# SEJAHTERA SALURAN SDN BHD & ORS
**v.**
# NUMIX ENGINEERING & ORS

Court Of Appeal, Putrajaya
Zainun Ali, Ramly Ali, Syed Ahmad Helmy Syed Ahmad JJCA
[Civil Appeal Nos: W-02(NCC)-1115-2011, W-02(NCC)-1050-2011, W-02(NCC)-1855-2011 & W-02(NCC)-1080-2011]
4 December 2013

**Case(s) referred to:**
*Watt or Thomas v. Thomas [1947] AC 484 (refd)*
*Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1995] 2 MLRA 461; [1996] 1 MLJ 113; [1996] 4 CLJ 716; [1996] 2 AMR 2477 (refd)*
*Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 MLRA 461; [1978] 2 MLJ 41 (refd)*
*Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors [2004] 2 MLRA 1; [2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781 (refd)*

**Legislation referred to:**
Companies Act, s 181, (1)(a)

**Counsel:**
*For the appellant: Svenden Singh Randhawa (together with Muhamad Fariz Mohd Ali Jagjit Singh Jasbeer Singh Emma Morgan) M/s Jasbeer, Nur & Lee M/s Azlan Shah Sukhdev & Co*
*For the respondent: Bastian P Vendargon (Wong Rhen Yen, JB Reuben Netto, Vincent Lim and S Ravenason together with him); M/s Mohanadass Partnership; M/s Syed, Paul & Co*

*[Order accordingly.]*

## JUDGMENT

### Background of the Appeals

**Zainun Ali JCA:**

**[1]** There are 4 appeals before us originating from two High Court actions which were jointly tried:

**KL High Court Petition no D26NCC-100-2010 (the s 181 petition)**

**The petition was filed by the respondents pursuant**s 181 of the Companies Act against Magic Telecom Sdn Bhd, Sejahtera Saluran Sdn Bhd (Sejahtera) and Loh Siong Chee (LSC) among others for the 1st appellant (ie Magic Telecom Sdn Bhd (Magic)) to be wound up on

grounds of oppression. The High Court allowed the respondents' petition. Dissatisfied with the decision, Sejahtera and LSC filed their respective appeals:

i. **Civil Appeal no W-02(NCC)-1115-2011** ( Sejahtera Selaruan Sdn Bhd v. Numix Engineering & 2 ors)

ii. **Civil Appeal no W-02(NCC)-1050-2011** (*Looh Siong Chee v. Numix Engineering & 2 ors*) Appeals no 1115 and 1050 originated from of the **High Court filed by** KL High Court Civil action no **S-22NCVC-211-2010 (the writ action) The writ action was filed by** Sejahtera and LSC against the respondents for a declaration that the Shareholders' Agreement and Memorandum of Undertaking in respect of Magic is valid and enforceable and that there was a breach of the same by the respondents; Sejahtera and LSC also prayed for injunctions restraining the respondents from dissipating the assets of Magic and for specific performance for transfer of business. The High Court dismissed the Sejahtera and LSC's action. Dissatisfied with the decision, Sejahtera and LSC filed their respective appeals:

iii. **Civil Appeal no W-02(NCC)-1855-2011** (Sejahtera Saluran Sdn Bhd v. Numix Engineering & 2 ors)

iv. **Civil Appeal no W-02(NCC)-1080-201**1 ( Looh Siong Chee v. Numix Engineering & 2 ors)

## Background Facts

**[2]** Numix was incorporated in 1997 to provide data services (internet access)-CDMA mobile and Wireless Broadband business. It's principal business was Ku Band VSAT. The 2nd and 3rd respondents are its directors. Numix has an ongoing partnership with Telekom Malaysia Bhd wherein Numix obtained loan facilities of RM17.38 million from Kuwait Finance House to discharge its obligations under the partnership agreement.

**[3]** The 2nd petitioner intended to expand Numix's business by developing the "All IP based CDMA" mobile and fixed wireless technology system. For this purpose and as part of the listing exercise, Magic Telekom Sdn Bhd, a subsidiary of Numix was incorporated in June 2009.

**[4]** On 03 September 2009, Numix secured the operating licenses of Application Service Provisioning (ASP), Network Service Provisioning (NSP) and NFP. On 15 October 2009, Numix applied for the Spectrum approval for 800MHz (Spectrum Approval) from Malaysian Communications and Multimedia Commission (MCMC) which formed the fundamental element of the business plan in Magic.

**[5]** However, having valuable licences, Numix lacked sufficient funds to

finance its business in Magic. During the course of sourceing for financial assistance, the 2nd and 3rd petitioners were introduced to LSC who agreed not only to inject capital investment but also to procure substantial investment in Magic. LSC also claimed that he was in a position to obtain the specific licences for the CDMA Wireless Broadband Business which would enable Magic to operate a cellular wireless broadband business.

**[6]** Thereafter, the parties entered into the following agreements:

i. A Shareholder's Agreement dated 19 January 2010 between Numix, LSC and Magic **"(the SH)"**

ii. A Memorandum of Undertaking dated 19 January 2010 between the Numix, the 2nd and 3rd Petitioners and LSC **"(the MOU)"**

iii. Subscription Agreement dated 22 January 2010 between Jet Allied, Magic, Numix and LSC "(the SA)"

**[7]** The above agreements defined the roles of Numix and LSC in Magic. Briefly the parties' obligations were as follows:

i. With a view to putting Magic on public listing and flotation on a recognised stock exchange, the parties agreed to use their best endavours to ensure that Magic meets its working capital requirements from the existing share capital and shareholders advance through the issuance of Redeemable Convertible Preference Shareholder (RPCS). Clause 2 of the SH made it clear that "*no unissued shares of the company shall be allotted and issued (other than pursuant to the rights of conversion under the RCPS)...*".

ii. LSC agreed to invest RM1 million in Numix for 35% shares and to procure a company, Jet Allied, to subscribe for RM5 million RCPS in Magic, to inject investment of additional RM15 million into Magic by way of the issuance of RCPS, to secure Spectrum approval on or before 20 April 2010 and to assist Numix in obtaining the approval of the relevant authorities for the transfer of the NFP license and the Spectrum approval from Numix to Magic.

iii. Upon full execution of LSC's undertakings, Numix agreed to contribute the requisite expertise and know-how for the business, to procure the transfer of its KU Band Business within 9 months from the date of the SH and to transfer the NFP and Spectrum to Magic.

iv. Clause 2.3 of the SH explicitly states that at all times, Numix's shareholding proportions would be 65% and LSC at 35%.

Clause 2.2 of the SH states as follows:

> *The participation of Numix and LSC in the equity capital of the company shall save as expressly provided or authorised under*

*this agreement at all times be in the following proportions:*

*Numix- 65%*

*LSC-35%*

*Hereinafter referred to as the 'agreed proportions'.*

v. Clause 8.1 of the SH also prescribed the ratio for appointment of directors by Numix and LSC is at 2/3 and 1/3 respectively and that in the event of any changes in the proportion of shareholdings, the ratio is to be maintained and adjusted accordingly.

**[8]** Pursuant to clause (H) of the SH and Recital (D) and (E) of the SA and Clause (H) of the SH, Magic increased its authorised share capital to RM100,000,000.00 comprising 80,000,000 ordinary shares of RM1.00 each and 20,000,000 RCPS of RM1.00 each.

**[9]** LSC was appointed as a director of Magic in September 2009 Numix. In consideration of his RM1 million investment in Magic, LSC was allotted 350,000 shares in Magic. Numix was the majority shareholder with 650,000 shares.

**[10]** Pursuant to the SA, Jet Allied subscribed 5 million RCPS with no voting power in consideration for RM5 million investment in Magic. As to the remaining 15 million RCPS, LSC represented that since Jet Allied conditioned the subscription of these shares upon approval of the Spectrum licence, the same would have to be subscribed by another company.

**[11]** It transpired that LSC failed to procure the additional 15,000,000 RCPS. Magic was short of funds. To meet Magic's need for urgent funds, LSC agreed to inject RM4 million into Magic. However, this was done through Sejahtera, which was claimed by LSC to be one of his family companies. Arrangement was made for the subscription of RM4 million ordinary shares (instead of RCPS) in Magic by Sejahtera. According to the respondents, they were persuaded to agree to such arrangement upon the following representations made by LSC:

i. That Sejahtera was one of his family companies and that the director of Sejahtera, Ms Hew San Mei is his adopted sister.

ii. That the 4 million ordinary shares would be issued to Sejahtera as temporary collateral only.

iii. That LSC would redeem these shares from the 15 million RCPS shares that he would raise within 14 days from the release of RM4 million by Sejahtera.

iv. That LSC gave an assurance that in any event he would ensure the completion of documentation to convert these shares into RCPS.

**[12]** Relying on the representations made by LSC and in view of clause 2.2 in the SH on "the agreed proportions" of the shareholdings in Magic, the respondents executed a circular resolution leading to the allotment of 4 million ordinary shares to Sejahtera. The 1st respondent and LSC had also executed letters of agreement dated 15 July 2010 and 16 July 2010. The facts that the RM4 million shares were to be treated as temporary collateral to be redeemed by LSC within 14 days from the release of RM4 million by Sejahtera and LSC's obligation to convert the shares to RCPS, were stated in those letters. On 21 July 2010, the 4 million ordinary shares in Magic were allotted to Sejahtera.

**[13]** The issuance of the 4 million ordinary shares to Sejahtera caused Sejahtera to have the majority shareholding in Magic at 80% and followed by Magic and LSC at 13% and 7% respectively. This was against the 'agreed proportions' as prescribed in the SH.

**[14]** On 17 August 2010, Sejahtera, being a majority shareholder wrote to Magic requesting for the appointment of Faris (CEO of Magic) and Azly (CFO of Magic) as directors of Magic with immediate effect. The respondents objected. Notice to refrain from requisitioning any EGM was issued by the respondents, alleging that Sejahtera was not a legitimate shareholder of Magic but that it held these shares as collateral, pending repayment of this amount by LSC. The respondents alleged that there were fraudulent misrepresentation and breach of undertaking on the part of LSC.

**[15]** Despite the respondents' objection, Sejahtera vide notice dated 27 September 2010 proceeded to requisition an EGM and this resulted in the appointment of Faris and Azly as directors of Magic on 8 December 2010.

**[16]** However, the EGM was declared to be null and void pursuant to a court order obtained by the respondents against the appellant.

**[17]** On 08 October 2010, the respondents filed the s 181 Petition for a declaration that the allotment of 4 million shares to the appellant was null and void and for rectification of the shares in Magic. The respondents averred that the allotment of these shares was to be treated as collateral for a temporary loan of RM4 million and that LSC had failed to redeem these shares within 14 days or to ensure the completion of documentation to convert these shares into RCPS.

**[18]** The respondents also claimed that the appellants acted in a manner that was oppressive, in disregard of and was prejudicial to the respondents' interests. They also claimed that the affairs of Magic had been conducted to defeat the provisions in the agreements of the parties.

**[19]** On 17 December 2010, LSC and Sejahtera filed the writ action for a declaration that the Shareholder's Agreement and Memorandum of Undertakings in respect of Magic was valid and enforceable and the same had been breached by the respondents and specific performance of the agreement

to transfer the KU Band business to Magic from the 1st respondent.

## Decision Of The High Court

**[20]** The trial judge was satisfied that the respondents had proven its case on the balance of probabilities. He found that all the complaints raised by the respondents clearly indicated that LSC was the alter ego of Sejahtera and that he had acted in a manner which was oppressive to the respondents and wholly disregarded the agreements of the parties for the incorporation of Magic.

**[21]** He then concluded that it was gravely oppressive to allow the continuance of Magic which justified a winding up order against Magic. The High Court Judge also ordered that: i) that the allotment of the 4 million ordinary shares in Magic to the Appellant on 21 July 2010 was null and void; (ii) that the share register of Magic be rectified to delete Sejahtera's shareholding of 4 million ordinary shares from the record; (iii) a declaration that the appellant was a nominee of LSC; (iv) a declaration that Magic was indebted to LSC in the sum of RM4 million. In respect of the writ action the learned Judge dismissed the claim save for the relief prayed for a declaration that the SH and the MOU were still valid and enforceable.

## Decision Of The Court Of Appeal

**[22]** Before us, it was submitted by learned counsel for the appellants that the RM4 million ordinary shares allocated to the appellant was not temporary in nature. The equity participation in Magic on the basis of 65%-35% between the respondent and LSC cannot be perpetual. Such agreement, if any was a private arrangement between the 1st respondent and LSC. The trial judge overlooked the fact that Sejahtera was not a party to the SH or the MOU and that there was no evidence that the parties intended Sejahtera be bound by the terms of the Share Agreement.

**[23]** We cannot agree with the above submission.

**[24]** It was a term of the SH that all new capital was to be raised by way of RCPS and not ordinary shares. Clearly, the allotment and issuance of the 4 million ordinary shares and which was against the "agreed proportions" was contrary to the provisions of the SH. Hence, conditions were imposed on LSC to redeem the RM4 million shares and convert them to RCPS in which he failed.

**[25]** The conditions were stated in the letters of agreement of 15 July 2010 and 16 July 2010, executed between LSC and the 1st respondent. The letter agreement of 15 July 2010 bears the caption "redemption of 4 million shares". Paragraph 3 of the letter clearly states that:

> *"...LSC hereby undertakes that upon his successfully raising Ringgit Malaysia Fifteen Million (RM15,000,000.00) of Redeemable Convertible Preference Shares (RCPS) he will apply to redeem" the Ringgit Malaysia Four Million (RM 4,000,000.00 million of ordinary shares. The*

*redemption of the Ringgit Malaysia Four million (RM4,000,000.00) of ordinary shares will be within 14 calendar days or earlier upon finalisation of the issuance of the RCPS". Upon completion of which, the revised shareholding of the company will be as reflected in the shareholder's register."*

The content of these letters also supported the respondents' case that the allotment and issuance of the 4000 ordinary shares was meant to be temporary collateral.

**[26]** The second respondent's testimony on the representation made by LSC for the issuance of the 4 million ordinary shares to Sejahtera was fully tested and considered. There was also overwhelming evidence that it was LSC who failed to raise the RM20 million as capital by way of RCPS from the outset of his appointment as a shareholder and director of Magic. He produced no evidence as to why he was unable to fulfil his undertakings. When Magic was in need of urgent fund, it was LSC who made arrangements for the issuance of RM4 million ordinary shares to Sejahtera, which he claimed to be one of his family companies.

**[27]** Based on the evidence, Faris was merely LSC's nominee. LSC conspired with his nominee to mislead the respondents into agreeing to cause Magic to allot the 4 million shares on the pretext that the allotment was only by way of temporary collateral. Subsequently LSC and Faris were both appointed directors of Sejahtera, commencing 15 July 2010 ie a few days prior to the allotment of the 4 million shares to Sejahtera on 21 July 2013. LSC was in fact holding 49% of the shares of Sejahtera, with Faris holding another 49%. LSC and Faris failed to disclose their interests in Sejahtera. Their surreptitious conduct was in evidence when they delayed the registration of their shareholdings in Sejahtera. This explains why such particulars were only stated in the search result conducted by the 2nd respondent on Sejahtera in late August 2010 and not in the earlier search result, conducted in early August 2010.

**[28]** On the evidence as disclosed, Sejahtera was the alter ego of LSC which was used to evade contractual obligations imposed on LSC under the SH and MOU. Based on the conduct of LSC and Faris it could be inferred that LSC had no intention from the outset to honour the oral representation and the undertaking to redeem or convert the 4 million shares as prescribed in the letters of agreement.

**[29]** There were also other evidences pointing to the fact that the release of RM4 million by the stakeholder solicitors to Magic was only made upon issuance of Numix's letters dated 15 July 2010 for novation of the Telecom's contract to Magic and a letter dated 16 July 2010 for the transfer of the NFP licence to Magic. It could be inferred that such arrangements were made as conditions imposed by Sejahtera to becoming a shareholder in Magic.

**[30]**Section 181(1)(a) of the Act looks to the effect and consequences of the wrong done in determining whether there is oppressive conduct in any given

case. (See the Federal Court decision in the case of *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1995] 2 MLRA 461; [1996] 1 MLJ 113; [1996] 4 CLJ 716; [1996] 2 AMR 2477). The burden is on the respondents to establish that there had been a commercially unfair conduct of LSC and Sejahtera in the operation of Magic. The core consideration was one of equity.

**[31]** Based on the background of the parties and the evidence presented before the court, Magic was a partnership between Numix and LSC. On the one hand, Numix agreed to contribute the requisite expertise and know-how for the business and prepared to procure the transfer of its KU Band Business the NFP licence and Spectrum approval to Magic; on the other, LSC agreed to inject the capital into Magic by making arrangements for subscription of shares in Magic and to work towards the approval of the relevant authorities for the transfer of the NFP license and the spectrum approval to Magic.

**[32]** Nevertheless, as a result of the allotment of the 4000 ordinary shares to Sejahtera, the management of Magic was taken out of the hands of the petitioners in breach of clauses 8.1, 8.4 and 10.1 of the SH. The petitioner's shareholding in Magic was diluted from 65% to 13%. Sejahtera became the majority shareholder and exercised its control and proceeded to requisition an EGM.

**[33]** What transpired was that Sejahtera which was effectively controlled by LSC sought to exercise its right as the majority shareholder of Magic to appoint Faris and Azli as directors of Magic. Obviously, with their appointment, LSC together with Faris could out-vote the respondents on any policy matter. The trial judge was correct in his finding that Faris was the nominee of LSC in Sejahtera and that both have conspired to wrest control of Magic. The action of the majority shareholder was clearly prejudicial to the rights of the members of Magic which amounts to oppression.

**[34]** It is well settled law that an appellate court will not intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 MLRA 461; [1978] 2 MLJ 41; *Watt or Thomas v. Thomas* [1947] AC 484; and *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2004] 2 MLRA 1; [2005] 2 MLJ 1; [2004] 4 CLJ 309; [2004] 6 AMR 781).

**[35]** We agree with the findings made by the High Court Judge. His findings were substantiated by contemporaneous documentary evidence and conducts of the parties. The trial judge had painstakingly identified and dealt with the issues exhaustively in each of the two actions before him. We find that his findings were supported by cogent reasons. Thus, there is no reason for the Court of Appeal to reverse the findings.