
COMPANY LAW

**CASE ANALYSIS ON DATO' AZIZAN
BIN ABD RAHMAN & ORS v
CONCRETE PARADE SDN BHD & ORS:
SHAREHOLDER RIGHTS AND CORPORATE
GOVERNANCE UNDER THE COMPANIES ACT 2016**

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This article provides a detailed examination of the Federal Court of Malaysia's judgment in the case of Dato' Azizan bin Abd Rahman & Ors v. Concrete Parade Sdn Bhd & Ors, focusing on its interpretation of Sections 85, 223, and 346 of the Companies Act 2016 ("**The Act**"). It highlights the court's approach to balancing shareholder rights with corporate autonomy and explores the implications for corporate governance and the minority oppression remedy in Malaysia.

INTRODUCTION

The case of Dato' Azizan bin Abd Rahman & Ors v. Concrete Parade Sdn Bhd & Ors offers critical insights into the Malaysian legal framework regarding shareholder rights, directorial discretion, and the mechanics of corporate governance. Central to the dispute were allegations of oppression and statutory violations in the context of a proposed business merger via private placement, and share buy-back transactions.

CASE BACKGROUND

Apex Equity Holdings Bhd aimed to merge with Mercury Securities Sdn Bhd, a move contested by Concrete Parade Sdn Bhd and other minority shareholders for a potential breach of the Companies Act 2016. The dispute originated from a Heads of Agreement signed on 21 September 2018, leading to a Business Merger Agreement and Subscription Agreement on December 18, 2018. The contention centred on the alleged non-compliance with Section 85 (pre-emptive rights to new shares) and Section 223 (shareholder approval for transactions of acquisition or disposal of substantial value). The High Court's decision on August 7, 2019, found no contravention of Section 223, and that pre-emptive rights were adequately addressed, a ruling overturned by the Court of Appeal on August 18, 2021. The Federal Court's decision on March 26, 2024, ultimately provided clarity on these sections, emphasising the balance between shareholder rights and corporate governance.

KEY LEGAL ISSUES

1. **Pre-Emptive Rights to New Share (Section 85):** Whether the directors' actions in proposing a private placement where new shares will be issued, thereby potentially diluting Concrete Parade's shareholding without explicit shareholder approval, constituted a breach of statutory pre-emptive rights.

2. **Disposals or Acquisitions of Substantial Assets (Section 223):** Whether the directors' failure to obtain prior shareholder approval for significant transactions, violated the statutory requirements outlined in Section 223.
3. **Share Buy-back Transactions:** Whether the share buy-back transactions conducted by Apex Equity from 2005 to 2017 were *ultra vires*, as company's articles of association ("AOA") did not provide for such transactions and amounted to acts of oppression against Concrete Parade.
4. **Remedy in Cases of an Oppression (Section 346):** Whether Concrete Parade's grievances could be remedied under Section 346 of the Companies Act 2016, addressing issues of oppression and unfair prejudice against minority shareholders.

COURT FINDINGS

The Federal Court provided a nuanced analysis of the legal framework underpinning corporate governance and shareholder rights, offering significant clarifications on the interpretation of Sections 85, 223, and 346 of the Companies Act 2016.

1. **Section 85 - Pre-emptive Rights**

The Court found that the Act allows a degree of flexibility in how pre-emptive rights are managed, contingent upon the company's constitution and shareholder agreements. The right of pre-emption in relation to a proposed allocation and issuance of new shares are subordinated to the content of the constitution of a company. This is because of the express words, "*Subject to the constitution*" in section 85(1). It held that shareholders could, through a general meeting, exercise their pre-emptive rights. If they wish to assert their pre-emptive rights then they may do so by voting against the resolution for the proposed business merger which involves part payment by way of private placement. If they wish to vote in favour of the business merger, then they may do so by voting in favour of the same, which means that those private placement shares which are necessary to provide the capital to secure the merger, will not be available for purchase by them. In effect, the shareholders chose to disapply or cede their option to purchase the same by voting in favour of the merger. This finding underscores the balance between protecting shareholder interests and enabling corporate growth strategies.

"Subject to direction to the contrary by the company at a general meeting"

Furthermore, the Court also considered the legal construction of the words "*Subject to direction to the contrary by the company at a general meeting*", pursuant to Article 11 of the Memorandum and Articles of Association of the company. The Court of Appeal erred by construing '*subject to direction to the contrary at a meeting of the company*' to mean that the company or its management/directors must advise the shareholders prior to the proposed issuance of new shares for the raising of capital, with an express reminder of the shareholders' pre-emptive rights and a clear and express statement waiving such rights to the new shares proposed to be issued.

The Federal Court explained that the term '*subject to direction*', means subject to instruction or order or stipulation, in their plain and ordinary meaning, where the shareholders at a general meeting 'direct' or instruct, or communicate about their views. It does not require an explanation on the shareholders' pre-emptive rights, nor is a clear and express statement required. The Court of Appeal failed to consider that the shareholders, by voting in favour or against the business merger, did comprehend or ought to have comprehended that their shareholding would be diluted by the proposed issuance of shares for the private placement.

2. **Section 223 - Asset Transactions**

On the issue of acquiring or disposing of substantial assets, the Court clarified that Section 223(b)(i) and (ii) is to be read **disjunctively**, not conjunctively, by reading 'or' as 'and', as per the Court of Appeal. Directors are allowed to negotiate and enter into conditional agreements that are subject to subsequent shareholder approval, pursuant to ordinary and plain construction of sub-paragraph (b)(i) "*subject to the approval of the company by way of a resolution*". This interpretation allows companies to engage in preliminary arrangements for significant transactions without contravening the Companies Act 2016, provided that these arrangements are ultimately ratified by shareholders, thus preserving the requisite oversight and involvement of shareholders in substantial corporate decisions.

The consequence of the Court of Appeal's interpretation where Section 223(b)(i) and (ii) is read conjunctively would require directors to first, obtain shareholders' approval before entering into any form of agreement for a proposed acquisition or disposal of a substantive asset; then, on top of that obtain a second shareholder's approval prior to the actual transfer or putting into effect of the transaction. In practice, this would not make commercial nor legal sense as most transactions will be aborted and opportunities lost with a requirement of two sets of shareholders' approvals.

3. **Share Buy-back Transactions**

The Court addressed the legality and propriety of the share buy-back transactions executed by Apex Equity, determining that such transactions, when conducted in accordance with the law and with shareholder's consent, do not inherently constitute oppression. It is clear that section 127 of the Act permits such share buy-back transactions by a public listed company, provided the other subsections are met. The issue here was whether the share buy-back transactions that were undertaken allegedly *ultra vires* the constitution are illegal.

It is evident from section 127 that the Act seeks to catch and make an offence relates primarily to the purchase of its own shares by a public listed company where:

- i) the company is insolvent;
- ii) the purchase is not conducted through the stock exchange (although there are further exceptions in the section); and
- iii) where such purchases are not made in good faith or in the best interests of the company.

Therefore, it would be difficult to conclude with any degree of certainty that the fact of the share buy-back transactions being *ultra vires* is, in itself, an illegality. The fact of the share buy-back transactions being *ultra vires* Apex Equity's constitution does not necessarily equate to an illegality. Furthermore, it observed that these transactions did not unfairly prejudice or discriminate Concrete Parade more than any other shareholders, and thus could not be deemed oppressive in the context of Section 346. Given that all the shareholders of Apex Equity were equally affected by these transactions, how is Concrete Parade alone singularly and unfairly prejudiced as compared to the majority of the shareholders of Apex Equity?

4. **Oppression Remedy (Section 346)**

Critically, the Court examined whether the actions of Apex Equity's directors amounted to oppression or unfairly prejudicial conduct towards Concrete Parade. It concluded that the application of the oppression remedy under Section 346 requires a demonstrable evidence of conduct that is both oppressive and unfairly prejudicial

specifically towards Concrete Parade, in its capacity as a minority shareholder, as a consequence of the proposed merger and the alleged contraventions, **any more than any other shareholder**. The Court found that Concrete Parade failed to sufficiently establish that the directors' actions met this high threshold, particularly given the mechanisms for shareholder approval and the lack of evidence showing disproportionate harm to Concrete Parade as opposed to the shareholder body at large.

ANALYSIS AND IMPLICATIONS

The Federal Court's judgments provide a nuanced interpretation of the Companies Act 2016, reinforcing the legal principles governing shareholder rights and corporate governance in Malaysia. This judgment has far-reaching implications for corporate governance practices within Malaysia, especially concerning the balance of power between directors and shareholders, the flexibility of corporate strategies in the face of statutory constraints, and the protections afforded to minority shareholders against potential abuses by majority shareholders or directors. It reaffirms the importance of adhering to statutory requirements while also recognising the pragmatic needs of corporate operations and the necessity of shareholder involvement in critical decision-making processes.

CONCLUSION

The Dato' Azizan bin Abd Rahman & Ors v. Concrete Parade Sdn Bhd & Ors case marks a significant contribution to Malaysian corporate law, offering clarity on the application of the Companies Act 2016. The Federal Court's analysis affirms the legal framework's capacity to mediate the complex interplay between protecting shareholder rights and enabling corporate governance practices conducive to business growth and restructuring.

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