). Accordingly, completing unfinished transactions should not be interpreted to mean full performance of those transactions…."***
>
> (Emphasis added)

[53] For a sense of what the Plaintiffs had in mind when it was argued that the remaining partners of the 1st ARCI Enterprise could exercise the rights to exploit the mining rights under MC 1/113 in the post-dissolution period until MC 1/113 was forefeited I will now jump forward to the evidence of the Plaintiffs in respect of the quantum to be assessed against TRA and Afrizan. This is contained in paras. 8 to 18 of the Plaintiffs' affidavit in support.

[54] The Plaintiffs aver that MC 1/113 was replaced by ML 5/2000 which was subsequently given to Monument Mining Limited ("***MML***") which carried out mining operations in the same area through MML's subsidiary. Based on MML's Gold Production Data and a technical report prepared by Snowden Mining Industry Consultants ("***the Snowden***

Report") made on behalf of MML. The Plaintiffs averred that the amount of quantum of damages to be assessed and allowed against TRA and Afrizan would be USD130,119,384.00 and USD26,023,876.80 respectively for the period between the appointment of Afrizan as Provisional Liquidator on 11.5.2007 until the date of Justice Lee's Judgment. In the Plaintiffs' submissions, applying the alternative shorter period between the appointment of Afrizan as Provisional Liquidator on 11.5.2007 until the date of the Gazette which forfeited MC 1/113 on 13.3.2008 the quantum would be USD21,686,564.00 against TRA and USD21,686,564.00 for Afrizan.

[55] From an examination of MML's Gold Production Data and the Snowden Report, I conclude that the data on gold production and the related financial information are based on a full-blown operation of ML 5/2000. Full-blown operations of MC 1/113 cannot be what is considered to be transactions begun but unfinished at the time of the dissolution which are necessary to wind up the partnership as contemplated in s. 40 of the Partnership Act 1961. This would be full performance of those transactions which are not within the ambit of s. 40.

[56] I further cite the passage from Yeo Hwee Ying's book at pages 342 to 343 which will illustrate the nature of transactions contemplated by s. 40:

"Accordingly, completing unfinished transactions should not be interpreted to mean full performance of those transactions. This interpretation is illustrated in Boghani v. Nathoo where the claimant and the defendant were in a partnership which was subsequently dissolved pursuant to a notice given by the claimant to the defendant. At the date of dissolution, there were two uncompleted hotel developments. The claimant argued that there should be an immediate sale while the defendant countered that the developments should be completed and then sold. The court ordered an immediate sale. Although the developments were unfinished transactions, it had not been demonstrated that completion was necessary in order to wind up the partnership. In fact, there were third parties interested in taking over the role of the partnership in the two developments, and it was therefore not necessary to complete the building of the developments before their sale:

> *To some extent the answer to this question depends on what is meant by 'necessary' and 'complete' in the context of section 38. The necessity must arise from the need to wind up the affairs of the partnership. It is not necessary for that purpose that the obligations arising from outstanding transactions must be satisfied by performance of the unfinished transaction. If completion is equivalent to full performance, then in many cases it is both impossible (because the partnership does not have the money) and unnecessary (because the third party is prepared to novate the obligation or to compromise the issue).*

The impact of the partnership's winding up on the banker-client relationship was explored in Chartered Bankv. Yong Chan where the bank had agreed with the partnership firm to honour cheques severally drawn by the partners. Upon the firm's dissolution, the partner tasked with the winding up, Y, continued to operate the partnership account. Subsequently, one of the other partners instructed the bank to honour cheques only if there was authorisation by all members of the partnership. Complying with this instruction, the bank

dishonoured one of the cheques issued by Y and returned it with the stamped instruction 'Signature of All Partners Required'. Feeling insulted, Y issued a libel writ against the bank and Raja Azlan Shah J took the opportunity to comment on the Malaysian equivalent of s 38 in his judgment:

> *The section speaks for itself. The dissolution revokes the authority of a partner to bind his co-partners except in so far as it is preserved by the instant action. That is to say, the partnership remains in being and any existing relationship of banker and the partners continues but only for the purpose of completing transactions begun but unfinished at the time of dissolution, winding-up the business and adjusting the rights of the partners, but not otherwise. The banker in such a case is safe to deal with the partner only to such an extent as is clearly within this purpose."*

[57] Are the matters averred to in para. 7 of the Plaintiffs' affidavit in support necessary in order to wind up the partnership? I think not. There is no evidence offered by the Plaintiffs to support this and the averments in para. 7 appear to be conjectural.

[58] For completeness, I will produce what TRA and Afrizan averred in their affidavits in reply to the Plaintiffs' averments in para. 7.

[59] TRA said this at paras. 40 to 44 of its affidavit in reply:

> *"40. By way of further reply to paragraph 7, I state that the Plaintiffs' averments in paragraph 7 are misleading. As noted above, Section 40 of the Act only 10 enables the Plaintiffs to complete*

transactions which are unfinished at the time of dissolution. In the present case, the dissolution of the 1st ARCI Enterprise caused the forfeiture of MC 1/113, and as such, there were no unfinished transactions of the 1st ARC Enterprise in relation to MC 1/113 after its dissolution.

41. In addition, there were no further rights or entitlements of the 1st ARCI Enterprise in MC 1/113 after the granting of the sub-lease to Selinsing Mining in December 1998, which occurred prior to the dissolution.

42. As such, there is no entitlement on the part of the 1st ARCI Enterprise to derive revenue from gold ore which it is entitled to mine pursuant to MC 1/113 beyond December 1998. As the period of assessment of damages in relation to the 1st Defendant is from is the point of appointment of the provisional Liquidator on 11 May 2007 to the date of the setting aside of the order appointing the Liquidator on 27 December 2012, clearly, the 1st ARCI Enterprise no longer had any interest in MC 1/113 at that time.

43. I further state that, at any material time between 11 May 2007 and 27 December 2012, the 1st Defendant had neither any contractual entitlement, nor any means to mine MC 1/113.

44. In addition, I state that the 1st Defendant never undertook any activity from 11 May 2007 until 27 December 2012 except to either withdraw from court cases and/or to meet obligations regarding compliance with the requirements of the Suruhanjaya Syarikat Malaysia."

[60] Afrizan said this at paras. 21 to 22 of his affidavit in reply:

"21. I am advised by my solicitors and I verily believe that upon the dissolution of the 1 st ARCI Enterprise on 9-7-2003 the rights and obligations of the partners continue only so far as necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise, pursuant to Section 40 of the Act.

> *22. I verily believe that the claim for damages by the Plaintiffs herein does not represent an action necessary to wind up the affairs of the 1st ARCI Enterprise and does not complete a transaction begun but unfinished at the time of dissolution, as the 1st ARCI Enterprise no longer had any interest in MC 1/113 from 14-12-1998 upon the granting of the sub-lease to Selinsing Mining Sdn Bhd and where in any event, MC 1/113/113 was forfeited by the State Authority as a result of the dissolution of the partnership and or the bankruptcy of the partners."*

[61] Apart from satisfactorily denying the Plaintiffs' averments, the Defendants have raised another valid point. The 1st ARCI Enterprise granted a sub-lease to Selinsing Mining in December 1998, prior to the dissolution and there is no entitlement on the part of the 1st ARCI Enterprise to derive revenue from gold ore which it is entitled to mine pursuant to MC 1/113 beyond December 1998. After the appointment of the Provisional Liquidator on 11.5.2007 to the date of the forfeiture of MC 1/113 the 1st ARCI Enterprise no longer had any interest in MC 1/113. The 1st Defendant had neither any contractual entitlement, nor any means to mine MC 1/113. Therefore, the Plaintiffs cannot be said to have suffered any damage arising from the appointment of the Provisional Liquidator.

[62] Premised on the above, there was no damage suffered by the Plaintiffs as a consequence of the appointment of Afrizan as the 1st ARCI Enterprise's Provisional Liquidator because there was nothing that the Plaintiffs could do to exploit the mining rights under MC 1/113 in the post-dissolution period until MC 1/113 was forefeited. The

authority of the remaining partners of the 1st ARCI Enterprise to mine MC 1/113 or derive any profits of it are not within the ambit of s. 40 of the Partnership Act 1961 as this were not matter that were necessary to wind up the partnership. No damages will be awarded for actual loss of the Plaintiffs for the period between the appointment of Afrizan as Provisional Liquidator on 11.5.2007 until the date of the Gazette which forfeited MC 1/113 on 13.3.2008.

[63] As for nominal damages, I agree with the approach and reasoning of the learned Deputy Registrar which I shall adopt as my own. Relevant excerpts from the learned Deputy Registrar's Ground of Judgment are:

a) Paragraph 22 of the Grounds of Judgment of the learned Deputy Registrar:

> *"..There, therefore, appears clear that the loss of the gross profit from the lease mining MC 1/113 flows from the forfeiture by the State Government of Pahang upon the bankruptcy of Yee Chang Man and Syed Kharul Azhar. It does not flow from the winding-up petition by TRA. Hence the quantum advocated by the Plaintiffs at para 8 above must, by the strength of the preceding factual score, collapses. It cannot form the basis for quantum in this assessment."*

b) Paragraph 28 of the Grounds of Judgment of the learned Deputy Registrar:

> *".... Afrizan's appointment was defective, hence he must refund all the remunerations he received during the wrongful*

> *appointment from 11 May 2007 (when he was appointed in the creditor's meeting) until 8 May 2008 (when he was appointed by the Malacca High Court). Be that as it may, I find no evidence led by the Plaintiffs to prove the amount of the remunerations."*

[64] The learned Deputy Registrar then decided to award nominal damages in the absence of evidence relying on the decision in *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, the Court had occasion to say this (at page 367):

> *"....It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract."*

Conclusion

[65] The appeals are dismissed and the learned Deputy Registrar's decision is upheld. This means that only nominal damages will be awarded to the Plaintiffs against TRA and Afrizan which will be RM5,000.00 respectively for their respective wrongdoings together with a further order for costs of RM5,000.00 against TRA and Afrizan separately for the assessment proceedings before the learned Deputy Registrar.

[66] The Court further orders costs of RM3,000.00 each for TRA and Afrizan in respect of this appeal.

12 July 2022

ATAN MUSTAFFA YUSSOF AHMAD

Judge

Kuala Lumpur High Court

(Commercial Division)

Counsel:

For the Plaintiff:	*Lim Kian Leong, Alvin Oh & Jessica Chong* *(Messrs Sia Siew Mun & Co.)*
For the 1st Defendant:	*Mahathir Abdullah* *(Messrs. Mahathir)*
For the 2nd Defendant:	*Faizal Khalid & Afifah Afif* *(Messrs. Sabri Ahmad & Co.)*