

COMPANIES LAW

Mergers and take-overs – Mandatory general offer by controlling shareholders – Failure of – Whether shareholder had *locus standi* to sue – Capital Markets and Services Act 2007, sections 218, 357 and 360

Mak Siew Wei v Dato' Dr Norbik Bashah bin Idris & Ors

[2016] 11 MLJ 772, High Court

Facts The plaintiff and the defendants were shareholders of a company ("the Company"). The plaintiff sued ("the Suit") the defendants in the High Court, alleging that the defendants had contravened section 218(2)¹ of the Capital Markets and Services Act 2007 ("the Act") and section 9(1)² of the Malaysian Code on Take-Overs and Mergers 2010 for their failure to undertake a mandatory offer for the shares in the Company upon obtaining control. The defendants, on the other hand, argued that the Suit was premature and disclosed no reasonable cause of action because the alleged contravention did not give rise to a private cause of action under section 357³ of the Act in the absence of a ruling by the Securities Commission ("SC"). Hence, it was argued that the plaintiff did not have the requisite legal standing to commence the Suit against them. The defendants subsequently applied to strike out the Suit. The plaintiff, however, contended that he was entitled to initiate the Suit pursuant to section 360⁴ of the Act.

Issue The issue was whether the plaintiff had the legal standing to commence the Suit.

Held In dismissing the application, the court held that a person, who claims to be aggrieved by a breach of section 218 of the Act, may resort to sections 357 and 360 of the Act for the legal standing in order to recover his loss and seek for other reliefs, without first obtaining a ruling by SC.

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¹ Subject to section 219, an acquirer who has obtained control in a company shall make a take-over offer for the remaining voting shares in accordance with the provisions of the Code, guidelines, directions, practice notes and any ruling issued by the Commission.

² A mandatory offer shall apply to an acquirer in the following situations: (a) where the acquirer has obtained control in a company; or (b) where the acquirer has acquired more than two per centum of the voting shares or voting rights of a company in any period of six months and that acquirer's holding was more than thirty-three per centum but not more than fifty per centum of the voting shares or voting rights of the company during that six months period, irrespective of how control or acquisition is to be effected, including by way of a scheme of arrangement, compromise, amalgamation or selective capital reduction.

³ Civil liability of person in contravention of the securities laws.

⁴ Power of court to make certain orders.